

X MISSES THE SPOT: *FERNANDEZ V. KEISLER* AND THE
(MIS)APPROPRIATION OF *BRAND X* BY THE
BOARD OF IMMIGRATION APPEALS

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INTRODUCTION

Simply put, ours is a nation of immigrants. The overwhelming majority of U.S. citizens are descendants of those who immigrated to the United States.¹ Immigration has been the wellspring of our nation's populace since its birth.² The laws governing immigration into these United States are constantly changing, commensurate with the political, economic, and social ebb and flow of American society.³ That immigration law and policy remain important and pertinent issues in our time is hardly a principle that needs repeating. And yet, much of the law governing the administration of our immigration system exists in a state of disrepair: a mere glance at the newspaper would be enough to remind even the most unaware of citizens of this fact.⁴ Moreover, the intricacies and nuances of immigration law lack

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¹ According to the 2000 Census, only 1 percent of Americans are indigenous to the United States ("American Indian or Alaska Native" and "Native Hawaiian and Other Pacific Islander"). U.S. CENSUS BUREAU, 2000 CENSUS: PROFILE OF SELECTED DEMOGRAPHIC & SOCIAL CHARACTERISTICS FOR THE NATIVE POPULATIONS tblFBP-1 (2000), <http://www.census.gov/population/cen2000/stp-159/native.pdf>.

² See generally Paul L. Frantz, *Undocumented Workers: State Issuance of Driver Licenses Would Create a Constitutional Conundrum*, 18 *GEO. IMMIGR. L.J.* 505, 508 (2004) ("[T]he United States is a nation built on immigration . . ."); James F. Smith, *A Nation that Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 *U.C. DAVIS J. INT'L L. & POL'Y* 227, 228-41 (1995) (detailing the history of U.S. immigration law).

³ See, e.g., Nicaraguan Adjustment and Central American Relief Act ("NACARA"), Pub. L. No. 105-100, 111 Stat. 2160, 2193 (1997) (codified as amended in scattered sections of 8 U.S.C.); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.); Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

⁴ See, e.g., Thomas Wenski, Editorial, *Hitting a Wall on Immigration*, *WASH. POST*, Oct. 20, 2008, at A15; Editorial, *A War on Janitors*, *N.Y. TIMES*, Oct. 20, 2008, at A30; Jerry Markon, *Justices May Take Immigration Cases*, *WASH. POST*, Oct. 19, 2008, at A2; Paul Giblin, *Arizona Sheriff Conducts Immigration Raid at City Hall, Angering Officials*, *N.Y. TIMES*, Oct. 18, 2008, at A10; Miriam Jordan, *Now Boarding: Illegal Immigrants on One-Way Tickets Home*, *WALL ST. J.*, Oct. 17, 2008, at A1; Ted Poe, Letter to the Editor, *Immigration Laws Counter Terror*, *WALL ST. J.*, Oct. 14, 2008, at A20; Nina

transparency.⁵ The power to create statutory immigration law, as in other contexts, lies with the United States Congress,⁶ subject to presidential veto.⁷ But to assume that the power to create—and more importantly to this Note, interpret—law lies solely with the legislative and judicial branches is chimerical. In fact, the most influential body in the interpretation and execution of the day-to-day aspects of our immigration law is not to be found within the halls of Congress, but rather under the aegis of the Executive.⁸

The Executive Office for Immigration Review (“EOIR”), a subsidiary of the United States Department of Justice (“DOJ”), is the administrative agency that oversees immigration litigation.⁹ Within EOIR, the Board of Immigration Appeals (“Board” or “BIA”), an adjudicative body which sits at the pleasure of the Attorney General, is the agency responsible for law-making via statutory interpretation in an adjudicatory context.¹⁰ An understanding of the role of executive administrative agencies like the Board in the development and creation of law is vital for a true appreciation of the power an agency like the BIA wields. Further, recent case law has added immense authority to the Board’s interpretive decisions.

Congressional decision making and resulting legislation are certainly not models of clarity. When Congress enacts legislation, it leaves out certain minutiae—sometimes purposely, other times not. When that legislation needs to be digested and administered, it is up to the appropriate administrative agencies to fill in the statutory gaps and define the details.¹¹ Such a

Bernstein, *Death of Detained Immigrant Inspires Online Game With Goal of Educating Players*, N.Y. TIMES, Oct. 5, 2008, at A40; *Immigration Deception*, Editorial, N.Y. TIMES, Sept. 19, 2008, at A18.

⁵ See Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 73 BROOK. L. REV. 467, 467-70 (2008); Michele Brané & Christiana Lundholm, *Human Rights Behind Bars: Advancing the Rights of Immigration Detainees in the United States Through Human Rights Frameworks*, 22 GEO. IMMIGR. L.J. 147, 147 (2008); Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà Vu of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475 (2007).

⁶ U.S. CONST. art. I, § 8, cl. 4. (declaring that Congress shall have the power “[t]o establish a uniform Rule of Naturalization”); *Id.* art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States”).

⁷ *Id.* art. I, § 7, cl. 2 (establishing the right of presidential veto).

⁸ See 1 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW & PROCEDURE §§ 3.04-.05 (2008).

⁹ *Id.* § 3.04.

¹⁰ See Organization, Jurisdiction, and Powers of the Board of Immigration Appeals, 8 C.F.R. § 1003.1(a)(1) (2008).

¹¹ See, e.g., *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”); David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327, 342 (2000) (noting that *Chevron* may be interpreted in a manner in which “statutory ambiguity or silence creates a presumptive delegation of legislative rulemaking power to interpret the statute to agencies”).

well-established practice has been essential to the implementation of administrative law and has been justified as appropriate given the assumption that the “gap-filling” agencies are experts in their given fields.¹²

That agencies have the power to “fill in” legislative gaps is not a hotly contested issue.¹³ The difficulty arises, however, when it is unclear whether Congress has left a gap at all in certain legislation, or whether the particular agency oversteps its carefully circumscribed boundaries in interpreting statutory language.¹⁴ Over the last twenty-five years, courts across the United States have utilized the framework set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁵ to evaluate executive agencies’ power to interpret and fill the gaps within certain legislation.¹⁶

In the 2005 decision *National Cable & Telecommunications Ass’n v. Brand X Internet Services*,¹⁷ the Supreme Court of the United States applied the two-part *Chevron* test¹⁸ in a case where a court of appeals’ interpretation of a statute in a prior decision was in direct conflict with the Federal Communication Commission’s (“FCC”) statutory interpretation.¹⁹ In line with its holding in *Chevron*, the Court held that the FCC’s statutory interpretation must control.²⁰ The *Brand X* decision²¹ further expanded the Supreme Court’s holding in *Chevron* insofar as it held that administrative agencies have the power to trump federal courts of appeal vis-à-vis statutory interpretation.²²

The precedent set forth in *Brand X*, albeit in an entirely different context, has been appropriated by the Department of Homeland Security (“DHS”) and the Board of Immigration Appeals in the context of removal

¹² See 3 JACOB A. STEIN, GLENN A. MITCHELL & BASIL J. MEZINES, ADMINISTRATIVE LAW § 15.05 n.16 (2008); *Am. Trucking Ass’n v. United States*, 344 U.S. 298, 309-12 (1953) (“[O]ne of the reasons why regulatory agencies . . . are created, . . . is the fond hope . . . that they bring to their work the expert’s familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess.”).

¹³ 3 STEIN ET AL., *supra* note 12, § 3.03 (“The right of Congress to delegate to administrative agencies . . . is not now open to question.”).

¹⁴ *Id.* (“The principal issues today are . . . (1) whether the agency has exceeded its delegated powers . . . , (2) whether it has abused the discretion vested in it, and (3) whether its statutorily delegated powers to sanction are penal in nature and therefore constitute an impressible invasion of the judicial power.” (footnote omitted)).

¹⁵ 467 U.S. 837 (1984).

¹⁶ See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188 (2006) [hereinafter Sunstein, *Chevron Step Zero*].

¹⁷ 545 U.S. 967 (2005).

¹⁸ See *infra* Part I.B.1.

¹⁹ *Brand X*, 545 U.S. at 979-80.

²⁰ *Id.* at 982-83.

²¹ See discussion *infra* Part I.B.3.

²² *Brand X*, 545 U.S. at 1003 (noting that the agency is in a better position to assess the extent of their authority than the courts).

proceedings.²³ In addition to DHS, agencies such as the Bureau of Immigration and Customs Enforcement (“ICE”) and the Office of Immigration Litigation (“OIL”) have employed the Supreme Court’s holding in *Brand X* to avoid statutory interpretations that the agencies find unfavorable.²⁴ One particularly egregious example is found in *Fernandez v. Keisler*,²⁵ where the Fourth Circuit allowed immigration authorities to essentially overrule controlling precedent.

Primarily, this Note examines *Fernandez* in the context of *Chevron* and its progeny—most notably *Brand X*—and argues that *Brand X* as applied to Board decisions is not only inappropriate but potentially injurious to the stability of our legal system. This Note also provides a solution to the *Brand X* problem and suggests an alternative framework of deference in conjunction with systemic changes to the Board that, together, can eliminate the interpretive usurpation that *Brand X* empowers. This investigation has implications for all areas of administrative law that utilize adjudicatory rulemaking since the holding in *Brand X* was not limited to one particular agency or area of law. However, this Note remains focused on the peculiarities of the Board of Immigration Appeals. An analysis of *Brand X* in the context of the BIA is incredibly pertinent; immigration law forums and listservs are awash with discussions of *Brand X*’s implications and the effects on immigration attorneys’ practices.²⁶

Part I of this Note begins with the necessary tools to develop a working solution to agency encroachment in the immigration context. Part I.A provides a very brief introduction to the field of administrative law, including a concise history and explanation of the Administrative Procedure Act

²³ A removal proceeding is a hearing in front of an immigration judge conducted for the purpose of “deciding the inadmissibility or deportability of an alien.” Immigration & Nationality Act (“INA”) § 240(a)(1), 8 U.S.C. § 1229a(a)(1) (2006). For more on the procedure and consequences of removal proceedings, see INA § 240, 8 U.S.C. § 1229a.

²⁴ The Office of Immigration Litigation (“OIL”) has openly encouraged government attorneys to utilize *Brand X* in this manner when litigating its cases. See Papu Sandhu, *Brand X Application to Immigration Cases; Supreme Court’s Decision in Brand X Reinvigorates Chevron*, IMMIGR. LITIG. BULL. (U.S. Dep’t of Justice), Apr. 2008, at 1, 17-18, http://www.justice.gov/civil/oil/ImmigrationBulletin/April_2008.pdf; see also *Recent Court Decisions*, IMMIGR. L. ADVISOR (U.S. Dep’t of Justice, Executive Office for Immigration Review), Dec. 2007, at 6-7, <http://trac.syr.edu/immigration/reports/212/include/12-2007.pdf> (reviewing the application of *Brand X* to a recent BIA decision). For a visual representation of the relationship between DHS, DOJ, BIA, ICE, and OIL, see EXECUTIVE OFFICE OF IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL app. C (2004) [hereinafter EOIR ORGANIZATIONAL CHART] (providing an organizational chart demonstrating the relationship between the relevant agencies), <http://www.justice.gov/eoir/vll/qpracmanual/pracman-ual/AppC.pdf>.

²⁵ 502 F.3d 337 (4th Cir. 2007), cert. denied sub nom. *Fernandez v. Mukasey*, 129 S. Ct. 65 (2008) (mem.).

²⁶ See, e.g., American Immigration Council, *Brand X* in Immigration Cases, <http://www.americanimmigrationcouncil.org/clearinghouse/litigation-issue-pages/brand-x-immigration-cases> (last visited Mar. 1, 2010).

and some salient constitutional and policy issues that are relevant to an understanding of the Act's consequences and implications. Next, Part I.B examines significant and influential case law leading up to *Brand X*, necessary for grasping trends in agency deference. Section I.B.1 briefly explains and examines the seminal *Chevron* case, and Section I.B.2 scrutinizes an important limiting case, *United States v. Mead Corp.*,²⁷ which should help define what I call the *Mead-Chevron* spectrum of formality. Finally, Section I.B.3 analyzes the most recent and potent of these agency deference cases, *Brand X*. With all of the preliminary information in mind, Part I.C provides a description and assessment of the principal case, *Fernandez v. Keisler*. This assessment reveals the enormous impact of *Brand X*, specifically in the context of removal proceedings.

With an understanding of the relevant foundational concepts, Section II.A.1 begins with a critique of the *Fernandez* decision, and an argument that courts must employ *Brand X* with care because of its constitutional and separation-of-powers implications. Section II.A.2 provides a hypothetical to demonstrate why the Board of Immigration Appeals is ill-equipped for reliance on *Brand X*. Part II.B next examines the Board itself, maintaining that the BIA is structurally and institutionally peculiar and that its decisions do not merit application of the strictures of *Brand X*. Sections II.B.1-B.3 describe characteristics of the BIA that make *Brand X* especially inappropriate as guiding precedent. Finally, Part III provides a framework and solution for the *Brand X* problem in removal proceedings. Part III suggests a reformulation of the amount of deference given to Board decisions based on the formality of the decision-making process; in addition, Part III argues that the Board should be given the option to proceed via legislative rule-making. This Note maintains that *Brand X* as applied to removal proceedings is dangerous and undesirable, and should be abandoned by adopting a framework akin to the proposed framework.

I. BACKGROUND

A. *Administrative Law, Agency Deference, and Rulemaking Authority*

1. Administrative Procedure Act of 1946

The history and development of administrative law in the United States is not without contention and controversy.²⁸ As a result of the tension between proponents of greater agency power—generally Congress—and

²⁷ 533 U.S. 218 (2001).

²⁸ For an in-depth investigation into this history, see George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996).

opponents of agency influence—chiefly the American Bar Association—a great deal of debate and disagreement necessitated the creation of comprehensive legislation in the burgeoning field of administrative law.²⁹ In 1946, Congress enacted the Administrative Procedure Act (“APA”).³⁰ The APA serves as the foundation for federal administrative law and provides a governing framework for agency decision making.³¹ Among other things, the APA provides the definition of an “agency”—a definition so broad that it begins by explaining what an agency *is not*: “[A]gency means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include”³²

Though administrative agencies had been around since 1789,³³ their powers and responsibilities were generally not the subject of great debate or controversy prior to the early twentieth century.³⁴ But in the New Deal era the number of administrative agencies exploded, to the chagrin of lawyers and judges alike.³⁵ This explosion resulted in the tension that led up to the passage of the APA.³⁶ The subsequent development of a large body of administrative law has seen the trend towards “agency deference,” a doctrine which recognizes the purported expertise of administrative agencies and their concomitant superior position in fashioning rules.³⁷ Professor Richard J. Pierce explains that in the early days of administrative law, the rulemaking authority given to administrative agencies was not as controversial as it is today since it was understood that disinterested technocrats—outside the hegemony of the political establishment—would take the policymaking reins.³⁸ Over the decades, however, it became clear that the system was flawed: policymaking was not an objective process run by disinterested technocrats but rather a highly political endeavor.³⁹ Looking to the doctrine

²⁹ *See id.* at 1559-60.

³⁰ Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551-83, 701-06, 801-08, 3105, 3344, 6362, 7562 (2000)).

³¹ 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 1.1, at 2 (4th ed. 2002).

³² 5 U.S.C. § 551(1) (2000).

³³ The first agency was created in July of 1789 “to ‘estimate duties payable’ on imports and to perform other related duties.” 1 PIERCE, *supra* note 31, § 1.4, at 8.

³⁴ *Id.*

³⁵ *Id.* § 1.4, at 12 (“[During the age of the New Deal,] agencies—especially the SEC [Securities & Exchange Commission] and the NLRB [National Labor Relations Board]—were for most lawyers becoming the symbol of an obnoxious political philosophy that was fast destroying freedom.”).

³⁶ *See* Shepherd, *supra* note 29, at 1561-1620.

³⁷ *See, e.g.,* Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676, 690 (2007).

³⁸ *See* 1 PIERCE, *supra* note 31, § 1.7, at 25.

³⁹ *Id.* (“Over the ensuing decades, judges and scholars identified a major flaw in the original understanding of the administrative process. While a mastery of technical issues is essential in addressing the policy issues Congress delegates to agencies, policymaking is, and should be, an intensely political process.”).

of separation of powers, courts began to address this issue in the 1980s and 1990s, a process which Professor Pierce admits is “far from complete.”⁴⁰

2. Rulemaking Procedure: Legislation or Adjudication

The Congress enacts legislation containing numerous “gaps.”⁴¹ If Congress explicitly leaves these gaps for an agency to fill, “there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.”⁴² This process is known as rulemaking.⁴³ The procedure by which an administrative agency issues a rule is described in section 553 of the Administrative Procedure Act.⁴⁴ The approach set forth in section 553 requires an agency to supply a general notice of the proposed rule,⁴⁵ to receive and to consider views and opinions submitted by any interested parties,⁴⁶ and to publish the new rule in a statutorily prescribed source, such as the Federal Register.⁴⁷ When an agency issues a rule pursuant to this procedure, the agency is said to be engaging in “legislative rulemaking,” or, if the agency also conducts an oral evidentiary hearing in addition to the three steps articulated in the Act, the process is called “formal rulemaking.”⁴⁸

An agency is not required to follow this procedure in cases where the agency issues “(A) interpretive rules, general statements of policy, or rules of agency, organization, procedure, or practice; or (B) when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”⁴⁹ Usually, when confronted with an issue that merits rulemaking, an administrative agency has the ability to choose whether to proceed by issuing a legislative rule—and thus be bound by the procedure outlined in APA section 553—or to issue an interpretive rule or policy statement, thereby acting within the confines

⁴⁰ *Id.* at 26.

⁴¹ *See Chevron*, 467 U.S. at 843-44.

⁴² *Id.* at 844-45. Note that this statement appears directly contradictory to earlier Supreme Court presentiment, wherein the Court, relying on the language of Article I of the U.S. Constitution, *see* U.S. CONST. art. I, § 1 (“All legislative powers shall be vested in a Congress of the United States . . .”), opined that legislative power may not be delegated to an entity outside of Congress. 1 PIERCE, *supra* note 33, § 2.6, at 86 (“That Congress cannot delegate legislative power . . . is a principle universally recognized . . .” (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892)) (internal quotation marks omitted)). This principle—quoted in *Marshall Field*—is known as the nondelegation doctrine.

⁴³ 1 PIERCE, *supra* note 31, § 7.1, at 411-12.

⁴⁴ 5 U.S.C. § 553 (2000).

⁴⁵ § 553(b).

⁴⁶ § 553(c).

⁴⁷ § 553(d).

⁴⁸ 1 PIERCE, *supra* note 31, § 7.1, at 411-12. Formal rulemaking, asserts Professor Pierce, “has become increasingly rare.” *Id.* at 412.

⁴⁹ 5 U.S.C. § 553(b)(A), (b)(B).

of the section 553 exception.⁵⁰ The Board of Immigration Appeals, however, is unique insofar as it is the only agency that has no such option.⁵¹ The Board can only issue a rule through adjudication.⁵²

The difference between legislation and adjudication in the context of administrative law is of great moment:

What distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitively touched by it; while adjudication operates concretely upon individuals in their individual capacity.⁵³

Adjudication is concomitantly narrow and necessarily fact-specific.⁵⁴ As opposed to legislation, adjudication is also characteristically retroactive,⁵⁵ applying to a particular individual once a rule has been pronounced.⁵⁶ The prospectivity inherent in legislative rulemaking is, for many scholars and commentators, superior to the effects of adjudicative rulemaking.⁵⁷ Indeed, there has been a great deal of scholarship extolling the relative virtues of legislative rulemaking over adjudicative rulemaking.⁵⁸ Nevertheless, for a number of agencies—the BIA excluded—the decision to proceed via adjudicative rulemaking is the result of a cost-benefit analysis. Since making

⁵⁰ See 1 PIERCE, *supra* note 31, § 6.2, at 306.

⁵¹ Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 ADMIN. L. REV. 647, 682 (2008).

⁵² *Id.* (“[T]he BIA . . . does not itself have the option of electing to proceed via legislative lawmaking. Insofar as the Board makes law, it is compelled to do so via administrative adjudication.”). Though the Board is unable to conduct formal or notice-and-comment rulemaking, the Attorney General does have the ability to carry out legislative rulemaking with respect to EOIR and the BIA. See, e.g., INA § 103(a)(1), 8 U.S.C. § 1103 (2000). One example is Attorney General John Ashcroft’s 2002 reorganization of the Board of Immigration Appeals. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878-81 (Aug. 26, 2002) (to be codified at 8 C.F.R. pt. 3). See *infra* Part II.B.2.

⁵³ JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 21 (1927).

⁵⁴ See Jeffrey J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 FLA. ST. U. L. REV. 529, 539-40 (2005).

⁵⁵ Retroactivity, moreover, is prohibited in agency rulemaking. See 5 U.S.C. § 551(4) (2000) (defining an agency rule as “the whole or a part of an agency statement of general or particular applicability and *future effect*” (emphasis added)).

⁵⁶ Rachlinski, *supra* note 54, at 539-40.

⁵⁷ See, e.g., Eyer, *supra* note 51, at 649 (listing several drawbacks of adjudicative rulemaking that commentators have recognized over time); 1 PIERCE, *supra* note 31, § 6.8, at 368-74; William D. Araiza, *Agency Adjudication, the Importance of Facts, and the Limitations of Labels*, 57 WASH. & LEE L. REV. 351, 376-77 (2000); William T. Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 DUKE L.J. 103, 103.

⁵⁸ See, e.g., 1 PIERCE, *supra* note 31, § 6.8, at 368-74; Araiza, *supra* note 57; David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965). *But see* Eyer, *supra* note 51 (arguing that certain rule-of-law goals are achieved in the process of adjudicative rulemaking as much as, or more than, via legislative rulemaking).

rules by adjudication is not subject to the lengthy and involved procedures of APA section 553, agencies often decide to proceed this way.⁵⁹

B. *Setting Some Ground Rules*

1. The Birth of the “Chevron Two-Step”⁶⁰

In 1984, the world of administrative law in the United States changed forever. It was in that year that the Supreme Court of the United States decided a case labeled by some as the “counter-*Marbury*,”⁶¹ referring to the holding’s apparent dismissal of judicial supremacy in certain contexts. In *Chevron, U.S.A., Inc. v. National Resources Defense Council*,⁶² the Court examined contradictory interpretations of a provision of the Clean Air Act.⁶³ The issue was whether an interpretation of the term “stationary source,” the implications of which would have a profound impact on industry, should reflect the Environmental Protection Agency’s (“EPA”) latest construal or an equally plausible meaning adopted by private industry.⁶⁴ The EPA’s interpretation of the relevant statute was rejected by the United States Court of Appeals for the District of Columbia.⁶⁵ The Supreme Court granted certiorari.⁶⁶ Writing for the majority, Justice Stevens, perhaps perplexed by the sheer complexity of the regulatory background,⁶⁷ overruled

⁵⁹ 1 PIERCE, *supra* note 31, § 6.1, at 306 (“In many cases, [agencies] will refrain from issuing rules of any type, and will rely instead on the adjudicative process as the primary source of the ‘rules’ they apply.”).

⁶⁰ *Id.* § 3.2, at 139.

⁶¹ Sunstein, *Chevron Step Zero*, *supra* note 16, at 188-89 (“*Chevron* was quickly taken to establish a new approach to judicial review of agency interpretations of law, going so far as to create a kind of counter-*Marbury* for the administrative state.” (footnote omitted)). See also, e.g., Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637, 2637 (2003); Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1108 (2001).

⁶² 467 U.S. 837 (1984).

⁶³ 42 U.S.C. § 7401-7671q (2000).

⁶⁴ See *Chevron*, 467 U.S. at 840 (“The question presented . . . is whether EPA’s decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single ‘bubble’ is based on a reasonable construction of the statutory term ‘stationary source.’”).

⁶⁵ *Id.* at 841; see also *Natural Res. Def. Council, Inc. v. Gorsuch*, 685 F.2d 718, 726 (D.C. Cir. 1982), *rev’d sub nom. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁶⁶ 461 U.S. 956 (1983).

⁶⁷ Professor William N. Eskridge, Jr. and Lauren E. Baer, having examined the conference notes for *Chevron*, discovered a statement made by Justice Stevens “explain[ing] his tentative willingness to side with the EPA: ‘When I am so confused, I go with the agency.’” William A. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO L.J. 1083, 1086 (2008). This comment is remarkable for two reasons. First, it is rather startling to imagine that such an important and influential decision as *Chevron* could

the D.C. court, instead casting his vote for the agency's statutory interpretation.⁶⁸ In so doing, Justice Stevens laid out an oft-cited, albeit inconsistently utilized,⁶⁹ framework for deciding to whose interpretation a court should defer.

The *Chevron* test involves a two-step analysis. When a court must decide whether to defer to an agency's statutory interpretation, the court's first step is to discern "whether Congress has directly spoken to the precise question at issue."⁷⁰ This question is essentially an inquiry into explicit congressional intent: if Congress clearly intended a specific interpretation, then that interpretation will control.⁷¹ This conclusion follows quite easily from the foundations of administrative law, for if Congress clearly lays out its intent, there is necessarily no gap for the agency to fill.⁷² It is essential, notes Justice Stevens, that "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."⁷³ Of course, where a statute manifests Congress's unambiguous intent for a particular interpretation to control, the analysis need proceed no further.⁷⁴

If, as is often the case, Congress has not manifested its unambiguous intent, a court must continue to the more controversial step two.⁷⁵ The court does not, Justice Stevens warns, "simply impose its own [statutory] construction," but rather looks to whether the agency's interpretation "is based on a permissible construction of the statute."⁷⁶ It is to be emphasized that

have been decided based on this arbitrary reflection of confusion. Second, and perhaps more important in the context of administrative law more generally, Justice Stevens's apparent confusion illustrates an important justification for one of the primary foundations of *Chevron* deference—issues such as those presented in the *Chevron* case are often too complex for lay judges and are better left to the agencies, which purportedly have expertise in the relevant field.

⁶⁸ *Chevron*, 467 U.S. at 866 ("The responsibilities for assessing the wisdom of [an agency's] policy choices and resolving the struggle between competing views of the public interest are not judicial ones . . .").

⁶⁹ See Eskridge & Baer, *supra* note 67, at 1090 (finding through an examination of Supreme Court case law that the Court fails to apply the *Chevron* doctrine in the majority of cases where such an application would be appropriate).

⁷⁰ *Chevron*, 467 U.S. at 842.

⁷¹ *Id.* at 842-43. The search for unambiguous congressional intent is tied to the concept of gap-filling. The clear expression of intent is equivalent to the absence of a statutory gap. See *id.* at 843 ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)) (internal quotation marks omitted)).

⁷² See *id.* at 842-43.

⁷³ *Id.* at 842-83. Justice Stevens adds in a footnote that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9.

⁷⁴ *Id.* at 842 ("If the intent of Congress is clear, that is the end of the matter . . .").

⁷⁵ 1 PIERCE, *supra* note 31, § 1.7, at 29.

⁷⁶ *Chevron*, 467 U.S. at 843. The fact that *Chevron* urges a two-part test may appear slightly confounding in light of the doctrinal underpinnings of legislative delegation to administrative agencies. If, as the later cases suggest, an administrative agency's interpretation is accorded so much deference

step two is not an investigation into whether the adjudicating court agrees with the agency's interpretation or would have similarly interpreted the statutory provision, but rather whether the interpretation is reasonable.⁷⁷ If the agency's interpretation passes step two, a court must give the agency's interpretation deference.⁷⁸ This has often been referred to as "*Chevron* deference."⁷⁹

Chevron was certainly not the first, nor the last, Supreme Court case to enunciate a policy of agency deference with respect to statutory construction.⁸⁰ Nevertheless, *Chevron* has become the case most cited for the propo-

that it can trump or overrule circuit court precedent, what is the reason for *Chevron* step two—a "reasonableness" analysis? Supporters of this doctrine unhesitatingly point to the fact that administrative agencies, when supplying statutory interpretations, are acting as a proxy for Congress, with full congressional authority delegated to the agency through the existence of a statutory gap. But does the Supreme Court employ a reasonableness analysis in analyzing legislation passed by Congress? If a case or controversy arises in which legislation is challenged, the Court does not look to whether the legislation was sensible or rational (unless, of course, the Court is applying its "rational basis review" to certain areas of constitutional law, *see, e.g.*, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000)). The Court's only concern is the constitutionality of the given legislation. So why does Justice Stevens bother with a *Chevron* step two? The reason is one which proves meaningless in the context of *Brand X*. *See infra* Part I.B.3.

Recall that *Chevron* dealt with the interpretation of a statute a court had never decided. Unlike *Brand X*, there was no binding precedent which mandated a contrary interpretation. In *Chevron*, step two serves as a vetting process of sorts: since no court has had a chance to look at this provision yet, can we determine whether or not the agency's interpretation was reasonable? The very existence, it seems, of a *Chevron* step two seems to rebut the notion that administrative agencies act as a proxy for Congress, for if that were truly the case, step two would be unnecessary and overreaching. *See* Thomas E. Zahn, Note, *Settled No More: An Administrative Agency May Overturn Prior Judicial Interpretation of a Statute within its Jurisdiction So Long as the Statutory Language is Ambiguous*: *National Cable & Telecommunications Association, et al. v. Brand X Internet Services, et al.*, 8 DUQ. BUS. L.J. 143, 163-64 (2006) (noting that, if an agency truly possessed authority commensurate with Congress "the Court, as with any other legislation would only be concerned with [the constitutionality of the agency's construction]. That the Court also measures the reasonableness of the agency's determination implies a superior interpretive authority remaining with the Judiciary.").

⁷⁷ *See Chevron*, 467 U.S. at 845 ("Once [the Court of Appeals] determined . . . that Congress did not actually have an intent regarding [the agency determination at issue]. . . the question before it was . . . whether the [agency's] view that it is appropriate in the context of this particular program is a reasonable one.").

⁷⁸ Whether the deference afforded the agency is one of strict compliance—what commentators have termed "obedience"—or rather one of mere persuasive weight was not made explicit by the *Chevron* court. Certainly in *Chevron* this deference was empirically more akin to obedience.

⁷⁹ *See, e.g.*, *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (questioning whether certain "interpretive statements" are "entitled to full *Chevron* deference"); *Massachusetts v. EPA*, 549 U.S. 497, 558 (2007) (Scalia, J., dissenting) (discussing the Court's application of "*Chevron* deference"). *Chevron* deference has often been compared to other degrees of deference afforded administrative agencies over the years. One example is *Skidmore* deference. *See, e.g.*, *Christensen v. Harris County*, 529 U.S. 576, 589 (2000) (Scalia, J., concurring) ("*Skidmore* deference [as opposed to the more recent *Chevron* deference] is an anachronism . . .").

⁸⁰ *See, e.g.*, *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111 (1944).

sition of agency deference and has aided countless courts in myriad contexts when faced with conflicting statutory interpretations.⁸¹ *Chevron* is still good law, and is consistently cited for the proposition that agencies receive interpretational deference where Congress has not expressed its unambiguous intent.⁸² Of course, whether a statute unambiguously reflects congressional intent is also an interpretational exercise.

2. Defining Limits: *Mead*

In 2001, the Supreme Court decided *United States v. Mead Corp.*,⁸³ which at the time appeared to limit *Chevron*'s outer reaches. The Court was confronted with a disagreement over the proper tariff classification of "day-planners" imported by Mead Corp., based on an informal ruling by U.S. Customs and Border Protection ("CBP").⁸⁴ When imports are brought into the United States, they are taxed based on the Harmonized Tariff Schedule of the United States ("HTSUS").⁸⁵ Describing the workings of the HTSUS, 19 U.S.C. § 1502(a) provides:

The Secretary of the Treasury shall establish . . . such rules and regulations not inconsistent with the law . . . and may disseminate such information as may be necessary to secure a just, impartial, and uniform appraisal of imported merchandise and the classification and assessment of duties thereon at the various ports of entry.⁸⁶

One way in which the Secretary of the Treasury disseminates these rules are through "ruling letters," which are issued in "respon[se] to transactions of the moment" and are therefore not subject to notice-and-comment, and need not be published.⁸⁷ Any one of the forty-six CBP offices has the authority to issue these ruling letters, which do not need to contain any reasoning other than a description of the goods and the proper classification and tariff.⁸⁸

Initially, Mead's imported day planners were classified pursuant to HTSUS under a category that was "free of duty."⁸⁹ Suddenly, CBP changed

⁸¹ See Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 823 (2006) (describing *Chevron* as "the most cited case in modern public law").

⁸² See, e.g., *Gonzales v. Oregon*, 546 U.S. 243, 255 (2006); *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 114 (2002); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991).

⁸³ 533 U.S. 218 (2001).

⁸⁴ *Id.* at 221.

⁸⁵ *Id.*

⁸⁶ 19 U.S.C. § 1502(a) (2000).

⁸⁷ *Mead*, 533 U.S. at 223. "Notice-and-comment" refers to the legislative rulemaking procedures articulated in 5 U.S.C. § 553. See *supra* Part I.A.2.

⁸⁸ *Mead*, 533 U.S. at 224.

⁸⁹ *Id.* at 224-25.

its classification, issuing a ruling letter placing day planners in a category subject to tariffs.⁹⁰ Despite Mead's repeated protests, CBP only issued a more formal—though still unpublished—rationale for its new classification.⁹¹ In response, Mead filed suit in the Court of International Trade.⁹² After summary judgment in favor of the government, Mead appealed to the United States Court of Appeals for the Federal Circuit.⁹³

During the pendency of that appeal, the Supreme Court issued a decision in *United States v. Haggart Apparel Co.*,⁹⁴ in which it held that regulations promulgated by CBP should receive *Chevron* deference.⁹⁵ Despite the Supreme Court's interim ruling, the Federal Circuit failed to apply *Chevron* to CBP's new classification, noting that the instant case was distinguishable from *Haggart*⁹⁶ and that rulings which do not arise out of notice and comment procedures "do not carry the force of law"⁹⁷

Cognizant of the fact that limits of the *Chevron* doctrine required definition, the Supreme Court granted certiorari.⁹⁸ Reiterating its holding in *Chevron*, the Court asserted that *Chevron* deference must be applied to an administrative agency's implementation of a statute "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."⁹⁹ The *Mead* Court proceeded to examine the level of formality with which different agencies promulgate rules, though was careful to note that the lack of formality was not dispositive in regards to the authority of the rule or interpretation:

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.

. . . .

⁹⁰ *Id.* at 225.

⁹¹ *Id.* (describing the letter as "carefully reasoned but never published").

⁹² *Id.*

⁹³ *Id.*

⁹⁴ 526 U.S. 380 (1999).

⁹⁵ *Haggart*, 526 U.S. at 394; *Mead*, 533 U.S. at 225.

⁹⁶ *Mead Corp. v. United States*, 185 F.3d 1304, 1307 (Fed. Cir. 1999) ("[T]his court determines that *Haggart*, and thus *Chevron* deference, does not extend to [these kinds of] classification rulings."), *rev'd*, 533 U.S. 218 (2001).

⁹⁷ *Id.* at 1307 (internal quotation marks omitted). *See also id.* ("Customs rulings . . . are not, like regulations, intended to clarify the rights and obligations of importers beyond the specific case under review.")

⁹⁸ *Mead*, 533 U.S. at 226 ("We granted certiorari . . . in order to consider the limits of *Chevron* deference owed to administrative practice in applying a statute.")

⁹⁹ *Id.* at 226-27.

That said, and as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded¹⁰⁰

Despite the Court's admonitions, it held that the rulemaking procedures utilized by CBP were not entitled to *Chevron* deference—in part due to the apparent lack of formality in CBP rulemaking procedures.¹⁰¹ The Court rationalized its decision based primarily on three factors: first, the relevant statute did not indicate facially that Congress delegated to CBP the authority to make rules carrying the force of law;¹⁰² second, all forty-six CBP offices issue between ten and fifteen thousand different ruling letters every year;¹⁰³ and third, the ruling letters are more akin to “interpretations contained in policy statements, agency manuals, and enforcement guidelines” than actual laws.¹⁰⁴

In so holding, the *Mead* Court essentially completed a definition of the spectrum of formality required for deference to agency rulemaking.¹⁰⁵ On the right side of the spectrum sits *Chevron*, where formal, legislative rulemaking procedures were employed in developing a statutory interpretation. At the other end, on the left, lies *Mead*, where unpublished and informal rules are issued by almost fifty different offices at a rate of about twenty-five to forty per day. Between the two, the Court seems to suggest, *Chevron*-style deference is appropriate; but when a procedure falls in line with or to the left of *Mead*, the only deference afforded the agency's interpretation will be that of persuasive non-binding authority.¹⁰⁶

3. *Brand X* Marks the Spot: Furthering *Chevron*

In a seeming reversal of the limiting tendencies evident in *Mead*, the Supreme Court took *Chevron* deference to new and unprecedented heights in *National Cable & Telecommunications Ass'n v. Brand X Internet Serv-*

¹⁰⁰ *Id.* at 230-31 (footnotes omitted).

¹⁰¹ *Id.* at 231.

¹⁰² *Id.* at 231-32.

¹⁰³ *Id.* at 233.

¹⁰⁴ *Mead*, 533 U.S. at 234 (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)) (internal quotation marks omitted).

¹⁰⁵ *See also* *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (holding Department of Labor's “opinion letter” too informal to warrant *Chevron* deference).

¹⁰⁶ *Mead*, 533 U.S. at 235 (“A classification ruling in this situation may therefore at least seek a respect proportional to its ‘power to persuade.’” (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))); *Christensen*, 529 U.S. at 586-87 (“[I]nterpretations contained in formats such as opinion letters are ‘entitled to respect’ . . . but only to the extent that those interpretations have the ‘power to persuade’” (quoting *Skidmore*, 323 U.S. at 140)).

ices.¹⁰⁷ At issue was the statutory interpretation—and concomitant classification—of a particular provision of the Communications Act of 1934.¹⁰⁸ Section 2(20) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996,¹⁰⁹ defines an “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”¹¹⁰ Additionally, section 2(46) defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used.”¹¹¹ The distinction between an “information service” and a “telecommunications service” proved to be critical due to the fact that Title II of the Communications Act subjects all telecommunications service providers “to mandatory common-carrier regulation.”¹¹² This regulatory scheme does not extend, however, to information service providers.¹¹³

The burgeoning popularity of broadband internet service, through both cable modem service and digital subscriber line (“DSL”) service, presented a problem. DSL service, for example, connects subscribers to the internet via telephone wires owned by the telephone company.¹¹⁴ Similarly, cable modem service utilizes television cable lines owned by cable companies to connect its subscribers to the internet.¹¹⁵ The classificatory conundrum was whether these broadband services are telecommunications services, and therefore subject to Title II regulation, or information service providers.¹¹⁶

In 2000, the FCC commenced a legislative rulemaking proceeding in order to discern whether broadband internet service belongs to the telecommunications or information service provider category.¹¹⁷ The proceeding culminated in a decision by the Commission that broadband internet service was an “information service” and not a “telecommunications service.”¹¹⁸ As a result of the FCC’s *Declaratory Ruling*, a number of different internet companies that disagreed with the agency’s interpretation peti-

¹⁰⁷ 545 U.S. 967 (2005).

¹⁰⁸ Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151 (2000)).

¹⁰⁹ 47 U.S.C. § 153(20) (2000).

¹¹⁰ *Id.*

¹¹¹ § 153(46).

¹¹² *Brand X*, 545 U.S. at 973-74.

¹¹³ *Id.* at 975.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 977.

¹¹⁸ *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4802 (2002) [hereinafter *Declaratory Ruling*], *aff’d in part, vacated in part*, *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003) (per curiam), *rev’d sub nom.* *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

tioned the courts for judicial review.¹¹⁹ The United States Court of Appeals for the Ninth Circuit was chosen by judicial lottery as the venue to adjudicate the various challenges.¹²⁰

The Ninth Circuit vacated the FCC's *Declaratory Ruling*, finding that its own precedent, *AT&T Corp. v. City of Portland*,¹²¹ in which it had already classified cable internet providers as telecommunications services without applying the *Chevron* doctrine, was dispositive.¹²² On appeal to the Supreme Court, Justice Thomas, writing for the majority, disagreed with the Ninth Circuit's decision to look at its own precedent instead of looking in the direction of *Chevron*.¹²³ Reiterating the applicability of the *Chevron* doctrine, Justice Thomas applied the *Chevron* two-step and found the FCC's interpretation in its *Declaratory Ruling* to be controlling.¹²⁴ In so doing, Justice Thomas held that the interpretive powers of an administrative agency may—at times *must*, even—trump those of a federal court of appeals.¹²⁵

C. *The (Mis)Appropriation of Brand X: Fernandez v. Keisler*

Although *Brand X* appeared in the context of a conflicting statutory interpretation by an independent administrative agency and a federal court, it was not long before the Board of Immigration Appeals—an executive agency sitting at the pleasure of the Attorney General—began to appropriate the *Brand X* rationale.¹²⁶ The conflict of interest here is palpable: once *Brand X* enabled an agency to interpret law contrary to federal circuit courts, it is not difficult to imagine why agencies would utilize such power.

¹¹⁹ *Brand X*, 545 U.S. at 979.

¹²⁰ *Id.*

¹²¹ 216 F.3d 871 (9th Cir. 2000), *overruled by* Nat'l Cable & Telecomms. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

¹²² *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003). [hereinafter *Brand X Circuit*]

¹²³ *Brand X*, 545 U.S. at 979-80.

¹²⁴ *Id.* at 989, 997.

¹²⁵ *Id.*; *see, e.g.*, *Fernandez v. Keisler*, 502 F.3d 337, 339 (4th Cir. 2007) (recognizing that *Fernandez* would be entitled to relief under *United States v. Morin*, 80 F.3d 124 (4th Cir. 1996), but denying relief based on *Brand X*), *cert. denied sub nom. Fernandez v. Mukasey*, 129 S. Ct. 65 (2009) (mem.).

¹²⁶ Within a two-month period in 2007, the Board fully embraced *Brand X* as a means of ignoring theretofore binding circuit court precedent. *See In re Briones*, 24 I. & N. Dec. 355, 371 n.9 (B.I.A. 2007) (indicating that the Board need not consider the applicability of Ninth or Tenth Circuit precedent after *Brand X*); *In re N-A-M-*, 24 I. & N. Dec. 336, 341 n.5 (B.I.A. 2007) (indicating that the Board does not need to consider following the Third Circuit's statutory interpretation as a result of *Brand X*); *In re Babaisakov*, 24 I. & N. Dec. 306, 322 (B.I.A. 2007) (admitting that the Board's decision represents "a departure" from existing precedent, but citing *Brand X* as authority for not considering circuit court precedent in its decision).

One example of such an appropriation is seen in *Fernandez v. Keisler*,¹²⁷ where the Board ignored previously binding Fourth Circuit precedent, the Fourth Circuit subsequently affirmed the Board's decision, and the Supreme Court denied certiorari.¹²⁸

In 1965, at the age of one, Luis Puentes-Fernandez came to the United States from Chile.¹²⁹ Mr. Fernandez entered the United States as a lawful permanent resident and remained in the country continuously throughout his life.¹³⁰ As a resident of the United States, Mr. Fernandez registered for the Selective Service when he was eighteen years old.¹³¹ After having lived in the United States for over thirty years, Mr. Fernandez applied for U.S. citizenship.¹³² As part of the citizenship process, Mr. Fernandez attended a naturalization interview, during which he signed an "affidavit of allegiance to the United States."¹³³ At the interview, the application inspector told Mr. Fernandez that he would be receiving additional information in the mail about the date of his oath ceremony, which marks the formal completion of the naturalization process.¹³⁴ Mr. Fernandez did not receive the information, however, and though he inquired about the date of his oath ceremony, the information was never relayed to him.¹³⁵ Thus, Mr. Fernandez never formally completed the naturalization process.¹³⁶

In 2003, Mr. Fernandez pleaded guilty to the criminal charge of distributing prescription drugs.¹³⁷ A Virginia court sentenced him to twenty years in prison, suspending all but three years.¹³⁸ Shortly thereafter, DHS served Mr. Fernandez with a Notice to Appear, charging him with removability pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) (for having been convicted of an aggravated felony) and (a)(2)(B)(i) (for having been convicted of a controlled substance offense).¹³⁹ In his defense, Mr. Fernandez argued that he was an unremovable United States national pursuant to section 101(a)(22)(B) of the Immigration & Nationality Act¹⁴⁰ ("INA") and that therefore the removal proceedings should be terminated.¹⁴¹

¹²⁷ 502 F.3d 337 (4th Cir. 2007), *cert. denied sub nom. Fernandez v. Mukasey*, 129 S. Ct. 65 (2008) (mem.).

¹²⁸ *Fernandez v. Mukasey*, 129 S. Ct. at 65.

¹²⁹ *Fernandez*, 502 F.3d at 339.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Fernandez*, 502 F.3d at 339.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ INA § 101(a)(22)(B) is found in the United States Code at 8 U.S.C. § 1101(a)(22)(B) (2000). Section 101(a) of the INA provides a list of definitions used in the context of immigration and national-

At Mr. Fernandez's removal hearing, the immigration judge ("IJ") terminated the proceedings,¹⁴² relying on Fourth Circuit precedent in *United States v. Morin*.¹⁴³ There, the Fourth Circuit had interpreted INA section 101(a)(22), which provides:

The term "national of the United States" means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.¹⁴⁴

The *Morin* court had held that a noncitizen who applies for citizenship to the United States and has signed the required affidavit of allegiance to the United States, but has not completed the oath ceremony, is a national of the United States pursuant to section 101(a)(22)(B).¹⁴⁵ Based on the *Morin* precedent, the IJ found that Mr. Fernandez was a United States national and therefore unremovable.¹⁴⁶ DHS appealed the IJ's decision and brought the case before the Board of Immigration Appeals.¹⁴⁷ The Board rejected Fernandez's reliance on *Morin*, holding instead that section 101(a)(22)(B) does not confer status as a United States national.¹⁴⁸ Citing its decision in *In re Navas-Acosta*,¹⁴⁹ the BIA reiterated that the only means by which a noncitizen can become a United States national is through the formal completion of the naturalization process.¹⁵⁰

ity law. Subsection (a)(22) provides a definition of the word "national." INA § 101(a)(22), 8 U.S.C. § 1101(a)(22).

¹⁴¹ *Fernandez*, 502 F.3d at 339. Pursuant to 8 U.S.C. § 1227(a), only aliens are removable from the United States. Therefore, if Mr. Fernandez could show that he was not an alien but rather a United States national, DHS would be unable to remove him.

¹⁴² *Fernandez*, 502 F.3d at 340. See also *In re Luis Puentes-Fernandez*, No. A13 377 329, 2006 WL 3485721 (B.I.A. Oct. 24, 2006).

¹⁴³ 80 F.3d 124 (4th Cir. 1996). An appeal from the BIA must be to "the judicial circuit in which the immigration judge completed the proceedings," INA § 242(b)(2), 8 U.S.C. § 1252(b)(2) (2000), which is the circuit whose precedent applies.

¹⁴⁴ INA § 101(a)(22), 8 U.S.C. § 1101(a)(22) (emphasis added).

¹⁴⁵ The *Morin* court's interpretation of INA § 101(a)(22)(B) was dispositive in resolving *Morin*. There, a man was charged with violating a murder-for-hire statute, an element of which required that the victim was a United States national. *Morin*, 80 F.3d at 126. The Court, in finding the defendant guilty of the crime necessarily found that, though the victim had only applied to become a United States citizen (i.e., he had not completed his oath ceremony), he qualified as a national under § 101(a)(22)(B). *Id.* at 126-27. This was explicitly held by the court. *Id.* at 126 (finding that "an application for citizenship is the most compelling evidence of permanent allegiance to the United States short of citizenship itself" and thus agreeing with the district court's determination that Morin was a U.S. national).

¹⁴⁶ *Fernandez*, 502 F.3d at 340.

¹⁴⁷ *Puentes-Fernandez*, No. A13 377 329, 2006 WL 3485721 (B.I.A. Oct. 24, 2006).

¹⁴⁸ *Fernandez*, 502 F.3d at 351.

¹⁴⁹ 23 I. & N. Dec. 586 (B.I.A. 2003).

¹⁵⁰ *Puentes-Fernandez*, No. A13 377 329, 2006 WL 3485721 (B.I.A. Oct. 24, 2006). Note again that the statute reads: "The term 'national of the United States' means . . . (B) a person who, though not

Mr. Fernandez appealed the BIA's decision, bringing the case in front of the Court of Appeals for the Fourth Circuit.¹⁵¹ The Fourth Circuit recognized that the BIA's decision ran counter to its precedent in *Morin*.¹⁵² While the Court conceded that, under *Morin*, Mr. Fernandez would be considered a national,¹⁵³ the Court looked instead to *Brand X*: "Fortunately, the Supreme Court has illuminated our way in its recent decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services . . .*"¹⁵⁴ The Court proceeded to utilize *Brand X* to justify its decision to ignore the *Morin* precedent and rely instead on the BIA's interpretation of INA section 101(a)(22).¹⁵⁵ Interestingly, the Fourth Circuit never explicitly overruled *Morin*. Rather, the Court decided that, in light of *Brand X*, the BIA's interpretation must prevail.¹⁵⁶ This was so even though the Board never conducted a rulemaking proceeding or published any official statutory interpretation of section 101(a)(22), such as the FCC's *Declaratory Ruling* in *Brand X*.¹⁵⁷ On October 6, 2008, the Supreme Court denied Mr. Fernandez certiorari.¹⁵⁸

II. THE (MIS)APPROPRIATION OF *BRAND X*

This Part takes a closer look at the wisdom of applying *Brand X* to removal proceedings based on the important structural quandaries implicated in its application and the peculiar structure and procedures of the Board itself. Section II.A.1 offers a sampling of constitutional questions that *Brand X* poses and explains why application of *Brand X* must be carefully considered. As a means of elucidating these issues, Section II.A.2 provides a brief hypothetical, illustrating some of the key procedural difficulties inherent in a system where BIA decisions are given *Brand X* deference. Part II.B takes a closer look at the Board of Immigration Appeals and suggests that its structural and procedural peculiarities make it particularly unsuitable to *Brand X*-style deference.

a citizen of the United States, owes permanent allegiance to the United States." INA § 101(a)(22), 8 U.S.C. § 1101(a)(22) (emphasis added).

¹⁵¹ *Fernandez*, 502 F.3d at 340.

¹⁵² *Id.* at 347 ("There remains the question of whether we must follow *Morin*'s interpretation of [8 U.S.C.] § 1101(a)(22) or the BIA's contrary interpretation.").

¹⁵³ *Id.* at 339 ("[W]e agree with Fernandez that he would qualify as a U.S. national under *Morin* . . .").

¹⁵⁴ *Id.* at 347.

¹⁵⁵ *Id.* at 347-48.

¹⁵⁶ *Id.* at 352.

¹⁵⁷ See *supra* Part I.B.3.

¹⁵⁸ *Fernandez v. Mukasey*, 129 S. Ct. 65 (2008) (mem.).

A. *A Failure to Distinguish: Brand X Misses the Spot*

1. Supremacy, Finality, and Judicial Review

A great deal of ink has been spilled on the relative wisdom of the Supreme Court's *Brand X* decision.¹⁵⁹ Even more has been written about *Chevron* and its constitutional implications.¹⁶⁰ It is well beyond the scope of this Note to normatively argue that *Chevron* and its progeny are wise or unwise. It is useful, however, to briefly touch on one particular set of problems these decisions present. Though certainly not uncontroversial, ever since *Marbury v. Madison*,¹⁶¹ the United States Supreme Court has operated under the paradigm that its decisions—especially those of a constitutional nature—are supreme and final.¹⁶² A close correlate of this idea is the fundamentality of separation of powers in the U.S. government.¹⁶³ That the circumscribed role of the judiciary, as articulated in Article III of the Constitution,¹⁶⁴ does not explicitly include judicial review or judicial supremacy is notable; but subsequent judicial opinions over the years have firmly established these two concepts within American jurisprudence.

¹⁵⁹ See, e.g., Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); Daniel J. Gifford, *The Emerging Outlines of a Revised Chevron Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783 (2007); Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021 (2007); Richard Murphy, *The Brand X Constitution*, 2007 BYU L. REV. 1247; Kathryn A. Watts, *Adapting to Administrative Law's Erie Doctrine*, 101 NW. U. L. REV. 997 (2007).

¹⁶⁰ See, e.g., Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272 (2002); Curtis A. Bradley, *Chevron Deference & Foreign Affairs*, 86 VA. L. REV. 649 (2000); Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era*, 32 B.C. L. REV. 757 (1991); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996); Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429 (2006); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990).

¹⁶¹ 5 U.S. (1 Cranch) 137 (1803).

¹⁶² See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997) (“The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the ‘powers of the legislature are defined and limited; and those limits may not be mistaken, or forgotten’” (quoting *Marbury*, 5 U.S. (1 Cranch) at 176)).

¹⁶³ The primacy of separation of powers doctrine was frequently articulated by the Founders, who cited Montesquieu as the father of this canon. See, e.g., THE FEDERALIST NO. 47 (James Madison) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. . . . The oracle who is always consulted and cited on this subject, is the celebrated Montesquieu.”).

¹⁶⁴ See U.S. CONST. art. III (describing the role of the judiciary in the United States government).

Chevron, as Professor Sunstein and others have remarked, seems to imply that the judiciary's supreme power over other branches—at least when it comes to statutory interpretation—is far from absolute.¹⁶⁵ Though this may irk many, the constitutionality of *Chevron* seems beyond reproach.¹⁶⁶ In *Brand X*, however, the Court moved the fairly uncontroversial *Chevron* line further askew from constitutional strictures in holding that court precedent, even at the highest levels, is not sacrosanct when confronted with agency determinations. That *Brand X* did not do away with the check *Chevron* provides on this agency power—the two-step analysis discussed *supra*—does not quell all fears. This becomes obvious when the *Brand X* decision is applied to a case like *Fernandez*.

The finality of judicial review provides a number of benefits to the American legal system. One of these benefits is stability.¹⁶⁷ Applying *Brand X*, *Fernandez* shows that judicial stability and prospectivity in cases arising from agency determinations are in danger. A brief hypothetical may aid in elucidating the point.

2. A Criminal Law Hypothetical

Assume Congress enacts a statute reading “All criminals are subject to mandatory additional taxation during the remainder of their lives.” Ignoring obvious constitutional problems with the statute, this phrase will most likely be read as a delegation by Congress to the appropriate agency, here independent Agency *C*, to determine what constitutes a “criminal” in this context. For example, does “criminal” mean one who commits misdemeanors, felonies, or both? In accordance with the rationale of *Chevron* and *Brand X*, assume that Agency *C* is made up of experts in criminal law, criminal procedure, criminal psychology, and other relevant fields that place Agency *C* in the best position to most accurately determine the definition of “criminal.” Assume further that Agency *C* determines, via long and arduous legislative rulemaking proceedings, that “criminal” refers to those who commit more than one felony within twenty years. A case subse-

¹⁶⁵ See Sunstein, *Chevron Step Zero*, *supra* note 16, at 190 (noting that courts have attempted “to re-establish judicial supremacy” since the *Chevron* decision); see also Garrett, *supra* note 61, at 2637 (noting that “*Chevron*’s command to courts to defer to certain reasonable agency interpretations of statutes is superficially an uneasy fit with the declaration in *Marbury v. Madison* that “[i]t is emphatically the province and duty of the judicial department to say what the law is” (quoting *Marbury*, 5 U.S. (1 Cranch) at 177)); Rossi, *supra* note 61, at 1108 (“[W]here courts review the legal interpretations of administrative agencies, the scope of the judiciary’s province and duty remains a complex issue, puzzling courts and commentators alike.”).

¹⁶⁶ See Evan J. Criddle, *Chevron’s Consensus*, 88 B.U. L. REV. 1271, 1325 (2008) (noting that *Chevron* may have “taken a seat alongside *Marbury* . . . in the pantheon of American public law”).

¹⁶⁷ See Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 430 (1988) (noting that “[r]eady overruling” constitutional decisions disturbs stability).

quently comes to a circuit court on appeal from Agency *C* wherein a felon challenges the statute, arguing that although he committed two felonies within nineteen years, in the interim he had devoted his life to altruistic ends and he therefore does not believe that he should be subject to the statute. The circuit court, while perhaps disagreeing with Agency *C*'s interpretation, applies the *Chevron* test and determines that the defendant is subject to the additional taxation called for in the statute based on the agency's determination.

Two years later, Agency *C* revisits its interpretation of this statute sua sponte, begins another rulemaking proceeding, and determines that its previous interpretation was entirely too harsh.¹⁶⁸ Now, decides the agency, the word "criminal" should be read to mean an individual who commits more than one felony in ten years. A new case makes its way up to the same circuit court that decided the first case, wherein a second defendant challenges the government's power to force her to pay additional taxes. This new defendant committed two felonies within eleven years. Despite the fact that the circuit court had previously held that committing two felonies within nineteen years triggered the statute, the court must now, under *Brand X*, hold that this second defendant should not pay additional taxes.¹⁶⁹

This hypothetical, which this Note will refer to as "Example (1)," is somewhat analogous to the *Brand X* case in that the independent administrative agency (there the FCC) conducted legislative rulemaking proceedings and developed a statutory interpretation based on a review of applicable law and policy after soliciting expert opinions from private industry. Additionally, as in *Brand X*, the rulemaking agency in Example (1), Agency

¹⁶⁸ Since the leaders of independent administrative agencies are chosen by the president, a change in administration often changes the policy direction of the agencies themselves. The agency that originally determined that a criminal is one who commits more than one felony within twenty years may have been acting under the auspices of a tough-on-crime president. When that president leaves office and a new one, perhaps a more merciful-minded individual, comes to power, it is not at all improbable that she or he may direct the agency to reexamine its interpretation of "criminal" with respect to this hypothetical statute. See, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991) (holding that Secretary of the Department of Health & Human Services Louis Wade Sullivan's issuance of new regulations concerning restrictions on Title X funding were constitutional and within the scope of his authority). This exact scenario is currently playing out with the Obama administration's treatment of the Board of Immigration Appeals. See, e.g., Editorial, *A Move Back Toward Due Process*, N.Y. TIMES, June 14, 2009, at WK7; Spencer S. Hsu, *Precedent Reinstated in Deportation Cases: Holder Says Immigrants Can Appeal Removal Orders Over Lawyer Errors*, WASH. POST, June 4, 2009, at A19; John Schwartz, *Bush Rule Bolstering Deportations is Withdrawn*, N.Y. TIMES, June 4, 2009, at A16.

¹⁶⁹ Of course, as part of the *Chevron* analysis, the court must conclusively find that the agency's interpretation, or change of interpretation, was not "arbitrary [or] capricious." *Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); see also 5 U.S.C. § 706(2)(A) (2006) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."). However, *Brand X* and its progeny show that significant deference is given to the agency in this regard.

C, is comprised of experts and is therefore best suited to make such a determination.

In extending Example (1), instead of an independent administrative agency conducting legislative rulemaking proceedings, assume that a particular executive agency under the aegis of the U.S. Attorney General, Agency *B*, may only make rules in an adjudicative capacity (like the BIA). Before Agency *B* ever has a chance to decide how to interpret “criminal,” the first defendant (who committed two felonies nineteen years apart) comes before the agency in an administrative hearing and asks for relief from the additional taxes imposed by the statute. Agency *B* decides that since this defendant seems like an all-around nice guy and there were nineteen years between his first and latest felony (neither of which was extremely serious in the agency’s view), the word “criminal” should be interpreted as an individual who commits two or more felonies in fifteen years. This interpretation, as is well-understood by the agency, allows this defendant to escape the burdens of additional taxation.¹⁷⁰ Agency *B*’s interpretation is subsequently affirmed on appeal by a circuit court.

Several years later, another defendant challenges the statute. This defendant has committed twenty-three misdemeanors and two felonies which were eighteen years apart. The agency determines that this defendant is a seriously bad person—it is beyond a doubt, reasons Agency *B*, that this is the kind of “criminal” that should be subject to the additional taxation Congress proposed. Agency *B* therefore holds that the word “criminal” means anyone who commits more than ten misdemeanors in addition to one felony within ten years.

As in Example (1), Agency *B* is applying its expertise by deciding the appropriate definition for the term “criminal” in the context of this statute. The defendant appeals the agency determination, pointing out that under Agency *B*’s previous ruling, she is exempt from this statute. The circuit court, however, must now defer to the agency’s new interpretation and, under *Brand X*, the second defendant is subject to the statute. This Note will refer to this scenario as “Example (2).”

Even assuming as true the tenet that an administrative agency is in the best position to develop rules and fill in statutory gaps, there are inherent problems with developing rules and filling in gaps on a case-by-case basis. *Chevron* and *Brand X* both involved scenarios in which the particular independent agencies had conducted legislative, notice-and-comment rulemaking proceedings. But the Board of Immigration Appeals does not operate like the EPA or the FCC. The BIA is part of an executive agency and is merely an adjudicative body that decides *cases*, much as any Article III

¹⁷⁰ Importantly, as in Example (1), Agency *B* is still applying its expertise, since its ruling is based on its decision of how to define the word “criminal.”

court.¹⁷¹ There are intrinsic differences between giving the FCC the ability to develop its own rules and fill in statutory gaps as compared to the BIA's deciding in any given case that a particular interpretation may be better than another.

This is exactly the kind of distinction that the *Fernandez* court, and other courts reviewing removal proceedings, fails to make. *Brand X* is inappropriate in the immigration context for the reason that entirely too much power is granted to a handful of Board Members, rather than an entire agency with attorneys and policymakers that render decisions more like a legislature than a court. Much like the hypothetical, the BIA's case-by-case interpretation allows it to abuse and negate the relative strengths of *Chevron* and *Brand X* wisdom.¹⁷²

B. *A Closer Look: The Peculiarity of the Board of Immigration Appeals*

It is beyond the scope of this Note to offer a normative argument for or against the Board's interpretation of INA section 101(a)(22) or the Fourth Circuit's interpretation in *Morin*. Rather, the issue is more akin to the oft-quoted adage of *Marbury*; to wit, whether a federal court of appeals or the BIA has the right "to say what the law is."¹⁷³ Certainly the Board has the ability to interpret appropriate statutes where there is ambiguity and therefore implied delegation; but the apposite question is whether there is a point on the *Mead-Chevron* spectrum of formality where *Chevron* deference is

¹⁷¹ See U.S. CONST. art. III, § 2, cl. 1 ("The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made . . .").

¹⁷² Note that a second set of problems would arise if the assumption of agency expertise is weakened. This can be illustrated through a final twist on Examples (1) and (2). Assume that in lieu of the statute discussed *supra*, Congress enacts a statute that reads, "all criminals, as defined under 28 U.S.C. § X, are subject to mandatory additional taxation during the remainder of their lives." Assume that the employees of the relevant agency, here Agency *B* (which acts only through adjudication), are experts in all areas of criminal law and procedure and have a great amount of expertise in interpreting and applying Title 18 of the United States Code, "Crimes and Criminal Procedure." Agency *B* has no expertise, however, in interpreting or applying sections within Title 28, "Judiciary and Judicial Procedure."

The first defendant, who had committed two felonies nineteen years apart, comes before Agency *B*, arguing that he does not fit the definition of "criminal" as articulated in 28 U.S.C. § X. Though the agency has no expertise in interpreting Title 28—even those portions referring to criminals—the agency determines that, pursuant to its understanding of § X, this first defendant fits the definition and is therefore subject to the additional taxation called for in the statute. It may appear as though the agency's decision must be affirmed on appeal pursuant to *Chevron*. Fortunately, however, it is well-established that an agency interpreting a statute it is not charged with administering does not receive *Chevron* deference. See, e.g., *Garcia v. Gonzales*, 455 F.3d 465, 467 (4th Cir. 2006) ("Although the Board is generally entitled to especial deference in interpretations of the Immigration and Naturalization Act, where the Board construes statutes over which it had no particular expertise, including the federal and state and criminal law and statutes at issue in the present case, the Board's interpretation is not entitled to deference." (internal citations omitted)).

¹⁷³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

inappropriate. A pertinent and related question is where BIA decisions fall on that spectrum.

In light of *Brand X*, the weight given to an agency rule or interpretation is more significant. If an agency's interpretation has the ability to carry the force of law, it is necessary to ensure as best as possible that the procedures used to arrive at that rule or interpretation are just, fair, and reasonable.¹⁷⁴ If an agency interpretation or rule has the ability to trump court precedent, however, the standard must be something even greater. The application of *Brand X* to removal proceedings intimates that the ability of the Board to adjudicate a specific case or controversy amounts to the creation of law—law that may be given greater weight than a decision by a United States court of appeals. As such, it is vital to examine whether the procedures followed by the Board in fashioning rules and interpretations meet the stringent standards necessary to pass constitutional muster.¹⁷⁵

Among others, three unique characteristics of the Board of Immigration Appeals serve to illustrate the incongruity of *Brand X*-style deference to Board decisions. These characteristics include the fact that the Board may only proceed by adjudication, that the Board has a record of instability in adjudicating removal proceedings, and that particular Board procedures place its decisions much closer to *Mead*'s level of formality than might be expected.

1. Adjudication Only

The very nature of the Board's procedures for developing rules is inappropriate for *Chevron*-type deference combined with *Brand X* powers. The BIA acts not much differently than a regular federal appellate court, the main difference being the limited subject matter jurisdiction of the Board.¹⁷⁶ This limited subject matter, though it most likely gives the Board greater

¹⁷⁴ This is in contrast to the mandate that the statutory interpretation is not substantively "arbitrary [or] capricious." *Chevron*, 467 U.S. at 844; see also 5 U.S.C. § 706(2)(A) (2006) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."). The difference, then, can be thought of as a distinction between procedural versus substantive arbitrariness. Under *Chevron* and *Brand X*, a reviewing court looks only at the substantive interpretation. *Mead*, on the other hand, illustrated a scenario where the Supreme Court examined whether the procedure itself was arbitrary.

¹⁷⁵ I do not mean to suggest that current Board procedures, combined with *Brand X* powers, are facially unconstitutional. Rather, the issue is one of constitutional uneasiness. If the Board can create law utilizing procedures which fail to comport with popular notions of majoritarianism and democracy, it may be necessary to investigate the means by which these procedures, or, as I suggest below, the degree of deference afforded decisions arising out of BIA procedures, operate and inform Board action. See *infra* Part II.B.

¹⁷⁶ Organization, Jurisdiction, and Powers of the Board of Immigration Appeals, 8 C.F.R. § 1003.1(b) (2009) (detailing the specific instances where the Board may exercise jurisdiction).

familiarity with immigration issues than a state trial or federal district court, is not a persuasive reason to allow the Board such a great deal of deference. The Board itself does not engage in legislative rulemaking—it does not conduct independent proceedings or produce reports on statutory interpretations.¹⁷⁷ It is limited to adjudicating specific cases and controversies, and as such, *Chevron* deference with *Brand X* power allows the Board and its members—nothing more than a specialized court—a tremendous amount of control. It is true that BIA procedure is not on par with the level of informality addressed in *Mead*.¹⁷⁸ But it is equally true that BIA procedure falls at a point on the formality spectrum far enough away from *Chevron* that it merits more scrutiny than that required under *Brand X*.¹⁷⁹ The U.S. government has undoubtedly misappropriated *Brand X* to the context of removal proceedings, and the results can be dangerous.

Professor Pierce, a longtime proponent of agency deference, has argued that adjudicative rulemaking is in many respects inferior to legislative rulemaking.¹⁸⁰ Professor Pierce identifies nine different advantages of legislative rulemaking over its adjudicative counterpart:

[(1) legislative rulemaking produces] higher quality rules than adjudication[; (2) it offers] enhanced political accountability of agency policy decisions adopted through the rulemaking process [; (3) legislative rulemaking] eliminates the need to engage in expensive and time-consuming adjudicatory hearings to address issues of legislative fact; [(4)] rulemaking eliminates the need to relitigate recurring issues; [(5)] rules created through rulemaking are easier and less expensive to enforce and to implement than are “rules” announced in the course of adjudicating specific disputes[; (6)]legislative rules provide affected parties with clearer advanced notice of permissible and impermissible conduct; [(7) legislative rules] avoid the widely disparate temporal impact of “rules” announced and applied through adjudicatory decisionmaking; [(8) legislative rules] reduce the incidence and magnitude of interdecisional inconsistencies in implementing regulatory and benefit programs [and]; [(9) legislative rules] allow all potentially affected members of the public an opportunity to participate in the process of determining the rules that affect them.¹⁸¹

Though Professor Pierce’s arguments are valuable, they are perhaps more appropriate for an agency that is in the process of a cost-benefit analysis concerning whether to proceed via legislative or adjudicative rulemaking. The BIA has no such choice.¹⁸² But in addition to pointing out the weaknesses inherent in adjudicative lawmaking, Professor Pierce’s arguments may be extended to demonstrate why the existence of such disadvantages is sufficient to render *Brand X*-style deference inappropriate when an appeals court reviews BIA interpretive decisions.

¹⁷⁷ See *id.* § 1003.1(d) (describing the powers of the Board).

¹⁷⁸ See *supra* Part I.B.2.

¹⁷⁹ See *supra* Part I.B.2-3.

¹⁸⁰ See 1 PIERCE, *supra* note 31, § 6.8, at 368-74.

¹⁸¹ *Id.* § 6.8, at 368-72.

¹⁸² See *supra* Part I.A.2.

Since the BIA is unable to choose to make rules by a legislative rule-making process, if the Board wants to create a precedential decision it must do so based on the particular facts of a case. As the “criminal” hypothetical illustrates,¹⁸³ this creates a stability problem that is difficult to explain away. Though one commentator has recently argued that adjudicative rulemaking offers some rule-of-law advantages, even she concedes that the role of stability is undermined by the Board’s adjudicative rulemaking process.¹⁸⁴ Katie Eyer found in a review of contemporary Board decisions that the BIA reversed itself at an alarming rate of 12 percent,¹⁸⁵ and she concedes that “an analysis of BIA caselaw does support the conclusion that the BIA reverses its position frequently, thereby undermining the rule-of-law goal of stability.”¹⁸⁶

One of the rationales for *Brand X* and the enormous amount of deference that the decision provides for is the notion that an administrative agency holds an intellectual monopoly on the intricacies of a particular area of law and is therefore best suited to interpret relevant statutes.¹⁸⁷ But the lack of stability evident in BIA case law begs the question, why is it that a purportedly expert group of Board Members so often changes its mind? Eyer suggests that the Board frequently reverses itself based on “a desire to promote . . . rule-of-law goals” such as prospectivity, notice publicity, and predictability.¹⁸⁸ Assuming Eyer is correct, her argument is still question-begging: why did the Board’s original precedential decision not take into account these rule-of-law goals that are so fundamental to a functioning legal system? The answer lies, in great part, in the nature of the Board’s decision-making process.

When an agency announces a “rule” in the process of adjudicating a specific dispute, it has before it only the parties to the particular dispute and the evidence those parties tender. Traditionally, that evidence focuses primarily or exclusively on the specific, historical facts related to those parties and their relationship. The factual pattern on which the agency predicates its rule may be widely generalizable or entirely idiosyncratic. The agency has no way of knowing whether the fact pattern before it applies to 100 percent, 50 percent, 10 percent, or 1 percent of superficially analogous relationships or incidents.¹⁸⁹

Indeed, the inferiority inherent in adjudicative rulemaking makes it hard to understand why *Brand X* deference would ever be applied to Board interpretive decisions.

¹⁸³ See *supra* Part II.A.2.

¹⁸⁴ See Eyer, *supra* note 51, at 695-96.

¹⁸⁵ *Id.* at 696.

¹⁸⁶ *Id.* at 697. Despite this evidence, the author concluded that the BIA’s high reversal rate is acceptable since she found that the rationale for the high rate was that the Board desired to “promote other rule-of-law goals.” *Id.*

¹⁸⁷ See 3 STEIN ET AL., *supra* note 12, § 15.05[3].

¹⁸⁸ Eyer, *supra* note 51, at 683-99.

¹⁸⁹ 1 PIERCE, *supra* note 31, § 6.8, at 368-69.

2. A Record of Instability

Over the past several years, a number of scholars and commentators have come forward with empirical and statistical evidence demonstrating serious problems inherent in the Board's adjudicative process.¹⁹⁰ The troubles are largely political in origin, and began in 2002 when then Attorney General John Ashcroft, in an effort to alleviate enormous delays in the process of appealing to the Board, instituted major reforms.¹⁹¹ In August of 2002, Attorney General Ashcroft issued a final rule wherein he sought "to improve the adjudicatory process for the Board because, under the current process, the Board has been unable to adjudicate immigration appeals in removal proceedings effectively and efficiently."¹⁹²

The effect of the Attorney General's ruling was to change the operations of the Board; whereas the BIA had historically operated like a federal appellate court, "hearing cases in three-member panels and issuing written opinions,"¹⁹³ Ashcroft ordered Board members to review appeals alone and, in most cases, to issue summary orders.¹⁹⁴ Additionally, Ashcroft got rid of half of the Board members, cutting the size of the Board from twenty-three to twelve,¹⁹⁵ in an effort to improve "cohesiveness and collegiality."¹⁹⁶ As a result of these changes, aliens saw a major shift in outcomes, as "Board decisions in favor of noncitizens fell from 25 percent to 10 percent."¹⁹⁷ The procedural changes and the increased number of unfavorable Board decisions for aliens sparked a gargantuan increase in appeals to federal circuit

¹⁹⁰ See, e.g., John S. Kane, *Refining Chevron—Restoring Judicial Review to Protect Religious Refugees*, 60 ADMIN. L. REV. 513 (2008); Benedetto, *supra* note 5; 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); Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1 (2006); John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1 (2005). See also AILA's Final Comments on the Proposed BIA Reform Rule, AILA InfoNet Doc No. 02032031 (Mar. 20, 2002), available at <http://aila.org>.

¹⁹¹ Alexander, *supra* note 190, at 12.

¹⁹² Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,878 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 3).

¹⁹³ Alexander, *supra* note 190, at 12.

¹⁹⁴ *Id.* Summary orders, termed "affirmance without opinion" ("AWO"), are expressly authorized in 8 C.F.R. § 1003.1(e)(4) (2009).

¹⁹⁵ Though Attorney General Ashcroft decreased the size of the Board, the Board was at all relevant times allowed to have up to fifteen members. See *id.* § 1003.1(a)(1).

¹⁹⁶ Alexander, *supra* note 190, at 12 (quoting 67 Fed. Reg. at 54,894).

¹⁹⁷ *Id.* (citing Comm. on Fed. Courts, *The Surge of Immigration Appeals and Its Impact on the Second Circuit Court of Appeals*, 60 REC. ASS'N B. CITY N.Y. 243, 245 (2005), available at <http://www.abcnyc.org/Publications/record/vol.%2060%20no.%201.pdf>).

courts: though such appeals had for decades constituted around 2 or 3 percent of circuit courts' caseload, in 2005 this number reached 18 percent.¹⁹⁸

The skyrocketing number of appeals from Board decisions does not necessarily indicate Board instability. However, in addition to the enormous increase in appeals there is other, more disturbing evidence relating to Board practice. A review of the Board's 2007 Yearbook illustrates that in that year the BIA completed 35,393 appeals;¹⁹⁹ divided over the 260 workdays in 2007,²⁰⁰ this amounts to the Board's deciding an average of over 136 appeals per day. During 2007, the Board only had eleven members,²⁰¹ which means that each Board member decided more than twelve appeals every day.²⁰² In 2008, the number of appeals completed increased more than 8 percent to 38,369.²⁰³ Even assuming that the Board had a full fifteen members throughout the year—the maximum number of members allowed at the time—the number of appeals per member per day would still be close to ten.

Even more alarming are the numbers for IJ decisions, which the Board reviews. In 2007, the nation's 207 immigration judges who received a regu-

¹⁹⁸ *Id.* at 10. For an interesting refutation by the BIA Chairman responding to the results of studies conducted following Attorney General Ashcroft's 2002 streamlining procedures—which uniformly indicated decreased stability and reliability in BIA practice—see Letter from Lori Scialabba, Chairman, Bd. of Immigration Appeals, to Am. Bar Ass'n Comm'n on Immigration Policy, Practice & Pro Bono (Dec. 22, 2003), available at <http://www.usdoj.gov/eoir/press/03/ABA.pdf>.

¹⁹⁹ EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2007 STATISTICAL YEARBOOK T2 tbl.17 (2008), <http://www.usdoj.gov/eoir/statspub/fy07syb.pdf> [hereinafter 2007 YEARBOOK].

²⁰⁰ The number of workdays per year is an estimate. This figure was determined by assuming five-day work weeks for fifty-two weeks. The true number of workdays is most likely smaller.

²⁰¹ See Alexander, *supra* note 190, at 9. As of August 2009, the Board was comprised of fourteen members, including the Acting Chairman. See EXECUTIVE OFFICE OF IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FACT SHEET: BOARD OF IMMIGRATION APPEALS 1-5 (2009), <http://www.usdoj.gov/eoir/fs/biabios.pdf>. In January of 2009, EOIR added a new Vice Chairman to the BIA, who in June 2009 was appointed Acting Chairman, and updated its Board member biographies. See *id.* at 1.

²⁰² It is illustrative to compare this figure to that of the busiest United States Court of Appeals—the Ninth Circuit. In 2007, the Ninth Circuit terminated 13,600 cases, spread across 28 judges. STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR 85 tbl.B (2008), <http://www.uscourts.gov/judbus2007/JudicialBusinesspdfversion.pdf>. Divided over the 260 workdays in 2007, see *supra* note 200, this amounts to 1.87 cases per judge, per day. In 2008, the Ninth Circuit received 13,577 filings and terminated 12,373 cases. STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2008 ANNUAL REPORT TO THE DIRECTOR 83 tbl.B (2008). Divided over the same number of judges and workdays, this amounts to 1.70 cases per judge, per day.

²⁰³ EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2008 STATISTICAL YEARBOOK T2 tbl.17 (2009), <http://www.usdoj.gov/eoir/statspub/fy08syb.pdf> [hereinafter 2008 YEARBOOK].

lar caseload²⁰⁴ decided 328,425 cases, averaging just over six cases per IJ per workday. In 2008, roughly 214 immigration judges regularly received caseloads,²⁰⁵ completing 339,071 decisions,²⁰⁶ averaging more than five and-a-half cases per IJ per day. Since the overwhelming majority of Board action consists of summary decisions,²⁰⁷ it is difficult to imagine that the majority of IJ and subsequent Board decisions are well-reasoned opinions accurately and impartially applying the law.²⁰⁸

In addition to the problems that inhere to adjudicative rulemaking, there is evidence demonstrating that the Board's particular adjudicative process lacks stability. In light of these data, it is disturbing that the Board itself has the power, under *Chevron*, to make law. Even worse, in accordance with *Brand X*, the Board can essentially overrule a federal court of appeals.²⁰⁹ The makeup and structure of the Board of Immigration Appeals illustrates the unsuitability of *Chevron* and *Brand X* deference in the context of removal proceedings.²¹⁰

3. Procedural Peculiarities and Inequities

In addition to the problems posed by exclusive reliance on adjudicatory rulemaking and Board instability, there are several procedural peculiarities unique to the Board that further dampen the case for *Brand X* deference in Board interpretive decisions. For example, an enormous proportion of aliens appearing before immigration judges, and subsequently the BIA, appear without representation.²¹¹ This is due to the fact that, unlike criminal proceedings in the United States, aliens have no right to counsel when they

²⁰⁴ Transactional Records Access Clearinghouse, Number of Immigration Judges 1998-2009, <http://trac.syr.edu/immigration/reports/208/include/payroll.html> (last visited Mar. 7, 2010).

²⁰⁵ *Id.*

²⁰⁶ See 2008 YEARBOOK, *supra* note 203, at B2 fig.1.

²⁰⁷ John D. Ashcroft & Kris W. Kobach, *A More Perfect System: The 2002 Reforms of the Board of Immigration Appeals*, 58 DUKE L.J. 1991, 1997 (2009) (noting that, in 2001, "over 58 percent of BIA cases were decided by single members who affirmed without opinion"); Shruti Rana, "Streamlining" the Rule of Law: How the Department of Justice is Undermining Judicial Review of Agency Action, 2009 U. ILL. L. REV. 829, 833 n.18.

²⁰⁸ It is, however, important to note that the volume of IJ decisions and the number of decisions appealed has decreased somewhat in 2007 after across-the-board increases in 2006. See 2007 YEARBOOK, *supra* note 199, at Y1. See also *Zhen Li Iao v. Gonzales*, 400 F.3d 530, 533-35 (7th Cir. 2005) (chastising immigration courts for poorly handling cases and noting the possibility that, given immigration courts' tremendous caseload, it is understandable why the decisions are so poor: "[I]t is possible that nothing better can realistically be expected than what we are seeing in this and like cases. But we are not authorized to affirm unreasoned decisions even when we understand why they are unreasoned.").

²⁰⁹ See *supra* Part I.B.3.

²¹⁰ Fortunately, the Obama administration is beginning to make certain changes that aim to inject stability and accountability into the process. See, e.g., Hsu, *supra* note 168; Schwartz, *supra* note 168.

²¹¹ 2008 YEARBOOK, *supra* note 203, at G1, W1.

appear in front of a tribunal.²¹² In 2003, 48 percent of all aliens appearing before immigration judges were unrepresented.²¹³ In 2006 that percentage decreased to 35 percent, but rose again in 2007 to 42 percent.²¹⁴ The numbers are slightly lower for proceedings before the Board, where in 2007, 25 percent of all aliens were unrepresented before the Board.²¹⁵ In 2008, slightly less than 40 percent of aliens appearing before immigration judges were unrepresented;²¹⁶ in that same year, over 22 percent of aliens appeared before the Board pro se.²¹⁷ Studies have consistently shown a large outcome differential between represented and unrepresented aliens.²¹⁸ In addition to the difference in outcomes, the fact that a statutory interpretation having the force of law can result from a case in which an alien has little or no real opportunity to engage in the adversarial process is troubling.

²¹² The constitutional foundation for a right to counsel in criminal proceedings is found in the Sixth Amendment. U.S. CONST. amend. VI. (“In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.”). Since immigration proceedings are technically not criminal prosecutions, the Sixth Amendment guarantee is inapplicable. Moreover, on January 7, 2009, Attorney General Michael Mukasey held that aliens do not even have a right to effective assistance of counsel when they are represented. *In re Compean*, 24 I. & N. Dec. 710, 714 (Att’y Gen. 2009). This decision reversed a long line of cases that had held that when aliens are represented they have a positive right to effective assistance of counsel. See *In re Assad*, 23 I. & N. Dec. 553 (B.I.A. 2003); *In re Lozada*, 19 I. & N. Dec. 637 (B.I.A. 1988). Aliens do have a “privilege” of representation, as long as such representation is “at no expense to the government . . .” INA § 292, 8 U.S.C. § 1362 (2000). Current Attorney General Eric Holder recently vacated the *Compean* decision. See Press Release, U.S. Dep’t of Justice, Attorney General Vacates *Compean* Order, Initiates New Rulemaking to Govern Immigration Removal Proceedings (June 3, 2009), available at <http://www.usdoj.gov/opa/pr/2009/June/09-ag-547.html>; Hsu, *supra* note 168; Schwartz, *supra* note 168.

²¹³ 2007 YEARBOOK, *supra* note 199, at G1 fig.9.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ 2008 YEARBOOK, *supra* note 203, at G1 fig.9.

²¹⁷ *Id.* at W1 fig.30.

²¹⁸ See, e.g., Robert A. Katzmann, Judge, United States Court of Appeals for the Second Circuit, The Orison S. Marden Lecture of the Association of the Bar of the City of New York: The Legal Profession and the Unmet Needs of the Immigrant Poor 2 n.2 (Feb. 28, 2007) (transcript available with the American Immigration Lawyers Association) (noting a 25 percent difference in success rates between asylum seekers with representation versus asylum seekers lacking representation), available at <http://aila.org/Content/default.aspx?docid=22056>; BD. OF IMMIGRATION APPEALS, DEP’T OF JUSTICE, THE BIA PRO BONO PROJECT IS SUCCESSFUL 12 (2004), <http://www.usdoj.gov/eoir/reports/BIAPrBonoProject-Evaluation.pdf> (indicating a 22 percent success rate for appeals filed by represented aliens versus a 7 percent success rate for appeals filed by pro se aliens); Donald Kerwin, *Looking for Asylum, Suffering in Detention*, 28 HUM. RTS. 3, 4 (2001) (noting that in 1999 approximately 25 percent of represented detainees were granted asylum, while only 3.4 percent of unrepresented detainees received asylum); see also Symposium, *Immigration—Practice & Policy*, 17 GEO. MASON U. CIV. RTS. L.J. 545, 546-47 (2007) (noting that approximately 40 percent of those represented in immigration cases received favorable decisions, while only 10 percent of those not represented received favorable decisions).

Another procedural peculiarity of the Board is that it disfavors and often does not allow parties to file amicus briefs.²¹⁹ This practice limits the ability of immigration experts and practitioners to inform Board decisions. Additionally, the Board almost never hears oral argument,²²⁰ relying instead on the government's and alien's respective briefs. An added peculiarity is that the overwhelming number of Board decisions are simple summary affirmances or denials of IJ decisions without opinion.²²¹ Further, the Board has the ability to designate its decisions as precedential or not precedential.²²² Only those decisions which the Board votes for have precedential value for employees of the Department of Homeland Security, immigration judges administering the United States immigration laws, aliens, and the BIA itself.²²³ Thus, the Board has the ability to make contrary decisions without ever having to explicitly overrule past precedent.

A final problem arises when the Board makes decisions interpreting statutes outside its area of expertise.²²⁴ In *Leocal v. Ashcroft*,²²⁵ for example, the Supreme Court reversed a Board decision where the Board had based its holding on an interpretation of a criminal statute, 18 U.S.C. § 16, that was cross-referenced in INA section 237(a).²²⁶ Though the Board's expertise is limited to the INA, it frequently interprets statutes outside of the immigration context.²²⁷ Fortunately, courts routinely refuse to give *Chevron* or *Brand X* deference to a Board decision which turns on an interpretation of a statute outside of the INA.²²⁸

²¹⁹ See EXECUTIVE OFFICE OF IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL § 4.6(i), at 56 (2004), <http://www.justice.gov/eoir/vllqpracmanual/pracmanual/tocfull.pdf> [hereinafter "BIA PRACTICE MANUAL"] ("The filing of multiple amici briefs that raise similar points in support of one party is disfavored."); *Id.* § 2.7, at 25-26 (noting that amici that wish to appear must seek approval of the court, and that such appearances are often limited to the filing of a brief).

²²⁰ See *id.* § 8.2(a), at 85-86.

²²¹ See Ashcroft & Kobach, *supra* note 207; Susan Burkhardt, *The Contours of Conformity: Behavioral Decision Theory and the Pitfalls of the 2002 Reforms of Immigration Procedures*, 19 GEO. IMMIGR. L.J. 35, 48 (2004) (explaining that 58 percent of all cases filed with the BIA in 2001 resulted in summary decisions); Rana, *supra* note 207, at 833; see also *Zuh v. Mukasey*, 547 F.3d 504 (2008) (reversing and remanding a Board Member's summary affirmance of an IJ decision that amounted to a clear abuse of discretion); *Smriko v. Ashcroft*, 387 F.3d 279 (3d Cir. 2004) (reversing and remanding a BIA decision because the Board Member "arbitrarily" affirmed the IJ decision without opinion).

²²² 8 C.F.R. § 103.37(g).

²²³ *Id.*

²²⁴ See *supra* note 172 and accompanying text.

²²⁵ 543 U.S. 1 (2004).

²²⁶ *Id.* at 13.

²²⁷ See, e.g., *Garcia v. Gonzales*, 455 F.3d 465 (4th Cir. 2006); *Omari v. Gonzales*, 419 F.3d 303 (5th Cir. 2005); *In re Alcantar*, 20 I. & N. Dec. 801 (B.I.A. 1994); *In re Williams*, A41 359 137, 2006 WL 3088890 (B.I.A. Sep. 22, 2006).

²²⁸ See *supra* note 172. In *Leocal*, the Supreme Court—without ever referencing *Chevron*—determined that the Board's interpretation of a criminal statute was plainly incorrect. 543 U.S. at 12. The Supreme Court gave no deference to the Board's statutory interpretation. *Id.*

The fact that the Board may only conduct rulemaking through adjudicatory proceedings, the fact that the Board has a clear record of instability, and the set of procedural inequities that the Board utilizes render its decisions particularly unsuitable to *Brand X* deference.²²⁹ It is imperative, therefore, that the system of deference now in place in the post-*Brand X* world be re-thought and re-configured.

III. SOLVING THE *BRAND X* PROBLEM

In this Part, this Note suggests a solution to the *Brand X* problem in the context of deference afforded to the Board of Immigration Appeals. Through a reconceptualization of the proper deference given to BIA decisions, in conjunction with possible structural changes to the Board's rulemaking procedures, the *Brand X* problem can be satisfactorily avoided and rule of law goals, such as stability, prospectivity, and formality can be more easily satisfied.

The Board of Immigration Appeals, as it exists today, must not be afforded the same *Chevron* and *Brand X* deference given to other administrative agencies. Were the Board suddenly robbed of its deference-affording powers, anomalous cases like *Fernandez* would most likely be eliminated

²²⁹ Some commentators have argued that an additional institutional problem with *Brand X* deference to Board decisions is that the BIA, as an adjudicative body, is too close to the prosecutorial and enforcement mechanisms of U.S. immigration law. See, e.g., Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 517 n.8 (2003). The Board of Immigration Appeals exists as part of the Executive Office for Immigration Review ("EOIR"), which was created in 1983 during a reorganization of the DOJ. See U.S. Dep't of Justice, Executive Office for Immigration Review, EOIR Background Information, <http://www.justice.gov/eoir/background.htm> (last visited Jan. 24, 2010). Uniquely, the Board is "entirely a creature of the Attorney General's regulations," as it has never been recognized by statute. THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, *IMMIGRATION: PROCESS & POLICY* 112 (3d ed. 1995); Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29, 30 (1977). Indeed, its continued existence relies solely on the discretion and regulations of the Attorney General. *Id.*

The EOIR operates under the Department of Justice, which is under the aegis of the United States Attorney General. BIA PRACTICE MANUAL, *supra* note 219, § 1.2(b), at 1-2. The Department of Homeland Security, which was established in 2002 and immediately subsumed the Immigration & Naturalization Service, operates as the immigration enforcement wing of the United States government. *Id.* Since DHS and DOJ are technically two distinct agencies, the Board in its adjudicative role is at least nominally separated from immigration enforcement. See EOIR ORGANIZATIONAL CHART, *supra* note 24 (providing an organizational chart demonstrating the relationship between DOJ, DHS, EOIR, and the BIA). Despite such a formal demarcation, there is ongoing tension between the purely adjudicative function of the Board and the enforcement responsibilities of DHS and its subsidiaries. Scholars and commentators have opined that the position of the Board within the larger immigration framework presents a conflict of interest. See Slocum, *supra*, at 517 n.8. This conflict has increased with the addition of *Brand X* to the BIA's arsenal. Now, the very agency charged with immigration police powers is unabashedly involved, some commentators argue, in the interpretation of relevant statutes. The power this system places in the hands of DHS is, to many commentators, simply indefensible.

since Board decisions would have to be aligned with the circuit court precedent to which an appeal from the Board would be directed.²³⁰ Under this system, Luis Puentes-Fernandez would not have been removed from the United States since the Board would have been forced to follow Fourth Circuit precedent—in this case *Morin*—and declare that Fernandez was a “national” pursuant to INA section 101(a)(22).²³¹ What would follow is a scenario where the Board would be forced to apply identical facts to the precedents of different jurisdictions, in some cases coming out with divergent results. Outside of cases of statutory interpretation, this is the way the Board currently operates.

Possible solutions to the *Brand X* problem may be classified by degree. One extreme solution, for example, would be to completely forbid circuit courts from giving Board decisions *Chevron* deference. This would allow circuit courts de novo review of questions of statutory interpretation of the INA when hearing appeals from the BIA. Such a solution might be termed the “no deference” alternative. A slightly less severe solution would be to allow BIA decisions *Chevron* deference, but only on issues of first impression. This would serve to rescind *Brand X*-style deference power from Board decisions, thereby returning agency deference to a pure *Chevron* approach. This solution might be termed the “*Chevron* only” alternative.

The “no deference” alternative, while perhaps attractive to some, would prove to be unacceptably over-inclusive. That administrative agencies are in the best position to interpret statutes relevant to their respective fields—the principle to which *Chevron* owes its fame—is a valuable paradigm. The superior option of the two would be to apply the “*Chevron* only” standard, essentially prohibiting a circuit court from applying *Brand X* to a decision of first impression made by the Board of Immigration Appeals. Again, utilization of this rule would mean that *Chevron* deference would be applied only in situations where the adjudicating circuit court had not yet spoken on the issue. Application of this rule, however, would bring about the anomalous results Justice Thomas worried about in *Brand X*: that the state of the law would be determined by the old adage “first in time, first in right.”²³² The “*Chevron* only” rule, as applied to *Fernandez* (where the BIA had precedent which conflicted with the Fourth Circuit’s),²³³ would mean

²³⁰ See INA § 242(b)(2), 8 U.S.C. § 1252(b)(2) (2000).

²³¹ See *supra* Part I.C.

²³² Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 983 (“A [rule] contrary [to the Court’s holding in *Brand X*] would mean that whether an agency’s interpretation of an ambiguous statute is entitled to *Chevron* deference would turn on the order in which the interpretations issue: If the court’s construction came first, its construction would prevail, whereas if the agency’s came first, the agency’s would command *Chevron* deference.”); JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 3 (5th ed. 2002) (“*Qui prior est tempore potior est jure*” (quoting a maxim of Roman law)).

²³³ Recall that the Fourth Circuit’s decision in *United States v. Morin*, 80 F.3d 124 (4th Cir. 1996), was based on a finding that INA § 101(a)(22)(B) conferred “national” status to an individual who had

that the Fourth Circuit's interpretation of INA section 101(a)(22)(B) in *Morin* would trump the BIA's contrary interpretation, because without *Brand X* the Board lacked the power to overrule circuit court precedent.²³⁴

An additional possible solution exists in reforming the degree of deference given by a circuit court based on where the BIA's particular decision falls on the *Mead-Chevron* spectrum of formality. In a case where the Board allows the parties to file amicus briefs, grants oral argument, issues a precedential decision (as opposed to a summary affirmance or denial), and where the alien is represented before the Board, *Chevron*, and indeed *Brand X*, deference appears more appropriate. This is because the level of formality is much closer to *Chevron* and *Brand X* than the procedures utilized in *Mead*. But where the Board affirms an IJ decision without opinion, or interprets a statute in a case involving an unrepresented alien, refuses to allow amicus briefs, denies oral argument, and issues a decision which has no precedential value, the rationale for application of *Chevron*, not to mention *Brand X*, evaporates. This does not mean, however, that a circuit court would be required to review such a BIA decision de novo. Rather, the solution would be to give a circuit court the ability to remand for a lack of formality. This resolution might be termed the "remand for formality" alternative.

Note that the "no-deference," "*Chevron* only," and "remand for formality" solutions all involve a change in the standard of review afforded Board decisions. There is, however, another category of options altogether. This set of solutions can be classified as systemic modifications to the Board of Immigration Appeals itself. For example, a roll-back of the changes Attorney General John Ashcroft made in 2002 might allow, at the very least, a return to the status quo ante.²³⁵ In this scenario, summary affirmance or denial would not be allowed, the number of Board members would return to twenty-three, and a three-member panel would hear and decide each appeal.²³⁶ These changes would alter, at least to a degree, Board decisions' level of formality, sliding slightly further away from *Mead*. Em-

gone through the naturalization process and signed an affidavit of allegiance, even though that individual had not completed the naturalization ceremony. The BIA, however, had decided in *In re Navas-Acostas*, 23 I. & N. Dec. 586 (B.I.A. 2003), that INA § 101(a)(22)(B) did not confer "national" status on an individual in the same scenario as *Morin*. The conflict in *Fernandez* was whose interpretation—the Fourth Circuit or the BIA's—should win out.

²³⁴ That *Brand X* was necessary in order for an administrative agency to essentially overrule a circuit court is not an unforeseeable conclusion. It is entirely possible that a *Chevron* analysis might be able to accomplish the same result. The difference is that *Brand X* made explicit what may not have previously been; namely, that circuit court precedent is not sacrosanct in the face of a contrary agency interpretation.

²³⁵ Recent developments in the Obama administration indicate that such change may be forthcoming. See, e.g., David Bennion, *Holder Starts to Unpack Ashcroft's BIA*, IMMIGR. RTS., Aug. 3, 2009, http://immigration.change.org/blog/view/holder_starts_to_unpack_ashcrofts_bia.

²³⁶ See *supra* Section II.B.2.

pirical research on the surge in appeals to circuit courts²³⁷ suggests that such a roll-back measure would significantly reduce the number of appeals of Board decisions. This modification, however, would not affect the substantive problems facing the Board.

Former chairman of the Board of Immigration Appeals Maurice A. Roberts has argued that the way to improve the substantive problems facing the Board would be for Congress to supply the BIA with a statutory basis, removing it from the Department of Justice.²³⁸ Were the Board to have a statutory basis and become an independent administrative agency, it would be less subject to the whims of the Executive via the Attorney General and its existence would be less precarious.²³⁹ Board procedure could be regulated by Congress, and it would be possible to introduce more transparency into the process.

As might be expected, no single alternative can remedy the host of problems affecting Board procedure and the inappropriate level of deference given to Board decisions under a *Brand X* regime. Rather, a combination of the alternatives discussed above is necessary. First, consistent with the “*Chevron* only” alternative, *Brand X* deference should not be permitted in reviewing BIA interpretive decisions unless and until such decisions are sufficiently formalized. This means that unless an alien was represented by counsel, amicus briefs were allowed, and the Board issued a precedential decision, *Brand X* deference should be barred.

Second, in line with the “remand for formality” alternative, circuit courts should consistently remand any Board decision contrary to that circuit court’s own precedent where the level of formality was clearly insufficient. The circuit court would essentially tell the BIA that, if it desires a rule contrary to circuit court precedent, it must follow a set of procedures that would place the decision at an acceptable point on the *Mead-Chevron* spectrum of formality. Finally, consistent with the current practice in immigration and administrative law more generally, as well as with the “no deference” alternative, when the Board issues a decision interpreting a statute outside of the Immigration & Nationality Act, no deference should be given to that interpretation. A circuit court must conduct a *de novo* review of the Board’s interpretation of the relevant statute, relying on the Board’s interpretation only as persuasive authority.

CONCLUSION

Systemic changes to the Board, such as rolling back Attorney General Ashcroft’s 2002 changes, might render *Brand X* deference to BIA decisions

²³⁷ See *supra* note 190.

²³⁸ Roberts, *supra* note 229, at 43-44.

²³⁹ *Id.* at 44.

slightly more palatable; but such changes are not enough to solve the underlying deference problems. A working solution would have to contain both a modified deference standard as well as systemic alterations to the Board and its procedures. While it is beyond the scope of this Note to describe appropriate systemic changes to the composition of the Board itself, in the context of the *Brand X* problem the best alternative is use of a combined “*Chevron* only,” “remand for formality,” and “no deference” approach, depending on the circumstances of a particular BIA decision.

Such a solution is as much a result of prudential concerns as substantive uneasiness: elimination of *Chevron* at this point on the trajectory of administrative law would be both untenable and infeasible. But a special standard for BIA decisions would not impose a prohibitive cost on circuit courts. Under such a system, the procedural safeguards of the *Chevron* two-step, no matter how flawed some may consider them to be, provide a basis for at least a modicum of restraint. If a circuit court has precedent contrary to a Board interpretation, the circuit court may remand the BIA decision for a more formal decision-making process. However, in the spirit of *Chevron*, the Board should be able to interpret the INA in order to implement appropriate and well-thought-out policy.

Since application of the *Chevron* doctrine may inevitably lead to another *Brand X*, however, an additional systemic change is necessary. To this end, either the Attorney General should provide the necessary regulations to allow the Board the option to proceed via legislative rulemaking, or Congress should provide the Board with an independent statutory backing which includes a legislative rulemaking option. Such a system will permit Board interpretations to move along the *Mead-Chevron* spectrum of formality towards *Chevron*, allowing the Board to take advantage of the myriad benefits that legislative rulemaking provides. A legislative rulemaking option will bring the Board in line with other administrative agencies, rendering application of traditional notions of agency deference more germane.

Turning back the tide on the development of the Administrative State would be both impractical and counter-productive. But that does not mean that federal courts of appeals must simply lay down their shields as the inevitably approaching army of administrative deference advances. A simple refashioning of the conception of deference and a return to the wisdom and limiting tendencies of *Mead* can add significant reinforcement to agency encroachment and infuse justice and equity into the process of dealing with aliens in the United States. After all, most of us were immigrants once.