Spring 5-22-2021

Judicial Deference To Administrative Statutory Interpretation In The Modern American Administrative State

Rachel Marie Macmaster
Syracuse University, rachel.macmaster@mcc.edu

Abstract

The American administrative state of the twentieth and twenty-first centuries is defined by deference by federal courts to administrative agencies. The political science and (especially) legal literatures have long discussed how federal courts defer to agencies, but little attention has been dedicated to how to identify deference and why courts defer. This dissertation redefines deference, a term that has been topic of extensive discussion in the last forty years but that was missing a key feature: the intent of the deferrers. Using administrative courts as the proxy for agencies at large, this dissertation suggests three reasons why judges may defer. First, an Article III court might defer to an administrative court by the advice of *Chevron v. National Resource Defense Council* (1984), a case that provided an explicit declaration in favor of deferring to agencies on the subject matters of which they are an expert. Second, an Article III court might defer to an administrative court when the courts are staffed by co-partisans (i.e. when the partisanship of the Article III court panel and the administrative court panel match). Third, an Article III court might defer to an administrative court when the Article III court would like to communicate instructions on good judicial practice to administrative law judges.

To test these theories, this dissertation utilizes a new approach to identifying deference. Using the universe of precedent decisions at the Board of Immigration Appeals, I identified each decision where there was a companion case in the various courts of appeals. This created dyads of cases (n = 116) that provide the opportunity to trace a dispute through two different judicial institutions. I coded each dyad on several variables that provided analytical leverage on all three theories.

Upon explicating the research design and case selection featured in this dissertation, I introduce the four forms of deference. If a court rules in favor of an agency and there is evidence in the text of the opinion that the court is actively deferring to the agency, then we can code this instance as "active deference." If a court rules in favor of an agency and there is no evidence in the text of the opinion that the court is actively deferring to the agency, then we can code this instance as "passive deference." If a court rules against an agency and there is no evidence in the text of the opinion that the court is actively not deferring to the agency, then we can code this instance as "passive non-deference." If a court rules against an agency and there is evidence in the text of the opinion that the court is actively not deferring to the agency, then we can code this instance as "active non-deference." In this deference scheme, even non-deference has theoretical significance. When a court provides rationales directly related to the actions of the agency, it is the rationale rather than the outcome that matters. When we combine an agency's outcome in court with active language either for or against the agency's actions, we can confidently make conclusions about judicial intent regarding administrative behavior in a way that is impossible when solely relying on win rates.

JUDICIAL DEFERENCE TO ADMINISTRATIVE STATUTORY INTERPRETATION IN THE MODERN AMERICAN ADMINISTRATIVE STATE

by

Rachel M. MacMaster

B.A., Marquette University, 2014
M.A., Syracuse University, 2016

Dissertation

Submitted in partial fulfillment of the requirements for the degree of

Doctor of Philosophy in Political Science.

Syracuse University

May 2021

Dedication

For our son, long in our hearts and soon in our lives.

Acknowledgements

The last seven years of my life, defined by this dissertation, can be divided into three places. It began in Syracuse, where I chased an idea and a goal: the stature of U.S. courts in separation of powers, and a doctorate. Along the way I was supported and guided by three exceptional scholars. Tom Keck, my advisor, pushed me to produce the highest quality work that I was capable of. Keith Bybee gave me the space to explore big ideas and new theories. And Yüksel Sezgin gave me tremendous support and unforgettable experiences in Syracuse and in Strasbourg. This dissertation would have been an impossible task without their guidance. Shana Gadarian, Chris Faricy, and Jenny Breen graciously joined on at the end to push me over the finish line. Quinn Mulroy, Spencer Piston, and Danielle Thomsen, who have all moved from Syracuse like I did, gave me great guidance and friendship while our paths crossed. I cannot thank all of you enough.

My grad student colleagues made the Syracuse experience unforgettable. They are an extraordinary group of scholars who will make their profession and their world a better place through their expertise and passion. A group of like-minded courts students frequently commented on and debated my work, making the outcome far better than if I had gone it alone: Nathan Carrington, Dr. Brandon Metroka, Claire Sigsworth, Dr. Logan Strother, and Eric van der Vort. Outside of courts, I met wonderful people and made lifelong friends: Dr. David Arcenaeux, Dr. Angely Martinez, Beatriz Rey, and Dr. Li Shao. Three of my classmates deserve a special thank you. Dr. Catriona Standfield exudes joy and kindness in everything she does, and she makes those around her the best versions of themselves. Joel Kersting's acerbic wit and unwavering support made my life in Syracuse consistently interesting and never lonely. Sara

Bishop, in particular, has imprinted on my life in immeasurable ways. We were an inseparable team up until her return to New Zealand, but distance did not change our friendship. She remains one of my closest confidants, and my life would be incomplete without her. And my final Syracuse companion, my puppy Molly, knew best when I needed a little extra love. Her body couldn't keep up with her spirit and she is now at rest. My six months with Molly were six of my favorite months.

After three years in New York, I chased love down to North Carolina. Researching and writing a dissertation without the support network I gathered in Syracuse was far more challenging than I ever thought it would be, and there were times when I came to regret the decision to leave. But the community I entered in Winston-Salem caught me when I was set to fall and fail. I made dear friends with students (now exceptional lawyers) from the Wake Forest University School of Law: Koren Hardy, Lauren Martin, Emily Melvin, Virginia Stanton, and Dima and Emilee Vinogradsky. A hearty thank you is in order for Sid Shapiro, noted authority on administrative law, who graciously let me sit in on his administrative law course in 2018. I even found a family in Winston-Salem. No income except for student loans necessitated a job, and that led me to the Wagoners. I had the joy of spending nine months with Charlie, Caroline, Maddie, and Wendy. At a time when I needed a family, the Wagoners were there to welcome me. They made the decision to move on to new opportunities extraordinarily difficult.

On December 29, 2018, I gained a new family through marriage. My new parents, Paula Weitman, Charlie Ryan, and Nicole Jaccoi-Ryan, and my new siblings, Jessica Ryan and her partner Hernán Guarderas, have made my life complete. Thank you for welcoming me into the Ryan clan; I love you all.

In late 2018 I switched my professional focus away from academia and into administration, which led to a move to Flint to accept a position as an institutional research analyst at Mott Community College. At Mott I found a community dedicated to educating its students exceptionally and affordably. Two important mentors, Rob Brodnick and Lynn Akey, arrived in my second year at Mott and taught me (1) the institutional research tools I didn't know, and (2) that I knew more institutional research than I realized. They have motivated me to continue to advance my career in higher education and institutional research. A moment must be spent remembering Michelle Glenn, a mentor and friend who left us far too soon. I will continue to do my part to support students and the college in her memory.

The move to Flint meant a return home to Michigan and doing so brought me back to my family after a decade away. Joseph, my favorite creator, consistently reminds me that finding a passion makes life fulfilling and that time spent together is time well spent, even if it's just watching reruns or playing Super Smash Brothers. Rebecca, my favorite thinker, lives her life on behalf of those she loves and has wisdom well beyond her years, wisdom she shares through long meandering phone calls and walks by the lake. Sarah, my favorite caretaker, is always there with a hug and a smile, advocating for the healing power of both medicine and a life well lived (usually in the form of falafel). Dr. Don MacMaster, my favorite educator, has taught me that the path to pursuing one's dreams is rarely direct, and that the road to that dream is paved with afternoons spent among the trees, with Tigers baseball, and with a good book. And Dr. Tina Rossi, my favorite healer, has shown that sometimes that path towards the dream gets interrupted and that it's still possible to exemplify grace and love even when life gives you every reason to hide away. Stuart Richardson, my brother in his own right, has always been by my side, even at different colleges, in different states, and occasionally in different countries. His passion and

potential inspire me daily. I love all these people deeply, and I certainly would not be here if it were not for them.

But only one person was with me at all three places. John Ryan started as a classmate, then became a friend, a boyfriend, a fiancé, a husband, and soon a father (to a child and not just our new puppy Gracie). John is proof that challenging beginnings (and occasionally challenging middles and challenging ends) need not preclude someone from a life of love and happiness. He is, quite simply, the smartest, kindest, silliest, most supportive, most special person I know. I often think about how my life would have been different had I made other decisions (decided not to go to grad school, waited a year to go to grad school, go to that other school instead of Syracuse, etc., etc.), and meeting John was, by far, the luckiest, loveliest consequence of the decisions I made. John: you are the best of us, and you make me the best version of myself. Thank you for your love and friendship, from all the way back in comparative law and courts class to today as we start our family.

This dissertation is complete because of everyone I thanked above, but it is dedicated to our son, who is set to make his arrival in early June. I've done it all for him.

April 2021
Grand Blanc, MI

Table of Contents

Introduction

Mr. Wong surely regretted his trip to Mexico.

After living in California from the age of fifteen, he decided to take a day trip to see the sights south of the border; he was away from the United States for only two hours before returning home. His last entrance to the United States was by illegal means: he arrived from China through falsely claiming his father was a United States citizen. After his trip abroad he voluntarily surrendered himself to the local Immigration and Naturalization Service (INS) office, conceding his illegal entry and asking for a stay of deportation. The special inquiry officer in charge of adjudicating his claim denied his request on the grounds that he was not continuously present in the United States for seven years because of his two-hour sightseeing jaunt to Mexico. His one avenue of relief (a stint in the U.S. military that ended with an honorable discharge) was insufficient since to be granted a stay of deportation the immigrant must have served in the armed forces for at least twenty-four months; Mr. Wong was discharged after twenty-three months and twenty-three days.

On appeal to the Board of Immigration Appeals (BIA), Wong was denied relief. The Board, considering *Fleuti* (which granted discretionary relief to an immigrant who, like Wong,

was continuously present until a brief trip to Mexico; *Rosenberg v. Fleuti*, 374 U.S. 499 (1963)), declared Wong ineligible for relief under the Immigration and Nationality Act (INA) since he never entered the United States legally like Fleuti did (*Rosenberg*). Since he was not technically present for at least seven years before his application for an adjustment of status (filed in 1961, four years prior to this decision), he was not eligible for relief and his appeal was dismissed (*Matter of Wong*, Dec. A-13128473 (BIA, 1965)).

Like many immigrants faced with this outcome from the BIA, Wong appealed to the closest court of appeals (in this case, the 9th Circuit Court of Appeals). Fortunately for Mr. Wong, the Court of Appeals reached the opposite conclusion regarding *Fleuti*. Where the Board argued that the trip to Mexico constituted a meaningful disruption in his presence in the United States, the 9th Circuit concluded that nothing in the record showed that Wong intended to break up his residence in the United States by briefly traveling to Mexico. The court, in reference to the BIA's interpretation of *Fleuti*, stated: "'The Service seeks to distinguish *Fleuti* on the ground that there the [C]ourt was dealing with an entry and that here we are faced with a concept of continuous physical precedent.[1] We do not regard this distinction as at all significant'" (*Git Foo Wong v. Immigration and Naturalization Service*, 358 F.2d 151 (1966), 153; citing *Waldman v. INS*, 329 F.2d 812 (1964), 815-816). They provide explicit instructions for the Board to rectify their mistake in this case: "In deciding whether to permit an application for suspension of deportation when the issue is physical presence 'in the United States for a continuous period of not less than seven years immediately preceding the date of such application,' the Board must

[1] Throughout immigration case law, the INS (and its successor, the EOIR) is used interchangeably with the BIA using the term "Service."

determine the significance of an absence from the United States during that time under the [s]tandard set down in *Fleuti*" (*Git Foo Wong* supra.).

Though Mr. Wong's two-hour trip to Mexico did not ultimately lead to his removal from the United States, it did make four years of his life extraordinarily difficult.

<>

The Wong cases are one dyad of hundreds that provide insight into the relationship between courts and the administrative immigration apparatus. Through tracing the movement of disputes from administrative courts to federal courts, patterns of deference by courts to agencies appear. This dissertation offers a new approach to defining deference and explains why deference occurs. By the end of this dissertation, I will provide answers to two questions. First, how can we better ascertain whether judicial deference to administrative agencies has occurred? Second, why does deference (or non-deference) occur? To answer these questions, I appeal to dyads like Wong's, where a dispute over immigration status moves from the immigration court system to the federal courts. As I explain in Chapter 1, using this set of data provides an exciting opportunity to consider this relationship without interference from confounding variables.

Administrative Courts in the Administrative State

Scholars of the bureaucracy and administrative law generally divide the day-to-day functions of agencies into two activities: rulemaking and adjudication. Rules, according to Section 551(4) of the Administrative Procedure Act (APA), "means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice

requirements of an agency (Administrative Procedure Act of 1946); rulemaking, then, is the process of "formulating, amending, or repealing" rules. In plain English, rules are interpretations of and changes to statutes that occur in the process of interpreting and implementing statutory law on the ground. The bureaucracy literature in political science has generally focused on rulemaking as a political act that has implications for how those interacting with the bureaucracy change their behavior, particularly as policy making activity for political actors who are otherwise restricted from acting politically (Croley 2003; Mashaw 1994; O'Connell 2008, 2011; Pierce 2011; Potter 2017).

Conversely, the political science literature has not often focused on the adjudicatory side of bureaucratic activity, even though, as I will argue, it is as politically important as rulemaking.[2] Section 551(7) of the APA defines adjudication as the "agency process for the formulation of an order," where Section 551(6) defines an order as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form of an agency in a matter other than rulemaking…(Administrative Procedure Act of 1946)." This is vague, and administrative law scholars have not reached consensus on what this section of the APA means except by the exclusion of rules; for the purposes of this study, orders are defined as the end result of adjudication, which is the process undertaken by administrative courts (Pierce et al 2013).

Administrative adjudication occurs throughout the bureaucracy, typically through the use of administrative courts, or agency offices that are staffed by judges who adjudicate disputes in

[2] The literature on the National Labor Relations Board (NLRB) is a notable exception to this rule, though a sizable portion of this literature focuses on the politics of NLRB decisions rather than how the NLRB makes those decisions.

an adversarial way not unlike courts in the judiciary (Kagan 2001).[3] As of 2020, there were sixty-three administrative courts scattered across the bureaucracy.[4] Like federal courts, administrative courts operate under a combination of legal and institutional constraints: they are required to determine how the facts of a case relate to relevant jurisprudence in light of appellate possibilities, and they must consider how the case at hand fits into the institutional structure of the agency much in the same way that a federal court must make decisions with an eye towards both past and future precedent (Coate and Kleit 1998). The APA defines administrative courts through describing the prerogatives of administrative law judges, the bureaucrats who staff administrative courts and are responsible for adjudicating disputes and, in turn, produce written opinions that explicate statutory interpretations that carry precedential force (Administrative Procedure Act, § 554-556).

Administrative Law in Action

Administrative courts and federal courts have a reciprocal, cyclical relationship consisting of several steps.[5] The process begins with a dispute brought to an administrative court under delineated statutory boundaries (as expressed by Congress in the language of the statute

[3] The other primary method of adjudication for dispute resolution in the bureaucracy is the use of alternative dispute resolution mechanisms such as arbitration and mediation. For example, the Office for Civil Rights in the Department of Education, tasked with enforcing Title IX of the Civil Rights Act of 1964, addresses Title IX violations by using binding arbitration. Similar mechanisms are present throughout agencies, though these offices are typically very small and only resolve a handful of disputes each year.

[4] A list of all administrative courts with their mission statements is provided in Appendix A.

[5] This dissertation uses administrative courts as its focus due to the institutional structures that administrative courts and federal courts share. Following the case study advice provided by George and Bennett, this dissertation employs a most likely case schema (George and Bennett 2005, 121).

and the agency as it has interpreted the statute over time). The form disputes take in these cases depends on the statute the administrative court is tasked with implementing. In some cases, a claimant is competing against the agency itself; for example, in removal proceedings before the BIA within the Executive Office of Immigration Review (EOIR), complainants bring a suit against the Department of Justice. In other situations, the claimant brings a suit against another non-state actor; for example, the National Labor Relations Board (NLRB) hears disputes between employees alleging discriminatory labor practices against their employer, neither of whom are agents of the federal government. The administrative court, at the end of the adjudication process, will reach either a pro-claimant (perhaps pro-immigrant or pro-employee) or anti-claimant (perhaps anti-immigrant or pro-employer) decision. The process can end here with no further adjudicatory action. If, however, the losing party is dissatisfied with the outcome for either factual or procedural reasons, they are entitled to appeal to the federal court indicated by the governing statute. Since these appeals are typically directed toward a non-Supreme Court federal court, the court is compelled to hear the appeal and make a determination.[6] The federal court, then, will decide either in favor of the original claimant, in favor of the original defendant, or a mixture of the two. If the disputants are satisfied, then the process ends. If one or both disputants are not satisfied, then the case can be appealed to the next highest court in the federal judicial hierarchy until there are no courts left to appeal to. At each stage (assuming an opinion is published),[7] the court will provide a written opinion on the merits of each dispute (Hume 2009).

[6] That said, not all determinations need be published. This is especially the case when the statute requires initial appeal to the geographically appropriate district court rather than the geographically appropriate court of appeals. The Social Security Administration's disability adjudicatory apparatus uses this approach: decisions are not transcribed until a case is appealed to an Article III court.

[7] I discuss this methodological challenge in Chapter 1.

In the context of the administrative court-federal court relationship, previous decisions made by federal courts in reference to an administrative court case affect future outcomes in administrative adjudication. This is not unique, since *stare decisis* dictates that courts are restrained, at least formally, by the strictures of precedent. But in the administrative court-federal court relationship, these strictures are imposed upon one institution by another rather than imposed by an earlier iteration of the same institution. An anti-administrative court opinion by a federal court has the potential to change the behavior of the administrative adjudicators, and these changes in behavior as a result of federal court actions are compounded over time to help define how bureaucratic institutions function.

The conjunction of two legal orders, one judicial and one bureaucratic, fosters plenty of opportunities for interactions between the two actors. In cases that arrive at the federal courts that begin in administrative agencies, the agency is the prevailing party more often than not. Figures vary depending on the types of cases examined and the research design employed, but agencies win anywhere between 55% and 80% of cases where they are a party (Barnett and Walker 2017, Kerr 1998, Miles and Sunstein 2006, Raso and Eskridge 2010, Richards et al 2006, Schuck and Elliott 1990, Watry 2000). Since agency-originating cases make up one of the largest proportions of appeals to the federal judiciary, it behooves us to understand why agencies are so successful in court.[8]

The extant literature defines this phenomenon, where a court rules in favor of an agency with greater frequency than other types of litigants, as deference. Political scientists and

[8] In 2017, appeals from administrative agencies comprised 20.4% of all appeals pending with the courts of appeals at the end of the year. Only appeals from the district courts comprised larger proportions (United States Courts 2017 Data Tables, Table B-1).

(especially) legal scholars have explored deference for years, generally concluding that deference occurs but stopping short of providing answers as to why. Deference, introduced by Farina (1989) and expanded upon in this dissertation, is "a style of review in which the Court adopts the agency's judgment at the expense of its own (Farina 1989, 454)" through the abdication of political power pursuant to the adoption of another branch's judgment; this occurs by allowing another political actor to exercise a power that the initial actor would typically enjoy. Deference, then, can be diagrammed in a two-by-two table, with an agency win or loss in the columns and active or passive deference in the rows. The rows identify evidence of actual deference in the text of judicial opinions: if the opinion includes language that lauds or criticizes the judicial actions of the administrative court, then the deference or non-deference is considered active; if the opinion does not include language that lauds or criticizes the judicial actions of the administrative court, then the deference or non-deference is considered passive.

This dissertation is divided into two parts, both of which serve to enrich the existing literature on deference. First, this dissertation redefines deference, focusing on the intent of the deferential judge rather than relying exclusively on the outcome of the case vis-á-vis the agency. It is impossible to ascertain deference by courts when we rely solely on the outcome; instead, we must appeal to judge's intent as communicated in the text of decisions. Upon explicating this and providing new evidence of deference rates, the dissertation turns to why courts defer. It offers three possibilities: copartisanship across institutions, adherence to deference doctrine, and a commitment to instruct other institutions as an expert in judicial procedure.

The first two theories (copartisanship and doctrine) have been explicated in the extant literature, and they will be considered in depth in Chapter 1. But the third theory, an institutional motivation, is a new addition to the literature. It suggests that courts defer as a result of the

position they occupy in the greater administrative state: courts model what they consider to be good judicial behavior and often actively point out inadequate judicial behavior. When courts defer, they are making decisions on the basis of their relative expertise in dispute resolution and statutory interpretation; by asserting this expertise through praising good administrative behavior and correcting bad administrative behavior, the courts signal their intent as to how the administrative state should exist and develop. Deference, then, is incidental to a larger goal of a well-functioning administrative state. This explanation ties together the two pre-existing theories, but it goes beyond simple legal or political explanations: it asserts a politico-legal landscape where courts and agencies are in conversation and where the administrative state develops as a result of these interactions, rather than through the individual actions of siloed institutions.

What follows, then, is an exploration of deference that plays out in five chapters. Chapter 1 provides the theoretical approaches (both old and new) to understanding deferential behavior by courts to administrative courts. My arguments are two-fold: first, that to truly understand deference we must redefine deference through no longer relying solely on agency win rates; and second, that deference exists at the intersection of copartisanship, adherence to doctrine, and a cooperative commitment to interbranch politics. To introduce the theories, I consider case selection in detail.[9] Chapter 2 explains the new approach to studying deference: through examining dyads of federal and administrative court opinions. There I explain the new method for defining deference. An extensive explication of the coding instrument used to identify deferential intent is included in Appendices C and D. Chapter 3 tests two explanations for deference that are drawn from the existing literature on deference: copartisanship across

[9] As I will discuss in more detail in Chapter 2, there are potential generalizability concerns based on case selection.

institutions and doctrinal commitments that compel judicial deference to an administrative court's statutory interpretation. These two theories garner fascinating results wherein *Chevron* deference appears to provide an opportunity for judges to mask their political motives for decision making. Chapter 4 appeals to the text of the dyadic opinions to suggest that deference serves to foster interbranch cooperation. I use content analysis to argue that courts use their opinions to model good judicial behavior and to provide instructions in the case of inadequate governance by administrative courts. Chapter 5 briefly concludes and discusses future avenues for research.

Chapter 1:
A Theory of Deference

Fifty years before this dissertation was written, Martin Shapiro confidently asserted that "courts typically let the agency do what it pleases" (Shapiro 1968). Twenty years later, Peter Schuck and E. Donald Elliott, in the first extended examination of judicial review of agency-originating decisions and the new deference doctrine explicated by *Chevron*, did not disagree with Shapiro's prescription, though their reasons for doing so reflected new insights into the relationship between the two institutions when an agency finds themselves in court: "...two trends that move in opposite directions are at work simultaneously. The total body of administrative law is increasing rapidly, but administrative law appeals constitute a very small and ever-shrinking portion of the workload of individual circuit judges. The combination of these two factors raises serious questions about the opportunity for appellate judges to develop substantial experience in handling administrative law cases" (Schuck and Elliott 1990, 998).

At the time Schuck and Elliott published their essay, this statement was accurate: in 1987 (the last year they present data), there were 2,723 appeals from administrative agencies in the circuit courts out of 35,176 total appeals to the circuit courts; only 8% of cases heard by the courts of appeals in 1987 were administrative appeals (Administrative Conference of the United

States, 1987 Annual Report). This is stark when, as Schuck and Elliott note, 16% of circuit court cases were administrative appeals in 1965 (Schuck and Elliott 1990, 998). There has been remarkable variability over time as to the number of appealed cases to the federal courts with its peak in the early 2000s.

That said, in any given year since the mid-twentieth century administrative appeals comprise at least 5% of the courts of appeals' dockets. If Shapiro is correct and courts generally give agencies *carte blanche* when sued, that means that at least 5% of the cases the courts of appeals hear are, in essence, already decided without knowing anything else about the case.

Is Shapiro right? Do agencies win in court most of the time? If so, do the wins constitute deference? A literature exists that answers the first question, but the second question has remained elusive. This dissertation gives an extensive treatment to both questions. It argues that the literature on identifying deference does not adequately measure what it purports to analyze, and that once deference is identified the second question can be answered.

In this chapter I describe a new theoretical approach to understanding deference in the twentieth and twenty-first century administrative state. I begin with defining administrative law and deference. I give special treatment to administrative law courts, the *sui generis* characteristic of administrative law. After defining deference, I explain the existing approaches to measuring deference and note that those strategies are deficient. I provide a new approach to identifying deference wherein the intent of the judges is ascertained from the text of opinions. But it is inadequate to simply identify whether an agency has won or lost; I must also provide an explanation as to whether the win or loss exemplifies (non-)deference. I offer two theories from the extant literature (doctrinal restrictions on courts and copartisanship across institutions) and one of my own (commitment to the development of the administrative state at large through

promoting good interpretive and dispute resolution practice across institutions). Later in the dissertation it will become clear that all theories have limited explanatory power. However, I will argue that the new approach is a promising avenue methodologically and theoretically. It is here that I argue for the strength of using dyadic data.

Administrative Law Introduced

Administrative law has existed in one form or another since the inception of the American state (Stewart 1975) but its modern form traces back to the passage of the Administrative Procedure Act of 1946 and, arguably, *Chevron v. Natural Resource Defense Council* (1984)[10]. There have been many attempts to define administrative law with each definition homing in on its constituent parts. Breyer and his co-authors, in their textbook on administrative law and regulatory policy, defines it as "those legal principles that define the authority and structure of administrative agencies, specify the procedural formalities that agencies use, determine the validity of administrative decisions, and outline the role of reviewing courts and other organs of government in their relation to administrative agencies (Breyer et al 2017, 2-3).'" Simeone suggests that administrative law is a law for modern problems: the development of substantive rights and procedural remedies already well-established. Administrative legal processes, then, are means of redress in the face of an inaccessible judiciary concurrent with heightened pressures on the Article III judiciary (Simeone 1992).

At its most essential level, administrative law refers to the policies and procedures that govern how bureaucratic agencies function in the day-to-day in context with external political

[10] A discussion of *Chevron* and its impact begins on page 22.

forces. Stewart finds that administrative law is schizophrenic in the tension between procedural formality and political control (Stewart 1975). And Moe argues that "bureaucracy [arises] out of politics, and its design reflect[s] the interests, strategies, and compromises of those who exercise political power" (Moe 1989, 267).

Administrative procedures, according to McCubbins et al, serve two main purposes: addressing informational asymmetries (Eskridge and Frickey 1994, Ferejohn and Shipan 1990, de Figueroida et al 1999, Huber and Shipan 2002, Lupia and McCubbins 1994) and tilting agency decision making toward the preferences of important constituents (Balla 1998, de Figueroida et al 1999, McCubbins et al 1987, Spence 1999). Strauss differentiates between three methods of separating prerogatives across the administrative state. The first, separation of powers, "supposes that what government does can be characterized in terms of the kind of act performed...and that for the safety of the citizenry from tyrannous government [the functions of the three branches of government] must be kept in distinct places" (Strauss 1984, 577). Separation of functions, in comparison, "admits that for agencies...the same body often does exercise all three of the characteristic governmental powers, albeit in a web of other controls--judicial review and legislative and executive oversight….The powers are not kept separate, at least in general, but certain procedural protections...may be afforded" *(ibid*, 577). Checks and balances bridges the two separations through "focus[ing] on relationships and interconnections, on maintaining the conditions in which the intended struggle at the apex may continue. From this perspective...it is not important how powers below the apex are treated; the important question is whether the relationship of each of the three named actors of the Constitution to the exercise of those powers is such as to promise a continuation of their effective independence and interdependence" *(ibid, pg#*). Strauss argues that to focus on separation of powers as the

governing principle of the administrative state is misguided; separation of functions and checks and balances more fully embrace the reality that governance does not fit into the tripartite structure defined by the first three articles of the Constitution.

The Administrative Procedure Act of 1946 (APA) embraces this. §706 explicates the separation of functions inherent in the relationship between the reviewing courts and the reviewed agency: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall – (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be: (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (d) without observance of procedure required by law; (e) unsupported by substantial evidence in a case subject to §556 and §557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (f) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error" (Administrative Procedure Act §706: Scope of Review).

This introduces tension in how the rule of law is exercised. Agencies implement administrative systems that leverage experience and expertise to provide consistent and informed decisions that accomplish statutory objectives; at the same time, the rule of law justifies intervention by courts to decide whether the administrative system comports with the core values

of the legal system. The challenge the administrative state faces is to balance these two ideals (Aagaard 2018).

Deference Defined

The primary goal of this dissertation is to provide a new and more thorough approach to understanding the concept of deference, for deference (or a lack thereof) defines the activities of courts in the twentieth and twenty-first century administrative state. Farina, in her essay on deference and the balance of power across branches in administrative law, defines deference as "a style of review in which the Court adopts the agency's judgment at the expense of its own" (Farina 1989, 454). I accept her definition and further strengthen it by adding an action to the interpretation: deference refers to the abdication of political power pursuant to the adoption of another branch's judgment through allowing another political actor to exercise a power that the initial actor would typically enjoy. To simplify this phenomenon, we can say that deference occurs when Actor A, who usually enjoys Power X, allows Actor B to exercise Power X in certain circumstances. For the purposes of deference, it is not enough for Actor B to exercise Power X; key to deference is Actor A's motivations. When Actor A defers to Actor B, there is an assumption made, either implicitly or explicitly, that Actor A has faith that Actor B can perform Power X to a comparable or better end than Actor A can perform Power X. Deference, in American politics, can take several forms: from Congress delegating powers to bureaucratic agencies (Epstein and O'Halloran 1999) and the President to the President enlisting the help of the bureaucracy to determine the best path to policy success (*Trump v. Hawaii,* 585 U.S. ___, 3-5 (2018)).

Of particular interest here is the deference provided by courts to agencies generally and administrative courts specifically. The differences between courts and the bureaucracy are not as distinct as they may appear at first glance. Aagaard implores us to consider how the rule of law is exemplified across both institutions. The commitment to the rule of law that judges employ is a foregone conclusion in the vast legal literature. But if we break down the features of the rule of law that agencies exemplify, we can point to some of the same features that Weber argued typified bureaucracies: the rule of law promotes predictability, consistency, and efficiency. In fact, agencies are often better arbiters of these principles than courts: agencies are composed of experts who are adept at reaching consistent decisions through creating processes that, through specialization and routinization, make decisions with greater speed and at lower cost than courts do (Aagaard 2018, Andreski (ed) 1983).

Deference by courts to administrative courts states that courts are likely to abdicate some of their interpretive and dispute resolution power to administrative courts through making decisions that provide those powers to the Article II courts. When an agency is party to a federal lawsuit, the court will often make decisions that defer to the expertise of bureaucrats and their interpretations of the agency's governing statutes. In practice, this means that agencies prevail in federal court more often than average (if by "average" we mean 50% of the time). Scholars have, since the advent of the modern administrative state, explicated the nature of judicial deference to administrative statutory interpretation, generally extolling the various deference doctrines that control courts (Eskridge and Baer 2008, Raso and Eskridge 2010). A spectrum of deference doctrines exists, ranging from exclusive deference by courts to agencies to deference in name

only (in order of strength of deference, *Curtiss-Wright,*[11] *Seminole Rock,*[12] *Auer,*[13] *Beth Israel,*[14] *Skidmore*;[15] Raso and Eskridge 2010).

But there is no doctrine that is more widely cited and applied than *Chevron.*[16] This doctrine calls for near exclusive deference by courts to agencies when questions arise as to the interpretation of the agency's governing statutes in circumstances where Congress was ambiguous as to how a statute should be interpreted. In practice, this deference is neither absolute nor well-defined and measured by the existing literature. Before I can test explanations of deferential behavior I must first define deference (both *Chevron* and otherwise) in such a way as to ensure that deference is identified and measured without accidentally including false positives.

The existing literature on deference uses a simple binary approach to code for deference by a court to an administrative court: if a court rules in favor of an administrative court's interpretation of their governing statute, then the decision is coded "1" for deference; if a court rules against an administrative court's interpretation of their governing statute, then the decision is coded "0" for no deference. Using agency win rates is a fine place to start to understand deferential behavior by courts (for deferring necessarily requires ruling in an agency's favor)[17], but it is inadequate in the long term. By distilling deference down to whether an agency wins or

[11] *United States v. Curtiss-Wright,* 299 U.S. 304 (1936).
[12] *Bowles v. Seminole Rock and Sand Co.,* 325 U.S. 410 (1945).
[13] *Auer v. Robbins,* 519 U.S. 452 (1996).
[14] *Beth Israel Hospital v. National Labor Relations Board*, 437 U.S. 483 (1978).
[15] *Skidmore v. Swift,* 323 U.S. 134 (1944).
[16] *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.,* 467 U.S. 837 (1984).
[17] A case could be made that deference can occur without a court ruling in favor of an agency. I will discuss this in chapter 5 as a potential future study.

loses, the context within which the decision is made and the rationale for why a decision is made is scrubbed away. As such, the evidence for deference is left unexamined.

Relying on win rates alone can obscure the true reason for ruling in an agency's favor; there are many circumstances where an agency could be successful in court that are unrelated to deference. As an example, consider the use of procedural rationales for judicial decisions. Bickel famously argued that courts can use procedural means to avoid making a decision in controversial cases, such as declaring a dispute moot or asserting a lack of jurisdiction (Bickel 1962, Sunstein 1999). In courts that do not enjoy a discretionary docket, these powers can be useful tools. To be sure, a court may rule on procedural grounds instead of actively deferring to an agency; however, there is no way to know if this might be the case without looking deeper. Further, there is a more likely explanation for the use of these procedural decisions in courts that have no control over their docket's composition or size: declaring an outstanding dispute moot clears up space for a dispute that remains active and would benefit from the dispute resolution expertise of the judges on the bench. In the last thirty years where docket sizes have expanded in conjunction with increasing litigation rates, this explanation becomes all the more likely.

In short, if we are to simply state that in a case where an agency is successful in court there is deferential intent by a judge or a court, then we are very likely to inadvertently lump together actual cases of deference with a significant number of false positives. This, in turn, inflates the deference rate. The solution to this problem is to appeal to the text of opinions. In order to truly identify deference, we must look to the text of the opinion to find evidence of deference or non-deference. Only then can we be sure that deference has or has not occurred. I explain the ways that deference is discerned for this project later in the text.

Deference in Action: Why Do Courts Defer?

The central challenge in administrative law is how decision-making authority is delegated across the administrative state. The APA as passed in 1946 delegated decision-making authority to administrative law judges but that authority was approximate and rough-hewn. By the *Chevron* era the interpretive authority was passed to agencies more conclusively (Gersen 2006).

Even given the extensive literature on *Chevron* and its contemporaries, no clear answer has been provided. Two primary explanations, alluded to by the literature but rarely explicitly tested, can be described as "doctrinal" and "partisan." Doctrinally, courts have been (at least nominally) restrained by deference doctrines since the nineteenth century, though the modern deference framework is defined by *Chevron* (Bamzai 2017). This doctrinal explanation states that variable deference rates can be discerned through (1) identifying the governing deference regime at the time a judicial decision is made, and (2) determining whether the court applies that deference schema. Since most of the literature on deference comes from law scholars rather than political scientists, most of the existing scholarship falls under this umbrella and as such is typically interpretive and rarely empirical.

A "partisan" explanation, in contrast, asserts that courts will defer when they are faced with an agency that they consider to be a copartisan. This explanation is consistent with the attitudinal and strategic strands of the judicial decision making literature which, generally, state that judges will more often than not vote in line with their policy preferences (Segal and Spaeth 1998), and that judges are strategic actors who realize that the ability to achieve their goals depends on the preferences of other actors, the choices they expect others to make, and the institutional context that they occupy (Epstein and Knight 1998). Both strands suggest that judges are political actors who have, and act upon, individual preferences that may or may not be

contrary to the preferences of the institution they occupy. The canonical works in judicial decision making seek to explain the behavior of Supreme Court justices and their decision making; though undoubtedly illustrative in this case, the more recent literature on courts of appeals judges and their decision making calculus is more relevant since the forces that motivate Supreme Court judges are tempered in lower courts due to the unique institutional characteristics of non-Supreme Court federal courts (Kaheny and Haire 2008, Kastellec 2007, Songer and Haire 1992, Songer et al 2000). Even given this caveat, we can expect that if partisan pressures explain deferential behavior there will be a relationship between copartisanship across institutions and the existence of deference.

In examining the data I collected and analyzed for this dissertation (to be explained in Chapter 2), I have reason to suspect that these two existing explanations do not explain all of the observed variation. Chapter 3 tests the two extant theories, while Chapter 4 introduces a new explanation: that courts, in an effort to foster interbranch cooperation and good governance across the political apparatus, defer to administrative courts in an attempt to signal adequate or inadequate interpretive behavior. We can expect, then, that if this theory has explanatory power that courts are purposefully communicating their preferences regarding how other judicial actors should perform their duties. Below I explicate the three theories and the observable implications for each.

Deference Doctrine

The first possible reason for judicial deference to administrative agencies is a commitment to extant and evolving doctrine that requires deference. Under this theory, doctrine developed by the Supreme Court and regularly reiterated by the federal courts conditions judicial

decision making through limiting judicial discretion in cases involving an administrative court's statutory interpretations. This is the predominant explanation in the extensive legal literature on deference.

In *Chevron v. Natural Resource Defense Council*, the Supreme Court clarified the relationship between the bureaucracy and the courts, entrenching deferential behavior that had already existed for decades (as I will argue in Chapters 3 and 4). The opinion heralded near-exclusive judicial deference to agency interpretation of statutes. The opinion provided a two-step test for judges to apply when faced with a statutory interpretation case. First, the court must ask whether Congress has explicitly spoken to the issue in question in the statute. If it has, then there is no issue to be resolved. If, however, Congress has been ambiguous or silent, then the court must determine whether the agency's interpretation of the statute is reasonable given the text of the statute provided by Congress. This standard gives great latitude for agencies in their statutory interpretation processes since their interpretation need only be reasonable to pass the *Chevron* test.

The Court's rationale in *Chevron*, provided by Justice Stevens in his majority opinion, states that Congress, in writing an ambiguous statute, "provided an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation" (*Chevron v. Natural Resource Defense Council,* 884-5). Further, the Court recognized that bureaucrats are specialists and judges are not.[18] Therefore, judges, recognizing this reality, should defer to the way agencies engage in their business as usual with the assumption that they (the bureaucrats)

[18] This feature of the opinion offers an interesting dichotomy. In *Chevron*, the distinction is made between generalist courts and specialist agencies. However, in the case of administrative courts and federal courts, the courts are the experts on acting judicially and thus the courts are the specialized entity. This turns the Weberian principles of bureaucracies on its head.

know the best way to fulfill their statutory duties; when the courts try to instruct the bureaucrat to act in a certain way, they are more likely to misunderstand agency functions than the bureaucrats who are actively working within the agency. The *Chevron* decision has been referred to as "the anti-Marbury": where *Marbury v. Madison* self-empowered the Court to act as a check on the other branches of government through the exercise of judicial review, *Chevron* voluntarily gave some of its interpretive power to another branch (*Marbury v. Madison* (1803), Sunstein 1990, Sunstein 2006a).

According to Pierce and Weiss, there are three grounds upon which judicial deference to agency interpretations of agency rules can rely. The first is that deference might be supported by the belief that the agency is more likely than a court to know what it intended when it issued the rule. But at the same time, it is very unlikely that the people who made the rule are the ones who are doing the interpreting or that the priorities of the agency at the time the rule is evaluated are the same as when the rule was initially implemented. This is a helpful reminder that agencies are the sum of many parts, not a monolith promoting one set of policies exclusively. The second ground states that deference is justified because the agency understands better than a court which interpretation will allow the agency to further its statutorily-defined mission. This provides a solution to the conundrum introduced when considering agencies as conglomerations of different ideas rather than one monolith of policy: even though the personnel and policies change in bureaucracies over time, the day-to-day activities of agencies rarely change significantly over time per Weber's ideal of a bureaucracy through the institution of a hierarchical structure, career employees hired apolitically, and a commitment to formal rules of procedure. Third, the jurisdictional reach of agency interpretations and judicial interpretations vary: since an agency's jurisdiction is national and a circuit court's jurisdiction is regional, a high degree of judicial

deference to agency interpretation of agency rules furthers the goal of maximizing national uniformity in implementing national statutes (Pierce and Weiss 2011).

Given this, we can consider *Chevron* as a doctrine of hard cases. Dworkin defined hard cases as cases where "the result is not clearly dictated by statute or precedent;" simply put, hard cases are those where the law runs out. Dworkin's process of deciding hard cases has two dimensions. The first step is fit, or the extent to which the novel legal theory crafted in the process of deciding the hard case is consistent with the existing legal landscape. If there is more than one novel legal theory that fits, then the second step, or justification, must occur: the judge must implement the theory that provides the best justification for the law at large (Dworkin 1975). Liu argues that the *Chevron* two-step tracks with Dworkin's theory of hard cases. Step one is prior to the hard case determination; this is the law-applying stage in statutory interpretation cases. But when the *Chevron* analysis moves to step two, then the theory of hard cases applies, for step two is the law-making stage. If Congress has not explicitly spoken on the issue, then there is no law that applies to the present dispute and the law, thus, has run out. The court, in that situation, is responsible for considering Dworkin's fit and justification to come to a decision that applies deference or non-deference (Liu 2014).

But this application of Dworkin's theory excludes the preferences and expertise of agencies in the process, and it is in this exclusion that a theory of deference emerges. As Liu notes, "the presence of an agency construction, however, means that the court itself need not make law to fill that gap; instead, it may defer to the law-making of the agency--which, unlike the court, is accountable to the political branches. Viewed this way, deference emerges as an act of judicial self-restraint, grounded in the recognition that the law carries greater legitimacy when made by politically accountable agencies than my unelected judges" (Liu 2014, 285).

This positivist account of *Chevron* breaks judicial reliance on interpretation of Congressional intent (Hart 2012, Raz 1979). Farina summarizes it well: "*Chevron* offers no evidence to support its conclusion that silence or unclarity in a regulatory statute typically represents Congress' deliberate delegation of meaning-elaboration power to the agency" (Farina 1989, 470). In fact, as Liu argues, there is little to suggest that Congress ever consciously left ambiguities such that the courts would be required to use *Chevron* to fill in the gaps (Liu 2014).

Chevron, as Merrill notes, was a strange candidate to become a landmark decision in administrative law: only six justices took part in the decision, and the decision to provide greater latitude to agencies took place as the early Reagan administration was engaging in a larger goal of deregulation and ceding power away from the bureaucracy (Merrill 1992, 975). But even so its tenets took hold and the legal profession, both in court and in the academy, took notice. In the years that followed the *Chevron* decision, scholarship on the new doctrine proliferated with extraordinary speed. A Nexis keyword search for *Chevron* in the text of law review articles from the top twenty-five law journals since 1986 yielded nearly 3500 articles comprising approximately 8% of all articles published in that time frame.[19]

Shapiro and Levy, speaking on the burgeoning *Chevron* literature ten years after the opinion was handed down, argued that "administrative law scholars, whether they agreed or disagreed with the Court's standards, assumed that *Chevron*…[was a landmark decision] that signaled a turning point in the substantive review of agency decisions" (Shapiro and Levy 1995, 1051). Their prescription, that *Chevron* was perceived as important regardless of whether scholars thought it was good law, was shared by numerous legal scholars and it led to an

[19] Information broken down by individual journal is available in Appendix F.

extensive and varied literature on the subject. Some scholars have argued that judicial deference to agencies did not occur as swiftly and unilaterally as the popular accounts suggest (Lawson and Kam 2013, Liu 2014). Other accounts add Congress into the fray: since Congress passes the legislation that creates appropriates funds for agencies, their preferences are not irrelevant (Garrett 2003, Liu 2014, Mantel 2009). Some question the extent to which the Court offered direct instructions for other federal courts in adjudicating agency deference cases, imploring the Court to clarify its position and pushing the legal community to investigate *Chevron* further (Bressman 2009, Chabot 2015, Foote 2007, Foy 2010, Merrill 1992, Stephenson and Vermeule 2009, Sunstein 2006b). Yet other scholars expand the scope beyond just the actions of the Court regarding *Chevron* by examining agency deference at all levels of the federal court system (Hubbard 2013, Note 2007).

The defense of deference to agencies by courts is not universal. For example, Manning argues that widespread deference may lead agencies to exploit the ambiguities in the rules that the agency itself is creating in order to maximize their power. An agency could issue a broadly worded rule that can be interpreted in multiple ways unilaterally instead of creating a more narrowly applicable rule through the time- and effort-intensive notice and comment process (Manning 1996). But the overwhelming rate with which the courts bless agency interpretations of their statutes (Pierce and Weiss cite a 90+% deference rate by the Supreme Court of agency interpretation of agency rules) suggests that the courts do not share this same concern (Pierce and Weiss 2011, citing Eskridge and Baer 2008).

But even though the *Chevron* literature is rich with interpretive guidance and jurisprudential insight, there is comparatively little empirical work on the effect of *Chevron* on both judicial and agency decision making. In my review of the literature, I found a few

exceptions in both the legal and political science literatures.[20] The foundational study of *Chevron* that appears in bibliographies in nearly every *Chevron* essay is a 1990 Duke Law Journal essay by Schuck and Elliott. They sought to understand the effect of *Chevron* on agency decision making, noting the dearth of large-n studies of the phenomenon. Their analyses indicate a steady rise in administrative filings in federal courts, beginning in 1965 and peaking just after *Chevron* (Schuck and Elliott 1990).

Shortly after the Schuck and Elliott essay was published, Kerr offered an empirical test of the traditional explanations of judicial deference to agencies. This is the first essay that suggests that partisanship might explain judicial decision making in these cases better than, or at least comparable to, *Chevron* (Kerr 1998). Miles and Sunstein took up the mantle of politically-motivated decision making in full, testing judicial decision making in cases involving the Environmental Protection Agency (EPA) and the NLRB. They found that Republican-appointed justices were more likely to rule against Democrat-appointed agencies than Democrats were (Miles and Sunstein 2006, further examined in Miles and Sunstein 2008). Most recently, Barnett and Walker tested the strength of *Chevron* deference in 1571 courts of appeals cases between 2003 and 2013. They found, generally, that the circuit courts upheld agency rulings 71% of the time and applied *Chevron* deference 75% of the time. This provides further by limited evidence that the courts defer to agencies more often than not (Barnett and Walker 2017).[21]

[20] Pierce (2011) conducted a meta-analysis of ten articles that identify agency win rates. However, one of the articles (Zaring 2010) is a meta-analysis itself. The four studies discussed here are the foundational studies as well as one recent study that has proved itself to be a significant contribution to the literature (cited by 139 others in the three years since publication).
[21] A fifth study (Eskridge and Baer 2008) places all Supreme Court agency interpretation cases between *Chevron* and *Hamdan v. Rumsfeld* (2004) (n=1014) on a deference continuum. The table summarizing the findings is reproduced on page 57-8.

I also identified three political science treatments of *Chevron*. The first was a dissertation drafted by Ruth Watry pursuant to her doctoral studies at the University of Delaware. She examines what she calls "contested agency interpretations of statutes" cases at the Supreme Court twelve years before and after the *Chevron* decision. In particular, she is testing the power of *Chevron* as an independent variable against conventional attitudinal accounts of judicial decision making via their ideological leanings (Segal and Cover 1989, Segal and Spaeth 2002). She finds that "attitude is an extremely strong predictor of liberal/conservative outcome in [contested agency interpretation of statutes] cases," though it is slightly less explanatory after *Chevron* (Watry 2000, 43).

Later, Richards et al studied the impact of *Chevron* on judicial decision making. They use jurisprudential regime theory as a foil, arguing that "while the attitudes of the justices do matter, *Chevron* may have nonetheless changed the structure of influences on justices' decisions in administrative law cases (Richards et al 2006, 444)." Using a sample of Supreme Court cases between 1969 and 2000, they find that *Chevron* led to an increase in deference and that justices are more likely to defer in a case involving administrative rulemaking than in cases that do not involve rulemaking (Richards et al 2006; see also Richards and Kritzer 2002). Most recently and echoing insights from both the interpretive and empirical work preceding it, Raso and Eskridge find that deference doctrine (and other methodological doctrines) do not hold exclusively as *stare decisis* would suggest (Raso and Eskridge 2010).

Though these studies begin to investigate the role of *Chevron* in interbranch politics, the extant literature has several weaknesses. First, only three studies examine pre- and post-*Chevron* judicial deference, and their conclusions are dated (Schuck and Elliott 1990, Richards et al 2006, Watry 2000). Most studies examine only post-*Chevron* deference and only over the course of a

short time frame (typically between two and ten years). This is useful for understanding contemporary deference practices, but it sheds little light on how judicial deference to agency decisions has evolved (or if it has evolved) over time. Second, only two of the political science studies take seriously the partisan counterfactual (i.e. that judicial deference to agencies is disguising co-partisanship across institutions) (Richards *et al* 2006, Watry 2000). However, I would argue that Richard et al use the wrong measure of partisanship. (I discuss this in chapter 2.) And more fundamentally, the two studies provide contradictory results: one finds that partisanship matters greatly but independently of *Chevron* (Watry 2000) while the other finds that partisanship is highly moderated as a result of *Chevron* after its passage (Richards *et al* 2006). Only one legal piece offers partisanship as a possibility and only in passing (Kerr 1998).

The most important shortcoming of the existing literature is the main focus of this dissertation: almost all studies of deference doctrine, especially those that find that *Chevron* does not fully explain deferential behavior, note that a large majority of agency appeals are decided in favor of the agency. In their 2010 article, Raso and Eskridge evaluate deference rates across different doctrines at the Supreme Court level between 1984 and 2006 (i.e. after *Chevron*). Their cross tabulations, provided in Table 1a, show that judicial deference to agency statutory interpretation is high regardless of the doctrine (if any) is applied (Raso and Eskridge 2010).

Table 1a: Deference Regime and the Decision to Uphold[22]

	No regime, anti-deference	Consultative deference, *Skidmore*	*Chevron, Beth Israel*	*Seminole Rock, Curtiss-Wright*
Uphold agency	**60.76%**	78.21%	72.13%	88.41%
Overturn agency	39.24%	21.79%	27.87%	11.59%

To complement this finding and to extrapolate on the finding that *Chevron* led to deference rates that were only slightly higher than when no deference doctrine was applied at all, I collected all cases that involved an agency as a party to a lawsuit in the courts of appeals in 1983 and 1985. I then identified a random sample of one hundred cases (fifty from 1983 and fifty from 1985) and coded for the agency involved, the outcome of the case, and the partisanship of both the judges on the panel and the author of the opinion. Every circuit court (including the D.C. and Federal Circuit Courts) and twenty-three agencies were represented in the sample. Table 1b provides the number of cases won and lost by an agency in the years immediately before and after the *Chevron* decision.

[22] Pearson's $chi^2 = 249.0136$; Pr = 0.000. From Eskridge and Raso (2010), pg. 1767. Emphasis my own.

Table 1b: Agency Win Rates Immediately Before and After *Chevron*[23]

	1983	Proportion of Sample	1985	Proportion of Sample
Agency win	28	56%	26	52%
Agency loss	8	16%	11	22%
Mixed outcome	5	10%	3	6%
Unknown outcome	9	18%	10	20%

These limited data suggest the possibility that *Chevron* did not have an appreciable effect on agency win rates at the courts of appeals, at least not to the extent that the existing literature suggests.[24]

Partisanship

An explanation more at home in the political science canon suggests that courts will be more likely to defer to agencies when they perceive copartisanship across the two institutions. There are a number of approaches to understanding judicial decision making as a political act, but regardless of the theory one truism overarches them all: judges are not neutral arbiters of law (Epstein et al 2007).

[23] N = 50 for both years. Random sample was selected via random number generator.
[24] These findings do not assert causality since they simply count cases before and after *Chevron*, but Chapter 3 provides a causal claim with regression analyses that come to a similar conclusion.

There are two strands of judicial decision-making theory emphasizing judicial preference that overlap in parts and diverge in others: attitudinalism and strategic theory. Of the two, attitudinalism has the most to offer for this dissertation project. The attitudinal model of judicial behavior suggests that judges, in essence, vote their political preferences. The history of this strand of judicial decision making theorizing begins with Pritchett who argued that judges are motivated by their preferences as evidenced by the observed increase in the number of dissenting opinions (where dissenting opinions are declarations of policy position in opposition to the majority opinion) (Pritchett 1941). Shortly thereafter, Dahl's seminal 1957 essay on judicial review practices at the Supreme Court in the first century and a half of the Court's history found that when the Court votes to declare a law unconstitutional (which is relatively rarely) they do so in line with the political regime that appointed them (Dahl 1957). Presidents, according to Peretti, can count on their judicial appointees on the Supreme Court to rule in line with the regime's policy preferences approximately 75% of the time (Peretti 1999). Judicial review, then, is primarily used by the "political" branches to shunt potentially controversial "cross-cutting" political issues to an unelected judiciary to solve (Graber 1993).

At its core, attitudinalism relies on identifying judicial preferences. Individual preferences, according to Rohde and Spaeth, are the primary determinants of judicial behavior. They break preferences into five characteristics: they are (1) relatively enduring, (2) an organization of interrelated beliefs that describe, evaluate, and advocate action regarding an object or situation, (3) composed of cognitive, affective, and behavioral components, (4) predispositions that result in a preferential response for the attitude, object, or situation, or toward maintenance or preservation of the attitude itself, and (5) social behavior that, at minimum, activates at least two intersecting attitudes: one regarding the attitude object and one

regarding the attitude situation (Rohde and Spaeth 1976, as cited in George 1998). Keck distinguishes between two varieties of preferences: political preferences (in the Dahlian strain) and policy preferences (Keck 2007). The promotion of policy preferences, initially explicated by Segal and Cover and Segal and Spaeth, accepts Dahl's premises (i.e. that judges will generally rule in favor of the regime of which they are a part) but pushes judicial preference one step further: in situations where the personal preferences of a judge conflict with the goals of the larger regime, then the judge will rule in favor of their own preferences and against the preferences of the regime (Dahl 1957, Segal and Cover 1989, Segal and Spaeth 2002; see also Keck 2007). Segal and Spaeth, in their spirited defense of attitudinalism, found that when justices are coded for partisanship and placed on a spectrum of both partisanship and the extent of partisanship, outcomes in politically charged decisions can be predicted with extraordinary accuracy (Segal and Spaeth 2002; see also Martin et al 2005).

There are two ways that we can measure partisan constraints on deference activity borrowing from the two strands of attitudinal theory. The first, borrowing from Dahl, is to determine the appointing party for each judge and each administrative law judge and look for matches in deference cases and no matches in non-deference cases (Dahl 1957). The other option, from Segal and Spaeth, is to determine the "pro-agency" stance versus the "anti-agency" stance and, using the partisanship identified in the first instance, ascertain whether the policy stance is the primary reason for ruling for or against an agency. Since the focus of this portion of the dissertation is on partisanship rather than ideology, I rely heavily on the Dahlian approach; I discuss this further in Chapter 2.

But the challenge inherent in drawing upon these theories of judicial decision making is the fact that they are primarily theories of Supreme Court decision making; applying these

theories to non-Supreme Court courts and their partisanship is not cut-and-dried for several reasons. For one, non-Supreme Court courts generally operate within a panel system wherein a rotating set of judges try cases. Further, non-Supreme Court courts do not have discretionary dockets; they are responsible for hearing all cases that come before them.

There are ways to circumvent these challenges. One approach is to only study en banc cases, or cases where all of the judges in the circuit hear the case together and where the judges vote as a single bloc. These are more likely to be important cases, and they give the opportunity to examine judicial coalition building to achieve their preferred results since judges, in en banc cases, cannot vote individually (George 1998). However, this is not to say that we cannot examine non-aggregate circuit court decision making. Fischman's study of circuit court judges found that the interaction between judges serving on appellate panels produces collegial pressure toward consensus (Fischman 2011). Goldman argues that presidents use lower court appointments to reward their party's faithful and to shore up party cleavages, not to support their policy agenda (Goldman 1975).

Further, non-Supreme Court judges may experience reversal aversion since having a higher judge overturn their decision court be potentially damaging to career prospects and internal conceptions of their success as an arbiter (Higgins and Rubin 1980). Schanzbach and Tiller, in their empirical study of contemporary sentencing statutes, argue that district court judges decide cases strategically to avoid reversal through using recommended sentences at the lower end of the recommended sentencing guidelines or through utilizing Bickel's non-decision decisions (Schanzbach and Tiller 2008; see also Bickel 1962). Epstein and her co-authors found that although Republican and Democratic judges do not decide cases differently, the partisan preferences of the appellate court that would oversee the cases decided at the lower court

influences their judgments (Epstein et al 2013). Landes and Posner, in their essay on rational judicial behavior, found that there is a conformity effect in the courts of appeals: the number of judges appointed by Republicans increases relative to the number appointed by Democratic presidents; as this occurs, all of the judges in the circuit tend to vote more liberally (with the same dynamic present in the opposite scenario). When the proportion of Republican judges to Democratic judges is skewed, the judges belonging to the minority party tend to vote in a more partisan way ("the fewer the judges appointed by Democratic presidents, the more liberally they vote") (Landes and Posner 2009, 775).

Drawing from all of the aforementioned strands of the judicial decision making literature, I assign partisan codes to each judge in each case in this dissertation's dataset. I will describe this in detail in chapter 2.

Commitment to Interbranch Cooperation

The final explanation eschews explicitly doctrinal and political rationales for deference; it instead considers the possibility that courts defer to agencies in an attempt to foster cross-institutional dialogue and good judicial practice across the political apparatus. It ties together, in part, the two existing theories and considers the possibility that courts act with an eye towards how their decisions may help guide other institutions in their business-as-usual.

This theory is primarily drawn from the burgeoning literature on interbranch institutionalism. The motivating principle of interbranch institutionalism states that institutions may make decisions that are immediately contrary to their interests but ultimately may be better for the political apparatus at large (Epstein and O'Halloran 1999). To quote Barnes, interbranch

institutionalists assume that the "intricate dispersal of power [across institutions] creates a complex and shifting web of relations among various centers of power, which varies across issue areas and over time" (Barnes 2007, 27). Further, "the dynamic tension built into this fragmented system is likely to produce a multiplicity of interinstitutional interactions" that can be traced across institutions and over time only if the relationship between the two institutions is taken seriously rather than taken for granted (Barnes 2007, 27-8; see also Graber 1993). Only when courts are considered as one actor of many can inferences about judicial behavior be made.

There are a number of ways that courts can be examined vis-a-vis other political actors, including through separation-of-power game theory (Epstein et al 2007; Epstein and Walker 1996; Eskridge 1991; Gely and Spiller 1992; McCubbins et al 1987, 1989) and the regime theory explicated above (Dahl 1957, Richards and Kritzer 2002). But my approach to understanding deference borrows from the judiciary-focused American political development literature for it provides the greatest opportunity to trace how deference activity has changed over time. Barnes refers to these approaches as "microinstitutional analyses" wherein "courts operate in a wide range of institutional contexts at any given time and thus play different roles in the policy-making process" (Barnes 2007, 33). Scholars operating within the confines of this subdiscipline acknowledge and celebrate the various roles that courts play in a way that other judicial scholars often overlook: by focusing on courts in interbranch context on one or a few policy issues, patterns can be unearthed as to the dynamics underlying judicial behavior (Barnes 2004, Feeley and Rubin 1998, Melnick 1994). Even though this dissertation is not a traditional American political development dissertation, the principles remain at the fore.

In the case of judicial deference to administrative agencies, courts may rule in such a way as to abdicate some of their dispute resolution and interpretive powers to another branch. If we

are to consider institutions as individual rational actors, then this action does not make sense: political actors acting rationally will always seek to enhance their own power. But what we find when we examine the case law, and particularly the text of the case law, is that courts will delegate court-adjacent activities (like dispute resolution and statutory interpretation) to administrative actors. A natural assumption is that this delegation is due to the aforementioned partisan and doctrinal theories. But when we control for those two possibilities, deference still occurs.

So why does this deference occur? Courts defer to ensure good judicial practice in a state that decentralizes much of its dispute resolution to non-judicial entities (like administrative courts). This might be self-serving – perhaps courts would prefer not to have their dockets filled with cases that could be potentially resolved elsewhere (after all, the non-Supreme Court federal courts do not have discretionary dockets). But in reality courts do not defer at each opportunity. Courts selectively defer and provide instructions to administrative courts so that they can reward good governance with deference (which an autonomous bureaucracy would likely cherish) (Carpenter 2001, 2010) and discourage insufficient dispute resolution with explicit instructions for future action. It is as if courts will only abdicate responsibilities when they believe that the institution taking on these responsibilities is up to the challenge. It is selective deference in pursuit of good governance in an interbranch system, or at least selective deference so that the benefits of abdicating responsibility outweigh the potential that the abdicated power is used incorrectly.

In short, I argue that courts defer to agencies outside of partisan and doctrinal bounds in order to promote an ideal form of judicial behavior across institutions. In the same way that courts are compelled to defer to agencies because, according to *Chevron*, agencies are experts in

their policy areas, courts can assert expertise about those actions that are inherently judicial in nature. By explicitly communicating their expertise in the text of opinions where an agency is a party, courts express their preferences as to how government should function across institutions. Deference to agencies, then, serves as an indication that agencies are acting correctly as defined by the court; active non-deference to agencies, then, indicates both that agencies are not acting correctly as defined by the courts and that the court can provide guidance for correct action in the future.

Chapter 2:
Methods and Case Selection

In order to test the theories explicated in Chapter 1, I employ a most-likely case study approach by examining the deferential relationship between federal courts and administrative courts (George and Bennett 2005). But before I reflect on case selection, we must fully understand the history and characteristics of administrative courts that make them an ideal avenue of study for this dissertation.

The Administrative Procedure Act (APA) aims for improved efficiency and fairness in agencies through the separation of the adjudicative (quasi-judicial), rule-making (quasi-legislative) and enforcement (quasi-executive) operations. The adjudicative aims, according to Graham, are "for the agency, through its quasi-judicial function, to decide a dispute as 'rightly' as possible with agency policy as the basic test" (Graham 1985, 260-1). To achieve these adjudicatory goals, many agencies turn to administrative courts. Administrative courts are a bureaucratic construction that interpret relevant statutory law and adjudicate disputes that arise under those statutes and interpretations. They are staffed by administrative law judges who publish decisions that provide resolution to disputes that rely on precedent and statutory interpretation.

Administrative law judges are selected in a merit-based process that starts at the Office of Personnel Management (for initial review of applications and administering a competitive examination used to rank applicants) and ends with the agency that houses the administrative court making the final hiring decision. Administrative law judges must be a licensed attorney with at least seven years of legal experience. They are hired as career appointees who are not subject to periodic performance reviews. Administrative law judges almost always leave their post voluntarily through retirement or death; a very small minority of administrative law judges are removed for misdeeds. The power to sanction administrative law judges lies in 5 U.S.C. Section 7521(a): "An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board (5 U.S.C. Section 7521(a))." The "good cause" standard, according to Rosenblum, falls between the "efficiency of the service" standard used to remove other civil service employees and the "good behavior" standard that Article III judges are held to. To quote Rosenblum: "Failure to follow agency directives in decision making provides justification for typical removals pursuant to the 'efficiency of the service' standard but is prohibited from use as 'good cause' for removal of administrative law judges" (Rosenblum 1984, 642; see also Office of Personnel Management 2020).

This all speaks to the tension inherent in administrative law judges specifically, and administrative courts generally, as to their position as both bureaucrat and adjudicator. Lens breaks down two complementary models of administrative law judge identity. The administrative law judge-as-bureaucrat model recognizes overlap between the agency and the administrative law judge such that the judge might sanction agency activity simply because it is agency activity.

The administrative law judge-as-adjudicator model, in comparison, embraces the designated adjudicator role to safeguard against inappropriate state action even within the agency the administrative law judge occupies (Lens 2012). The dominant role of the administrative law judge as either bureaucrat or adjudicator derives from the type of agency within which the administrative law court is housed.

To attempt to mitigate these dual identities, the APA provides for separation between administrative courts and the agency where they reside. To quote the APA as codified in the U.S. Code, an administrative law judge may not "be responsible to or subject to the supervision or direction of an employee or agency engaged in the performance of investigative or prosecuting functions for an agency" (5 U.S.C. § 554(d); see also Burrows 2008). The Office of Personnel Management has reiterated that the agency that houses the administrative court is responsible for maintaining the independence of the administrative court and its judges (5 C.F.R. Section 930.201(f)(3); see also Burrows 2008).

Administrative courts generally, and administrative law judges specifically, are potentially very powerful. Marquardt and Wheat argue that administrative law judges are a "corps of hidden allocators, unknown to the general public, untouched by formal agency or [Office of Personnel Management] scrutiny, yet armed with immense discretionary and policy power. (Marquardt and Wheat 1981, 302). Administrative law judges exist in a complex state: they are employees of an agency, but they are simultaneously divorced from the day-to-day operations in the agency due to their quasi-judicial role (Simeone 1992). The development of administrative courts in the post-Administrative Procedure Act era has melded the adjudicatory strength of administrative law judges with minimal external accountability measures. Marquardt and Wheat continue on to say "all this results in a situation where administrative law judges, in

an increasingly narrow judicialized setting which is essentially immune from democratic control and accountability, become central public policy makers in the regulatory arena…. So the judicial procedure of the administrative law judge either means everything in the agency decision making process or it may mean nothing. In those few important cases which the agency chooses to review, the agency heads have the power to overturn the administrative law judge's decision and substitute their own decision" (Marquardt and Wheat 1981, 303-4).

The goal, under the APA, is to promote "assurances of neutrality" for administrative courts to preserve the administrative process (Simeone 1992, 163). The relatively anonymous nature of administrative law judges is in almost every way a benefit for how administrative courts function, and attempts at quantifying administrative law judge performance or success is anathema to the institution as it was envisioned by the APA, which further isolates administrative courts from bureaucratic oversight and further promotes administrative court independence (O'Keeffe 1986). There have intermittently been attempts to cull the power of administrative courts, though most of these attempts have been unsuccessful in the long term. For example, the 95th and 96th Congresses (from 1977 to 1981), for whom regulatory reform was a major priority, introduced one hundred and fifty-seven bills that attempted to clarify regulatory policy in some way. Some of these bills directly referenced administrative law judges, including advocating for term limits (S. 755), instituting periodic reviews by the Administrative Conference of the United States (S. 262, H.R. 6768), and introducing information dispute resolution processes that would occur outside of the administrative court apparatus (Marquardt and Wheat 1981).

All the while, there is evidence that administrative courts and administrative law judges have favored making their offices even more independent from the agencies in which they reside

(United States Civil Service Commission, Report of the Commission on the Study of the Utilization of Administrative Law Judges 1974, as discussed in Lubbers 1981). One of the most common proposed reforms is the formation of a unified corps of administrative law judges instead of discrete administrative courts and administrative law judges in agencies across the administrative state. Simeone's arguments in defense effectively sum up the arguments in favor of a unified corps. First, Simeone argues that an administrative law judge corps would remove the system of judges that are directly associated with the agency that they occasionally are tasked with evaluating for missteps. Second, a unified corps of administrative law judges would be more efficient for both the management of judges and the management of administrative court caseloads. Third and relatedly, a unified corps could shift routine civil cases from the Article III judiciary to an administrative court to free up Article III dockets for the cases, often criminal or constitutional, that only the federal judiciary can adjudicate. Fourth, a unified corps would expand administrative law judges' breadth of knowledge. Fifth, creating a unified corps would recognize that the functions of administrative law judges and Article III judges perform many of the same functions to begin with. Finally, a unified corps would naturally lend itself to a uniform training scheme for new administrative judges. In short: expanding administrative law judges' breadth of knowledge and experience (acts that would surely judicialize the administrative adjudicators) would benefit the administrative state writ large through resolving many of the issues inherent in the structure as explicated by the APA (Simeone 1992).

Case Selection

It follows from the features and development of administrative courts that we can expect the most explicit descriptions of (non-)deferential behavior from courts to agencies when courts

explain to other courts about how to best act like courts. To probe this relationship, I use one case study examined in depth. The nature of methodology for American political development-inspired projects preferences in-depth analysis of one or a few cases in order to thoroughly examine the case over time (George and Bennett 2005, Gerring 2004, Orren and Skowronek 2004).

In identifying a case for this dissertation, I sought to select an administrative court apparatus that best exemplifies, in aggregate, the average features of administrative courts while also preferencing features that make the study feasible. I prioritized the following considerations:

- Size – most administrative courts adjudicate only a handful of cases each year. Of the sixty-three potential cases identified and provided in Appendix A, there are three administrative court systems that are outliers in the size of the court system, the number of cases heard and decided, and the consequent political impact the court has on other actors (the BIA, the NLRB, and the Social Security Disability apparatus (SSD)). The case study should pay attention to one of these extraordinary cases for the reasons explicated in the following bullet points.
- Longevity – in order to provide a thorough account of twentieth-century administrative law, I require cases that have existed in some form for the majority of the century. More specifically, the ideal case study has to have been in existence and politically salient in three major eras in order to fully examine the effects of extra-bureaucratic shifts on administrative court behavior: post-New Deal/pre-Administrative Procedure Act, post-Administrative Procedure Act/pre-*Chevron*, and post-*Chevron*.
- Intermittent and/or ongoing internal crisis – the ideal case study has undergone or continues to undergo major internal crises. Given the twentieth century increases in

litigation across all levels of the judiciary, this criterion generally refers to impossibly large docket sizes and the attempts to resolve the problems that result from those dockets.

- Political salience of issue area – in order to ensure that the chosen administrative court is amply relevant in the political system at large, I require a case that involves an issue area that is frequently considered and debated by all branches of government.
- Availability of data – relatedly, the case study chosen must have reasonably accessible data to analyze. By reasonably accessible, I mean that most relevant administrative court opinions are available online.

Each of the sixty-three administrative courts identified in Appendix A were evaluated based on the five criteria explicated above. After evaluating each potential case, I selected the BIA as the focus of this dissertation. There are many reasons why this case is ideal as a focal point for the dissertation.

1. The immigration court system is large both in terms of number of constituent parts and the number of cases heard.

The immigration court system consists of geographically-dispersed immigration courts, administered by immigration judges that are hired in the same apolitical merit-based way that other bureaucrats are hired, and the BIA, the final administrative appellate body appointed by the Attorney General (and serving directly under and at the pleasure of the Attorney General). As the need for immigration adjudication increased over the last 75 years, the number of immigration courts and immigration judges rose in turn. As of this writing, there are fifty-eight immigration courts nationwide, employing nearly 350 immigration judges (Executive Office of Immigration

Review 2019) who completed, in FY 2016, 273,390 cases (Executive Office of Immigration Review 2017). By extension, the BIA, as the review body of the immigration court system with no discretionary docket, hears thousands of cases annually.

2. The Department of Justice's immigration apparatus is just one part of a larger administrative immigration regime, especially today.

In the early years of the modern immigration apparatus (i.e. since 1940 when the INS moved from the Department of Labor to the Department of Justice (DOJ)), the INS was responsible for both border security and regulating immigration in their administrative courts. (Naturalization, or the process of obtaining citizenship and the benefits pursuant to it, is a judicial prerogative that the administrative immigration apparatus simply assists with.) Prior to 1983 when the Department of Justice reorganized the agency to combine all immigration adjudication under one roof at the EOIR, the immigration courts were under the purview of the INS while the BIA was directly accountable to the attorney general; with different overseers, the two judicial actors could very well have had different goals when deciding cases. The 1983 reorganization alleviated these concerns by, according to the EOIR itself, "ma[king] the immigration courts independent of the INS, the agency charged with enforcement of federal immigration laws" (Executive Office of Immigration Review n.d.).

After the creation of the Department of Homeland Security (DHS) in 2002, the border patrol and immigration enforcement duties were moved from the EOIR to new offices at DHS, including the Office of Citizenship and Immigration Services (the closest analog to the original INS). Only the immigration courts and the BIA remain under the umbrella of the DOJ. This means that almost all cases that the immigration courts and the BIA hear begin with actions by

the DHS at the border. This new administrative set up means that sophisticated cross-agency cooperation is required for successful day-to-day operations even prior to judicial intervention.

3. The history of immigration courts is well-documented from a number of different vantage points.

Judicial records from both administrative courts and federal courts are easily available online. As long as a federal court has issued a written opinion, the opinion will be available on LexisNexis, WestLaw, and on the individual court's website; even unpublished opinions are accessible on the aforementioned databases or in tabular form in hard copies of the Federal Supplement (for district court cases), the Federal Reporter (for courts of appeals cases), and the United States Reporter (for Supreme Court cases) which are easily accessible at law libraries. Administrative court cases, in comparison, are more variable in the ease with which they can be found. Many administrative courts have at least a sample of their decisions available at the aforementioned databases. Some also maintain databases on their own websites. Others still do not have their cases published until a party appeals to a federal court. This is the case for the administrative court system regulating the Social Security disability apparatus. The courts of the Social Security Administration produce by far the most cases per year of any administrative court with over 630,000 cases closed by approximately 2000 administrative law judges with a year-end backlog of over a million cases in FY 2015 and an average processing time of nearly 550 days (Social Security Administration n.d.). However, their cases are not published, or even transcribed, until required to do so by the geographically appropriate district court in the event of an appeal. Even then the originating administrative court opinion is not available online. Though

the Social Security court system would have been a fascinating case study for this dissertation, it falls victim to its own size.

4. The immigration court system is in crisis.

The past twenty-five years have seen a tremendous increase in the docket size of immigration courts. To some extent, this tracks with increased docket size in the federal courts: though there is likely not an increase in the inherent litigiousness of Americans like Manning suggested, there has undoubtedly been a rise in the number of cases that have been brought to courts of all kinds in the latter part of the twentieth century into the twenty-first century (Burke 2002, Galanter 1983, Haltom and McCann 2004, Lieberman 1981, Manning 1977, Olson 1991).

The same is true for the immigration courts. In 1980 the immigration courts disposed of 3100 exclusion hearings and 45,034 deportation hearings (INS 1980). By 1996 that number ballooned to 33,824 exclusion hearings and 197,678 deportation hearings (EOIR 2001). Pursuant to these increases, cases were delayed often for years: in 2002 there was a backlog of more than 57,000 cases, 38,000 of which were over a year old (Ashcroft and Kobach 2009). These docket pressures not only strained the immigration courts' ability to make decisions effectively, but it also affected the relationship between judicial and administrative adjudicators since an increase in administrative caseloads led to a subsequent increase in the number of cases that were appealed to the federal courts.

These caseload pressures elicited first a (mostly successful albeit short-lived) series of docket-clearing reforms under Attorney General Reno in 1999 (Dorsey and Whitney LLP 2003) and an additional series of BIA reforms under Attorney General Ashcroft in 2002. The 2002

Ashcroft reforms were comprised of four major parts: replacing three-member review with single-member review for the majority of cases, moving from *de novo* review to a clearly erroneous standard of review (i.e. a far less strict standard), implementing a time limit of ninety days for single-member adjudications and 180 days for three-member adjudication, and reducing the size of the BIA from twenty-three members to eleven members (Ashcroft and Kobach 2009). These reforms were largely unsuccessful since they did not decrease docket sizes in either the short- or the long-term. Additionally, they introduced a host of due process concerns. For example, the Ashcroft reforms led to the use of succinct boilerplate language affirming immigration judge decisions without explicated reasoning, making judicial review far more challenging; this is a particularly damning shortcoming since the rise of immigration court decisions led to a subsequent increase in the number of BIA cases appealed to the federal courts, effectively transplanting docket size pressures from one judiciary to another.

Further, fewer BIA members in conjunction with an excessive number of cases and the end of *de novo* review meant that cases at the BIA were given a cursory examination at best; when an appellate body is built into a legal system, it suggests that the possibility of an additional level of review promises some sort of reexamination of the case at hand to ensure that the correct decision has been reached (Benesch 2007). For a system that affects the lives and livelihoods of hundreds of thousands of persons a year to have intrinsic flaws that have not been resolved behooves researchers to give significant time to understanding why the system developed the way it did.

5. The Executive Office of Immigration Review publishes their precedent decisions online.

Compared to the other administrative courts (read: most other immigration courts besides the NLRB), the EOIR is remarkably open with their precedent decisions both on their personal website and on external databases. I discuss this below.

Selecting the Board of Immigration Appeals as the primary case study introduces potential generalizability concerns. Since the vast majority of administrative courts are small and adjudicate only a handful of cases per year, choosing one of the large administrative courts (Board of Immigration Appeals, National Labor Relations Board, or the Social Security disability apparatus) may produce results that are not generalizable to administrative courts at large. Further, immigration as a policy issue crosscuts the political spectrum in a way that could potentially dampen any partisan effects that could explain deferential behavior by Article III courts to Article II courts. I accept these critiques as valid but argue that the similarities in structure between the immigration judiciary (with its various immigration courts and the Board of Immigration Appeals as an appellate body at the top of the hierarchy) and the Article III judiciary make the selection of the BIA the best analog to the federal courts of all administrative courts examined. I stand by the methodological choice but acknowledge that the results of this study cannot be easily generalized to administrative courts at large. Future deference studies should build off this study of the Board to include other administrative courts to promote generalizability.

Research Design

The insights of this dissertation are as much methodological as they are theoretical. In order to provide a novel approach to understanding and identifying deference, I created a new coding system through extensive examination of the case study literature in interpretive legal scholarship (Hall and Wright 2010). I explain this coding scheme in detail in Appendices C and D, but it is important at this point to underscore the new means through which deference can be studied for this dissertation and for any studies of deference that follow.

Studying interbranch institutionalism presents unique methodological challenges. For one, identifying communication between branches is rarely clear-cut. Scholars must rely on various forms of data that present evidence of communication even if the data individually are not smoking gun instances of inter-institutional communication. Interbranch institutional scholars rectify this by layering multiple data sources upon each other in order to create a narrative that highlights the contributions of each institution in order to make inferences about how events occur vis-á-vis institutional interaction.

Consequently, this dissertation utilizes several different sources of judicial data. The judicial data collected and analyzed for this dissertation represent an important advance in the study of interbranch institutionalism, especially as it relates to the relationship between courts and other political actors. As aforementioned, the administrative court-federal court relationship is a cyclical one that oftentimes produces opinion dyads where both courts are compelled to adjudicate the same dispute. This dyadic data source has several advantages. By the nature of the data many potentially confounding variables are eliminated: since the dispute to be resolved is the same across both courts, the only variation is in the court that is doing the resolving. This helps to illuminate the differences in dispute resolution styles and it has the potential to highlight

differing institutional constraints on dispute resolution. Further, the direct line of communication between administrative courts and agencies through written opinions provides an exciting opportunity to understand the decision making processes at work by both judiciaries as a direct result of their interactions.

In order to create these dyads I appealed to several databases, both public and private, that archive judicial opinions. LexisNexis and WestLaw, for example, provide a variety of administrative court opinions in addition to their extensive collection of federal court opinions. However, the number of cases decided by the BIA introduces a problem when attempting to collect the universe of cases. The EOIR divides BIA opinions into three categories: precedent opinions, non-precedent opinions, and unpublished opinions. Precedent opinions, as determined by EOIR leadership, represent the governing interpretation of immigration laws for the DOJ at any given point in time. There are approximately five thousand precedent decisions, all of which are available directly from the DOJ via legal databases and on the EOIR website. Non-precedent decisions do not hold precedential value but the EOIR has determined that they may be useful for those in the immigration court system to consider as indications of contemporary administrative practice. There are several thousand cases that fit this category annually. They are variably available on online databases which makes identifying the universe of cases very difficult. Most cases are routine and thus unpublished and unavailable for analysis.

Using the fully accessible universe of precedent decisions,[25] I used the LexisNexis Shepardize feature to identify pairs of BIA decisions and the corresponding appeal(s) in the

[25] There are generalizability concerns inherent in using only those cases that are deemed important enough to declare precedential. However, since the relationship between the courts and the bureaucracy is the phenomenon under analysis and not the factual contents of the opinion *per*

federal courts. Most of these dyads consist of one BIA case and one case in the geographically appropriate court of appeals; a small portion of dyads are comprised of one BIA case and one case in the geographically appropriate district court (for habeas requests),[26] and a slightly larger but still small portion of cases contain more than one federal court case.[27] Some dyads were inaccurately coded by LexisNexis and were thus excluded from analysis. Appendix E provides the cases identified for analysis in this dissertation.

The empirical thrust of the dissertation attempts to identify and measure deference. The existing scholarship tends to assert deference through observing high agency win rates in court. But consider the weaknesses inherent in making inferences on deference based solely on whether an agency wins or loses in court or even why agency appeals end up in federal courts. There are any number of reasons why an agency might prevail in court independent of deference doctrine. The data provided in Table 1a on page 31 regarding agency win rates across doctrinal eras provide a brief illustration as to why the question of judicial deference to agency action and understanding the development of the administrative state is important, but it does not provide any indication as to why or how this development occurred. The existing literature does a poor job of providing an account of this, in part because it relies heavily on agency win rates without contextualizing them in order to understand the greater political environment that those win rates inhabit. By using dyadic data, agency win rates are given a natural foil in the form of the originating administrative court opinion. In addition, analyzing the text of the opinions themselves beyond just the win-lose outcome provides evidence of the calculus employed by

---

se, the likelihood that the content of the BIA decision is not representative of all of the BIA' decisions is not a disqualifying limitation.

[26] These are excluded since they do not involve a court of appeals.

[27] In these cases (of which there are two instances), I code for two separate dyads: the BIA case and the first court of appeals case, and the BIA case and the second court of appeals case.

administrative and federal judges; this is instrumental in understanding the relationship between the two judiciaries.

To ascertain deference rates, I employ a new two-step approach in identifying whether deference has occurred. First, I determine whether an agency was the winning party in the case under analysis. This is necessary but not sufficient to conclude that deference has occurred. To finally conclude that deference has occurred, I determine whether the federal court has explicitly stated that it is deferring to the administrative court.

One of the most promising avenues that this approach to measuring deference can provide is the further disaggregation across the deference/non-deference divide to assert theoretical significance to both deference and non-deference situations; this is a possibility that the existing literature on deference does not explore. There are four, not two, possible outcomes when identifying deference. If a court rules in favor of an agency and there is evidence in the text of the opinion that the court is actively deferring to the agency, then we can code this instance as "active deference." If a court rules in favor of an agency and there is no evidence in the text of the opinion that the court is actively deferring to the agency, then we can code this instance as "passive deference." If a court rules against an agency and there is no evidence in the text of the opinion that the court is actively not deferring to the agency, then we can code this instance as "passive non-deference." If a court rules against an agency and there is evidence in the text of the opinion that the court is actively not deferring to the agency, then we can code this instance as "active non-deference." In this schema, even non-deference has theoretical significance. When a court provides rationales directly related to the actions of the agency, it is the rationale rather than the outcome that matters. When we combine an agency's outcome in court with active language either for or against the agency's actions, we can confidently make conclusions about

judicial intent regarding administrative behavior in a way that is impossible when solely relying on win rates.

A key feature of the dissertation's empirics relies on the content of the courts' opinions. In order to analyze these judicial data, I created a content analysis schema (explained in extensive detail in Appendices C and D). I appealed, in particular, to the legal literature on content analysis of judicial opinions; though the majority of legal literature is dedicated to interpretive studies of various doctrines and statutes, there is a burgeoning tradition of using explicit coding schemes to identify patterns in case law by legal scholars. I found in my review of both the legal and political science literatures that legal scholars were more explicit about their coding schemes than political scientists. I undertook a meta-analysis of studies cited in Hall and Wright's review of content analysis of judicial opinions in order to create a coding schema that accounts for variables of potential interest (Hall and Wright 2010).[28]

I first coded for the doctrinal era the case was decided within. This consists of two parts: identifying the deference doctrine(s) that the court could apply and determining whether that doctrine(s) was actually applied. Eskridge and Baer differentiate between several forms of deference, noting that each doctrine can be placed on a continuum on the extent of deference by courts to agency interpretations of statutes (Eskridge and Baer 2008). The literature, as aforementioned, places a great deal of emphasis on *Chevron* as an important codification of deference procedure. By coding for the controlling deference doctrine, I am able to extend the theoretical and empirical contributions of the existing literature by both expanding the time frame under analysis and extending the analysis to consider other non-*Chevron* forms of

[28] See Appendix B for meta-analysis.

deference. Borrowing from Eskridge and Baer, I code for the deference doctrines provided in Table 2a.

Table 2a: Deference Regime and Agency Win Rates in Eskridge and Baer Sample

Deference Regime	Form of Deference	Agency Win Rate in Eskridge and Baer sample of Supreme Court cases
Anti-deference	The Court invokes a presumption against the agency interpretation in criminal cases (the rule of lenity) and in some cases in which the agency interpretation raises serious constitutional concerns (the canon of constitutional avoidance)	36.2%
No deference	*Ad hoc* judicial reasoning	66.0%
Skidmore deference	Agency interpretation is entitled to "respect proportional to its power to persuade," with such power determined by the interpretation's "thoroughness, logic, and expertness," its "fit with prior interpretation," etc.	73.5%
Beth Israel deference	Pre-*Chevron* test permitting reasonable interpretations that are consistent with the statute	73.5%
Chevron deference	Reasonable agency interpretations of ambiguous statutes accepted. If the statute is clear, no deference to agency.	76.2%

Consultative deference	The Court, without invoking a named deference regime, relies on some input from the agency (e.g. *amicus* briefs, interpretive rules or guidance, or manuals) and uses that input to guide its reasoning and decision making process	80.6%
Seminole Rock deference	Strong deference afforded to an agency's interpretations of its own regulations	90.9%
Curtiss-Wright deference	Super-strong deference to executive interpretations involving foreign affairs and national security.	100.0%

Source: Eskridge and Baer 2008, 1099. Chart is verbatim from source material except for excluding one column from the original table (proportion of deference in their sample).

I then coded for several different markers of partisanship. There are several ways to code for the ideological and partisan preferences of a judge. The primary means that the judicial decision making literature has defined a judge's preference is through transplanting the party of the appointing president as the party of the judge. Per Dahl, this draws on the insight that judges and their appointing president are more often than not similar (Dahl 1957). This method has high intercoder reliability which is undoubtedly why this method is used frequently. But there are several critiques of this method throughout the literature. First, this method assumes that all appointing Republican presidents are equally republican and that all appointing Democratic presidents are equally democratic (Giles et al 2001, Songer and Haire 1992). Pinello, in a meta-analysis of studies on the extent of the link between judicial ideology and judicial decision making, found that though the correlation between political party and judicial ideology across all courts and subject matters is moderate, Democratic judges are more liberal than Republican

judges and Republican judges are more conservative than Democratic judges (Pinello 2007; see also Cross and Tiller 1998, Flemming et al 1998, Gerber and Park 1997). Second, this method assumes that all judges are motivated by ideology equally (read: that judges decide exclusively as a result of their partisanship) (Epstein et al 2013). Third, this method assumes that a judges' ideology is stable over time (Epstein et al 2007, Martin and Quinn 2007). Finally, the method assumes that the president is in complete control of the nominations process. It neglects to consider senatorial courtesy and the influence of special interests outside of the government (Giles et al 2001).

There have been two primary alternatives to this measure that Epstein et al classify as exogenous and endogenous measures (Epstein et al 2013). The most famous exogenous measure comes from Segal and Cover's seminal work on defining judicial political preference (Segal and Cover 1989). They performed a content analysis of newspaper clippings on nominations of Supreme Court justices and developed a formula to assign a partisan alignment: the fraction of paragraphs coded conservative subtracted from the fraction of paragraphs coded liberal. The most widely cited endogenous variable comes from Martin and Quinn assessed voting patterns of justices each term and placed each justice in each year on a scale from most republican to most democratic (Martin and Quinn 2007). This measure has the benefit of recognizing the fluid nature of ideology, but it has a serious endogeneity concern: the measure uses votes on cases to determine votes on other cases.

In order to assign a partisan identity to the leadership of federal agencies, I use the party of the appointing president in the same way that I do in assigning a partisan identity to federal judges. It should follow that in the same way that the president would prefer partisan friendlies on the courts the president would also want to ensure that his or her agency leadership is

sympathetic to his or her policy positions. Marisam, in his essay on the president's agency selection powers, concluded that "presidents continually select which agencies act by exercising a set of statutory and constitutional powers" (Marisam 2013, 821). This theory recognizes the traditional understanding that Congress chooses which agencies should act on which sets of policies since the president does not have the power to transfer congressionally granted powers between agencies, but also acknowledges that the president has powers over the bureaucracy's landscape independent of those congressional powers (Barron and Kagan 2001, Grundstein 1944, Miller 1993). Marisam identifies three powers that give the president the ability to shift the landscape of the bureaucracy to fit his or her needs. First, the president has the power to subdelegate authority to the agency they choose when Congress has expressly delegated that authority to the president. Second, the president has the power to delegate constitutional powers to an agency and thereby force Congress' choice of agency on particular regulatory matters. Third, the president has the power to reconcile agencies' overlapping jurisdiction by deciding which of the agencies in the shared regulatory space should act (Marisam 2013).

Though this approach is useful, it requires several caveats. For one, assigning partisanship based on the partisanship of the appointer presents a unique difficulty for Board members who are appointed by someone other than the president. Where it is relatively easy to ascribe partisanship to a presidential appointee to the NLRB, whose members are appointed by the president, through the president's party affiliation, it is less simple to ascribe partisanship to a BIA member appointed by the Attorney General. Though it logically follows that an Attorney General appointed by a president would have many of the same partisan priorities as the appointing president, it is hard to know whether those partisan priorities would translate into

appointing copartisans to positions within the agency. I assume that the partisan priorities are transferred to bureaucratic appointees, but I do so with caution.

A further difficulty lies in five interrelated assumptions: (1) that presidents will always appoint copartisans, (2) that presidential partisanship is static over time, (3) that presidents of the same party are similarly partisan (i.e. that Lyndon Johnson and Jimmy Carter are similarly democratic while Dwight Eisenhower and George W. Bush are similarly Republican), (4) that appointees share the same ideological priorities of the president, and (5) that those appointees will consistently hold the same ideological priorities of the president that appointed her over time. Some of these assumptions are easy to overcome: for example, by disaggregating the data by president rather than just by party, we can avoid false equivalency concerns; and if we accept Dahl's conclusions about justices adhering to the regime that appointed them is true, then we can circumvent the fifth assumption. However, the first and fourth assumptions are important barriers that must be addressed before making conclusions as to the power of a partisan explanation.

To overcome those assumptions, I take a step back to observe partisanship in the aggregate by coding for the policy position of the decision and the overall partisan makeup of the circuits at the time of the decision. All told, I have a good sense of how partisanship might affect judicial decision making at both the administrative court and the federal court level after considering all of these codes in concert.

Beyond these codes (and the codes discussed in Appendices C and D), I identified pertinent deferential language in the text of the opinions. By this, I am referring to passages within the opinions where the federal court explicitly mentions the administrative courts and the activities that the administrative court undertook while adjudicating the dispute. This is because the means through which judges communicate their preferences about how law should be

interpreted and applied across the administrative state can be ascertained from the verbiage of judges rather than through static codes exclusively. Since non-discretionary dockets severely restrict judges' ability to pick cases that best advance their policy preferences, judges can use their decisions to advance their policy agendas rather than electing to not hear cases they would rather avoid (Bickel 1962, Cohen 1991, Macey 1994, Sunstein 1990). By extricating the portions of opinions where the author provides a rationale for her decision and considering those rationales alongside the political and doctrinal motivations previously identified, I am able to make conclusions as to why courts defer.

By means of example, consider the two following passages from cases in my dataset. In *Yaldo v. Immigration and Naturalization Service*, the 6th Circuit Court of Appeals considered whether INS properly applied evidentiary standards regarding an immigrant accused of pursuing a "sham" marriage to avoid deportation. In a *per curiam* opinion in favor of INS, the court stated,

> "Review of the entire record discloses that both the Special Inquiry Officer and the BIA employed the proper standard of 'clear, unequivocal, and convincing evidence' in making their findings below. Review of the record further discloses that the testimony of petitioner's ex-wife, if believed, would, along with the other evidence, support the findings below. As stated above, we are not permitted to substitute our judgment for that of the Board or the Special Inquiry Officer[29] with respect to the credibility of this testimony or the ultimate findings of fact based thereon. It is

[29] This was the title given to immigration judges in the early post-APA years.

> therefore determined that the findings below are supported by 'reasonable, substantial, and probative evidence,' and the decisions of the BIA are affirmed" (*Yaldo v. INS,* 424 F.2d 501 (1970), 503).

In this text, particularly in the underlined passages, we observe two pro-agency forces working in tandem. First, the court acknowledged that the Special Inquiry Officer and the BIA acted correctly in applying the clear and convincing evidence standard for the facts presented in this case. This is an important statement: the court is arguing that the judicial actors in the bureaucracy acted correctly in their activities as adjudicators. Second, the court continues on to remind its audience that it is not able to substitute its own interpretations of the evidence for that of the two INS actors.[30] By not providing their own conclusions after asserting that the conclusions drawn by the bureaucratic actors were appropriately found, the court in *Yaldo* acted with a high level of deference.

By means of comparison, consider *Yanez-Jacquez v. Immigration and Naturalization Service*. Yanez-Jacquez, a permanent resident, was assaulted on a brief trip to Mexico. He sought to get revenge on the assailants and perched by the river where he was previously attacked wielding an ice pick. He was found by Border Patrol and charged with possessing a weapon, a deportable offense. After the Board ordered his deportation, the 5th Circuit Court of Appeals reversed. The crux of the court's argument hinged upon the meaning of "entry" in the Immigration and Nationality Act; the Act requires that a permanent resident not commit a crime within five years of the most recent entry, and his initial entry to the United States was eight years prior to the Mexico trip. The court found that his trip to Mexico did not constitute an entry

[30] In a pre-*Chevron* case.

under the INA as defined by *Fleuti*. Judge Simpson, in the opinion for the court, explicitly disapproved of the interpretation of the Immigration and Nationality Act provided by the Board:

> "This case is necessarily limited to its facts. A different set of facts applied to the criteria to be weighted might dictate a different result…. Under the facts of this case, we simply conclude that the agency determination that the incident of May 6, 1963, was an "entry" does not have support in the record (*Yanez-Jacquez v. INS,* 440 F.2d 701" (1971), 704).

In the same way that the court in Yaldo was laudatory for the Service's actions, the court in *Yanez-Jacquez* is opposed to the Service's interpretations. The court is not only skeptical of the decision made by the Board; Simpson explicitly states that there is no factual support for the Board's decision. This is a strong statement against the Board's interpretive faculties, and it constitutes a textbook case of active non-deference.

The Four Deferences

Where the extant literature sees deference as binary (deference or no deference), I place deference in quadrants.

Table 2b: Deference Quadrants

	Agency Win	Agency Loss
Explicit Deference Claims	Active Deference	Active Non-Deference
Absence of Deference Claims	Passive Deference	Passive Non-Deference

This serves to provide further theoretical leverage in order to better understand how the courts and the bureaucracy interact – by interrogating the judicial opinions for deferential intent and practice, we can provide a compelling account as to why courts do or do not defer. The columns differentiate between a win and a loss; this is the primary means through which the existing literature identifies deference (Barnett and Walker 2017, Eskridge and Baer 2008, Hume 2009, Watry 2000). If the agency wins, I code the case as deference. If the agency loses, I code the case as non-deference. But the binary requirement (a win or a loss) is not as clear cut as it might appear at first glance. For one, a case may not have a single winner or a single loser; instead, a case might have a mixed outcome where both parties win in part and lose in part. To identify a win or a loss, then, we must triangulate using several approaches. The first step in coding for type of deference is to read the text of the BIA opinion. This is critical for understanding the corresponding court of appeals case for a close reading unearths the inherent strengths or weaknesses of the decision before the case arrives in the federal judiciary. It also often provides an alternative account of the facts of the case that can offer insight on the approach both courts take to adjudicate identical disputes. The second step is to read the opinion and come to a conclusion as to the successful party at the end of the opinion. This is a good approach when the coder has legal expertise, but to ensure accuracy I refer to LexisNexis and WestLaw case summaries to confirm conclusions made after a full reading of the opinion.

Additionally, for cases that are not clear cut as to a winner and a loser, I carefully weigh the components of each case that constitute winning aspects for each party, concluding from that which party was successful at more than 50%.[31]

The rows, my addition to the literature, codes for whether there is evidence that the court is actually deferring. This is what is missing in the previous attempts at defining deference: there are any number of reasons why a party is unsuccessful in court that can be independent of deferential behavior, including the comparative strength of the arguments, the governing ideology of the judiciary at the time of the decision, the pressures of a full docket, and other ineffable phenomena. But when the text of the opinion is scoured for language directly speaking to the actions of the BIA in their initial decision, then we can confidently conclude that deference has or has not occurred. Of interest for this dissertation, then, are the quadrants in the upper right and lower left corners: those cases where (1) an agency won and (2) the deference was active; and where (1) an agency lost and (2) the non-deference was active.[32]

One hundred and sixteen dyads of BIA and courts of appeals cases, representing one hundred and thirteen immigrants (plus one immigration attorney in the United States) from forty-four countries, were coded for deference and the other myriad codes explicated in Appendices C and D. Figure 2a provides a temperature map of the cases in the dataset where larger dots represent countries with more immigrants represented in the sample.

---

[31] Fortunately only one case was so ambiguous as to require this weighing procedure.

[32] This is not to say that the other two quadrants (passive (non-)deference) are not worth investigating. After all, deference *may* occur even if there are not explicit discussions of deference in the text of the opinions. This is why I still identify agency wins and losses where there are no explicit discussions of deference or non-deference as deference, for we cannot evaluate whether or not a win or loss constititutes deference or non-deference when the opinion lacks the explicit discussions. Because of this, they are excluded from the current analysis.

Figure 2a: Countries of Origin in BIA/Courts of Appeals Sample of Dyads

The plurality of cases feature an immigrant from Mexico (twenty-five appellees). Eight come from China (with an additional four from Hong Kong and one from Taiwan), six each come from the Philippines and El Salvador, five each from Italy and Canada, and four come from the Dominican Republic.

Table 2c provides the deferences present in the sample.

Table 2c: Deferences in BIA/Courts of Appeals Sample of Dyads

Deference Type	Count of Cases
Active Deference	42
Active Non-Deference	39
Passive Deference	29
Passive Non-Deference	6
Total	116

Of note is (1) the near equal distribution of active deference and active non-deference cases, and (2) the comparative dearth of cases where an agency loses but the court does not explain why vis-a-vis the agency's decision making. It appears, then, that in instances where an agency's decision is reversed by the court it rarely allows this to occur without explanation as to why.

Table 2d breaks down deference type by pre- and post-*Chevron* eras.

Table 2d: Deferences in BIA/Courts of Appeals Sample of Dyads by *Chevron* Era

Period	Active Deference	Active Non-Deference	Passive Deference	Passive Non-Deference	Total
Pre-*Chevron*	20	14	18	5	57
Post-*Chevron*	22	25	11	1	59
Total	42	39	29	6	116

We observe a marked decrease in the number of moderate deference cases and a similar increase in active non-deference cases following *Chevron*. As I will discuss in Chapter 3, the high proportion of active to moderate cases post-Chevron is notable since only a portion of these cases actively cite and apply *Chevron*; there appears to be a paradigm shift that is independent of active application of the doctrine. Further, the assumption that *Chevron* led to an increase in deferential activity is not supported by these data. In fact, there is an increase in cases of active non-deference by 20% (from 24% to 44% of the pre-*Chevron* sample) compared to a 5% increase in the number of active deference cases (from 34% to 39% of the post-*Chevron* sample).

Chapter 3:
Partisanship and *Chevron* as Explanations for Deferential Behavior

In Chapters 1 and 2, I provided a theoretical foundation for understanding the relationship between courts and the bureaucracy as it applies to interactions over administrative court proceedings and judicial deference to administrative agencies both because of and independent of *Chevron*. I introduced a new paradigm for defining deference that adds judicial intent into the process of identifying deferential activity by courts and agencies. With deference accurately identified, Chapters 3 and 4 answer why deference occurs. Chapter 4 appeals to the text of the opinions to consider deference as explicated by the courts themselves, but before this novel approach can be considered, we must examine extant explanations for deferential behavior. In this chapter I give thorough treatment to attitudinal and doctrinal rationales as explanations for deference by courts to agencies.

Partisanship

This section tests one main hypothesis: I assess the claim that where there is a partisan match between the administrative panel and the judicial panel there is more likely to be deference. This explanation is expected from the attitudinal strand of empirical political science, but the literature has come to contradictory conclusions (see Chapters 1 and 2 for details). In this section I will provide the results of a series of regressions testing the impact of partisanship on the likelihood that a court rules for or against an agency controlling for the contextual facts of the case.

But before I provide regression evidence that a partisan explanation is not altogether explanatory, I will describe the data as they relate to partisanship. Given the patchwork nature of deducing partisanship for administrative law judges and circuit court judges, I delineate multiple descriptive measures of partisanship in order to lay the groundwork prior to hypothesis testing.

Table 3a provides the partisan breakdown for the universe of courts of appeals cases. I define a Republican panel as one that includes at least one more Republican-appointed judge than Democratic-appointed judges; the opposite is true for Democratic panels. The distribution is roughly equal. This is a fortuitous coincidence: we need not control for the number of cases that are decided by each party since the case law naturally did so.

Table 3a: Number of Cases by Panel Partisanship

Panel Partisanship	Number of Cases
Republican	56
Democratic	57
Unknown	2
Even	1
Total	116

Tables 3b and 3c discuss unanimity. Unanimity has the potential to concentrate like-minded sentiment in such a way as to illuminate nascent pro- or anti-agency opinions. A sizable portion of the cases (approximately one-third) are decided by unanimous panels (Table 3b). Of those unanimous cases, a slight majority are exclusively Republican panels. Table 3c provides a breakdown of cases whose panel is exclusively staffed by one party.

Table 3b: Number of Cases by Unanimity Type

Unanimity Type	Number of Cases
Not Unanimous	69
Unanimous	35
Unknown Panel	26
Total	116

Table 3c: Number of Cases by Unanimity Type and Panel Partisanship

Unanimity Type	Number of Cases
Non-Unanimous	***69***
Republican	31
Democratic	37
Unknown partisanship	1
Unanimous	***35***
Republican	19
Democratic	16
Unknown Panel	***26***
Total	116

The key distinction is not the partisanship *per se*; instead, we must investigate the impact of the partisan match between the Board and the courts. Regressions later in this chapter will assert causality, but first I will provide tabular data on partisan match. There are two ways to measure partisan match: through matching the deciding panels and through matching the partisanship of the courts as a whole at the time the case was decided. Table 3d distinguishes between the partisanship of the two panels at the time of the decision. This is calculated using the appointing president of the judge as described in Chapter 2. This is a more fine-tuned approach to determining whether there is a partisan match, but there is one primary weakness that necessitates another more general approach to complement. We cannot determine partisanship for the BIA prior to 1978 since the BIA did not indicate the deciding panel in their decisions. Though we could assume that the panel is exclusively made up of the judges on the Board at the

time, I am uncomfortable making that assumption where there is another means for determining a partisan match that, though imperfect, is an adequate supplement. Even after 1978, *per curiam* opinions by the BIA do not indicate the members of the panel deciding that *per curiam* decision in the same way as federal courts do. Thus, there are more null values in this table than in the table below. Table 3d, then, shows the partisan match of the two panels post-1978 when the BIA began to regularly indicate the composition of the panels.

Table 3d: Partisan Match of the Panels, 1978-2016

Board Partisanship	Court of Appeals Partisanship	Number of Cases
Republican	Republican	15
Republican	Democratic	14
Democratic	Republican	10
Democratic	Democratic	10
N/A (partisanship equal)	Republican	10
N/A (partisanship equal)	Democratic	4
All matched		25
All unmatched		24

Table 3e distinguishes between the partisanship of the courts at large. Though this measure is less exact, it has the benefit of capturing the entire span of time given the prevalence of *per curiam* opinions by the Board before 1978.

Table 3e: Partisan Match of the Courts, 1940-2016

Board Partisanship	Court of Appeals Partisanship	Number of Cases
Republican	Republican	21
Republican	Democratic	13
Democratic	Republican	38
Democratic	Democratic	38
N/A (partisanship equal)	Republican	1
N/A (partisanship equal)	Democratic	5
Unknown	Unknown	6
All matched		59
All unmatched		57

Table 3f begins to answer the second question (is the (non-)deference active or passive?). It disaggregates the four kinds of deference by panel partisanship. We observe little difference between the instances of any of the forms of deference between the two parties. The insight will be substantiated causally shortly.

Table 3f: Deference Type and Panel Partisanship

Panel Partisanship	Active Deference	Active Non-Deference	Passive Deference	Passive Non-Deference	Grand Total
Republican	21	21	12	2	56
Democrat	20	18	15	4	57
Unknown	0	0	0	0	2
Even	1	0	0	0	1
Total	42	39	29	6	116

These tables are necessary to provide a grounding for the regression analyses that follow. The regression analyses fall into two main categories that correspond with the two steps of deference analysis explicated in Chapter 2: first, was the agency successful in court; and second, was the deference active or passive?

For each test I utilized multiple logistic regression.[33] The regressions should be read with the knowledge that a Republican Board/panel/court is coded as 0 and a Democratic Board/panel/court is coded as 1. Thus, a unit change in the positive direction suggests a more democratic outcome, while a unit change in the negative direction suggests a more republican outcome. An agency win is coded as 1 and an agency loss is coded as 0. A case indicating deference is coded as 1 and a case indicating non-deference is coded as 0. A case indicating

[33] I also ran x^2 tests to evaluate correlations. Results are presented in Appendix G.

active (non-)deference is coded as 1 and a case indicating moderate (non-)deference is coded as 0.

I ran twelve distinct regressions investigating six independent variables on two dependent variables: whether an agency wins or loses, and the existence of passive or active (non-)deference. The six variables are as such:

1. *Panel match* – this indicates whether or not the partisanship of the deciding panels at the Board and the Court of Appeals match. A match is coded as 1; a non-match is coded as 0.
2. *Court match* – this indicates whether or not the partisanship of the deciding Board and Court of Appeals match at large. A match is coded as 1; a non-match is coded as 0.
3. *Board partisanship* – this indicates the partisanship of the BIA panel as defined by the appointing Attorney General (and, in turn, the Attorney General's appointing president). A majority Democratic Board is coded as 1; a majority Republican Board is coded as 0.
4. *Court of Appeals panel partisanship* – this indicates the partisanship of the Court of Appeals panel as defined by the appointing president. A Democratic panel is coded as 1; a Republican panel is coded as 0.
5. *Per curiam: Board of Immigration Appeals* – this indicates whether the case was decided per curiam at the BIA. As aforementioned, this was the norm before 1978. A *per curiam* opinion is coded as 1; a non-*per curiam* opinion is coded as 0.
6. *Per curiam: Court of Appeals* – this indicates whether or not the Court of Appeals case was decided *per curiam*. A *per curiam* opinion is coded as 1; a non-per curiam opinion is coded as 0.

Each independent variable is regressed against two dependent variables with various controls (indicated in the footnotes). The first refers to the two steps of the deference

identification process: whether or not the agency was successful in court ("agency win or loss") The second refers to the decision was active or passive ("deference type").

Tables 3i and 3j provide the regression data on all one hundred and sixteen dyads.

Table 3i: Effect of Numerous Variables on Agency Win or Loss: Logistic Regressions

Independent Variable	β-Coefficient (Standard Error)	Significance	Nagelkerke's R^2
Panel Match[34]	0.671 (0.445)	0.132	0.03
Court Match[35]	0.332 (0.425)	0.436	0.009
Board of Immigration Appeals Partisanship[36]	0.001 (0.001)	0.547	0.012
Court of Appeals Panel Partisanship[37]	-0.024 (0.556)	0.996	0.047

[34] Controlling for the overall partisanship of the Board of Immigration Appeals, the partisanship of the Court of Appeals panel, and the overall partisanship of the Court of Appeals.
[35] Controlling for the overall partisanship of the Board of Immigration Appeals and the overall partisanship of the Court of Appeals.
[36] Controlling for the partisanship of the Attorney General.
[37] Controlling for the overall partisanship of the Court of Appeals.

Board of Immigration Appeals *Per Curiam*[38]	0.919 (0.429)	0.032 **	0.063
Court of Appeals *Per Curiam*[39]	2.165 (0.657)	0.001 ***	0.180

*** ≤ 0.01 | ** ≤ 0.05 | * ≤ 0.1

Table 3j: Effect of Numerous Variables on Deference Type: Logistic Regressions

Independent Variable	β-Coefficient (Standard Error)	Significance	Nagelkerke's R^2
Panel Match[40]	0.027 (0.479)	0.955	0.02
Court Match[41]	0.156 (0.451)	0.728	0.013
Board of Immigration Appeals Partisanship[42]	0.000 (0.001)	0.678	0.004

[38] Controlling for the overall partisanship of the Board of Immigration Appeals.
[39] Controlling for the overall partisanship of the Board of Immigration Appeals and the overall partisanship of the Court of Appeals.
[40] Controlling for the overall partisanship of the Board of Immigration Appeals, the partisanship of the Court of Appeals panel, and the overall partisanship of the Court of Appeals.
[41] Controlling for the overall partisanship of the Board of Immigration Appeals and the overall partisanship of the Court of Appeals.
[42] Controlling for the partisanship of the Attorney General.

Court of Appeals Panel Partisanship[43]	0.498 (0.631)	0.430	0.146
Board of Immigration Appeals *Per Curiam*[44]	-1.384 (0.550)	0.012 ***	0.095
Court of Appeals *Per Curiam*[45]	-0.972 (0.496)	0.029 **	0.067

*** ≤ 0.01 | ** ≤ 0.05 | * ≤ 0.1

The majority of regressions do not reach statistical significance as defined by a *p*-value of 0.1 and below. There is no statistically significant correlation regarding partisanship. This tracks with the literature on Court of Appeals judges and the effect that partisanship has on their decision making. That said, it is surprising that we observe *no* effect of partisanship on deference rates; even though the literature on judicial decision making in the courts of appeals, as discussed in Chapter 1, suggests that partisan calculations are moderated as compared to Supreme Court decision making, the partisan motivation is not completely absent in the courts of appeals.

Further, we observe that whether a case is decided *per curiam* by the Board and the Court of Appeals is correlative with deference existence and type to a statistically significant degree. *Per curiam* decisions provide judicial panels the opportunity to obscure their identity for any number of reasons. In the courts of appeals, according to Hume (2009), *per curiam* opinions are most commonly utilized for "unimportant" cases, those that are considered particularly weak

[43] Controlling for the overall partisanship of the Court of Appeals.
[44] Controlling for the overall partisanship of the Board of Immigration Appeals.
[45] Controlling for the overall partisanship of the Board of Immigration Appeals and the overall partisanship of the Court of Appeals.

opinions or cases that may be politically contentious. Nygaard, a circuit court judge, extolled the virtues of the *per curiam* opinion for the day-to-day operation of the court: "According to a survey by the American Judicature Society, judges ranked opinion-writing as a significant case of delay in the intermediate appellate courts....Without the allure of 'NYGAARD, Circuit Judge' at the beginning of an opinion, it might well be shorter and more to the point, and have fewer bursts of rhetoric. Judge PER CURIAM is statistically less windy than its named colleagues" (Nygaard 2005, 47). It is a combination of these factors that I believe is the phenomenon at play here. The *per curiam* question becomes more prescient in the *Chevron* regressions, so the discussion continues there.

The data in aggregate do not support the partisan match theory. The panel match regressions (the most important regression required to support the theory) garners no significant results. This suggests that co-partisanship across decision making bodies does not affect case outcomes. This result is not indicated by the extant judicial decision making theories; that said, there is no apparent literature on the effect of partisanship on BIA judges. I return to discuss this in Chapter 5.

Adding *Chevron*

In order to test the effect of *Chevron* on dyad outcomes, I divided the dyadic data into two buckets: cases that occurred in or before 1984 and cases that occurred after 1985. Since the *Chevron* decision is a natural cut-point, this provides substantial leverage on the question of whether the *Chevron* decision made a difference in deferential activity. Like the partisanship-only regressions, I use logistic regression.

Tables 3k and 3l provides regression results for the fifty-seven pre-*Chevron* dyads. Immediately following, in Table 3m and 3n, are regression results for the fifty-nine post-*Chevron* dyads. The independent and dependent variables are the same as those utilized in the partisanship regressions.

Table 3k: Effect of Numerous Variables on Agency Win or Loss: Pre-*Chevron*

Independent Variable	β-Coefficient (Standard Error)	Significance	Nagelkerke's R^2
Panel Match	n/a[46]		
Court Match[47]	1.224 (0.777)	0.115	0.244
Board of Immigration Appeals Partisanship[48]	2.234 (1.380)	0.106 *	0.094
Court of Appeals Panel Partisanship[49]	0.662 (1.054)	0.530	0.154

[46] There are too few observations to garner a reliable result from the logistic regression. Because BIA panels were not reliably published for each case until the mid-1970s, only 6 of 57 dyads have a panel match value.
[47] Controlling for the overall partisanship of the Board of Immigration Appeals and the overall partisanship of the Court of Appeals.
[48] Controlling for the partisanship of the Attorney General.
[49] Controlling for the overall partisanship of the Court of Appeals

Board of Immigration Appeals *Per Curiam*	n/a[50]		
Court of Appeals *Per Curiam*[51]	2.165 (0.657)	0.001 ***	0.180

*** ≤ 0.01 | ** ≤ 0.05 | * ≤ 0.1

Table 3l: Effect of Numerous Variables on Deference Type: Pre-*Chevron*

Independent Variable	β-Coefficient (Standard Error)	Significance	Nagelkerke's R^2
Panel Match	n/a[52]		
Court Match[53]	0.294 (0.657)	0.655	0.005
Board of Immigration Appeals Partisanship[54]	1.050 (1.320)	0.426	0.026

[50] There are too few observations to garner a reliable result from the logistic regression. Because BIA panels were not reliably published for each case until the mid-1970s, only 6 of 57 dyads have a panel match value.
[51] Controlling for the overall partisanship of the Board of Immigration Appeals and the overall partisanship of the Court of Appeals.
[52] There are too few observations to garner a reliable result from the logistic regression. Because BIA panels were not reliably published for each case until the mid-1970s, only 6 of 57 dyads have a panel match value.
[53] Controlling for the overall partisanship of the Board of Immigration Appeals and the overall partisanship of the Court of Appeals.
[54] Controlling for the partisanship of the Attorney General.

Court of Appeals Panel Partisanship[55]	2.234 (1.306)	0.087 *	0.256
Board of Immigration Appeals *Per Curiam*	n/a[56]		
Court of Appeals *Per Curiam*[57]	-0.865 (0.632)	0.171	0.044

*** ≤ 0.01 | ** ≤ 0.05 | * ≤ 0.1

Table 3m: Effect of Numerous Variables on Agency Win or Loss: Post-*Chevron*

Independent Variable	β-Coefficient (Standard Error)	Significance	Nagelkerke's R^2
Panel Match[58]	0.102 (0.606)	0.866	0.055
Court Match[59]	0.221 (0.601)	0.713	0.035

[55] Controlling for the overall partisanship of the Court of Appeals
[56] There are too few observations to garner a reliable result from the logistic regression. Because BIA panels were not reliably published for each case until the mid-1970s, only 6 of 57 dyads have a panel match value.
[57] Controlling for the overall partisanship of the Board of Immigration Appeals and the overall partisanship of the Court of Appeals.
[58] Controlling for the overall partisanship of the Board of Immigration Appeals, the partisanship of the Court of Appeals panel, and the overall partisanship of the Court of Appeals.
[59] Controlling for the overall partisanship of the Board of Immigration Appeals and the overall partisanship of the Court of Appeals.

Board of Immigration Appeals Partisanship[60]	0.001 (0.001)	0.394	0.037
Court of Appeals Panel Partisanship[61]	-0.561 (0.622)	0.367	0.041
Board of Immigration Appeals *Per Curiam*[62]	1.117 (0.628)	0.075 *	0.107
Court of Appeals *Per Curiam*[63]	3.274 (1.101)	0.003 ***	0.361

*** ≤ 0.01 | ** ≤ 0.05 | * ≤ 0.1

Table 3n: Effect of Numerous Variables on Deference Type: Post-*Chevron*

Independent Variable	**β-Coefficient (Standard Error)**	**Significance**	**Nagelkerke's R^2**
Panel Match[64]	-0.365 (0.772)	0.637	0.081

[60] Controlling for the partisanship of the Attorney General.
[61] Controlling for the overall partisanship of the Court of Appeals
[62] Controlling for the overall partisanship of the Board of Immigration Appeals.
[63] Controlling for the overall partisanship of the Board of Immigration Appeals and the overall partisanship of the Court of Appeals.
[64] Controlling for the overall partisanship of the Board of Immigration Appeals, the partisanship of the Court of Appeals panel, and the overall partisanship of the Court of Appeals.

Court Match[65]	0.378 (0.763)	0.621	0.059
Board of Immigration Appeals Partisanship[66]	0.000 (0.001)	0.923	0.001
Court of Appeals Panel Partisanship[67]	-0.421 (0.798)	0.597	0.205
Board of Immigration Appeals *Per Curiam*[68]	-1.064 (0.695)	0.126	0.066
Court of Appeals *Per Curiam*[69]	-1.521 (0.723)	0.035 **	0.168

*** ≤ 0.01 | ** ≤ 0.05 | * ≤ 0.1

Before *Chevron* we observe, unlike in the regressions discussed previously, several moderate indications that partisanship had an influence on judicial decision making, particularly on federal judges. All significance indicated in the pre-*Chevron* regressions drop away after the *Chevron* decision. In its place, whether a court of appeals case is decided *per curiam* attains high levels of significance across the board. We observe opposite effects of *per curiam* on court of appeals decision making: as the deference/non-deference dummy increases by one (read:

[65] Controlling for the overall partisanship of the Board of Immigration Appeals and the overall partisanship of the Court of Appeals.
[66] Controlling for the partisanship of the Attorney General.
[67] Controlling for the overall partisanship of the Court of Appeals
[68] Controlling for the overall partisanship of the Board of Immigration Appeals.
[69] Controlling for the overall partisanship of the Board of Immigration Appeals and the overall partisanship of the Court of Appeals.

indicates deference), the case is more likely to be *per curiam*; and when the deference type dummy increases by one (read: indicates active), the case is less likely to be *per curiam*. Thus, a deferential case and a non-active case are likely to be published *per curiam*. Operationally, this suggests courts anonymize (or decide a case as an institutional unit rather than as individuals) in situations where the court is ruling in favor of an agency but not providing positive reinforcement for good judicial and administrative behavior by the BIA. But when the court feels compelled to comment on the Board's activity, the court will infrequently decide as one body and instead indicate an author.

Why this shift occurs after the *Chevron* decision should be investigated. Drawing on the extensive literature on *Chevron* cited in Chapters 1 and 2 in concert with the regressions, *Chevron* was likely a monumental case for judicial procedure independent of the two-step process introduced by the decision. *Chevron* gave judges, I suspect though cannot prove (though future scholarship might, see Chapter 5), the means to obscure personal partisan preferences under the guise of *Chevron* procedure and *per curiam* decisions. That the *Chevron*-independent regressions did not indicate partisan motivations but the pre-*Chevron* regressions did (albeit moderately) suggests that the effects in the post-*Chevron* era were stronger than those before *Chevron*. (After all, there is no real difference in the number of cases before and after *Chevron* in the dataset, so differences in effect cannot be attributed to sample size. Similarly, the distribution of partisanship (defined by presidents and judge partisanship) is roughly equal across samples.)

It is important to note that the effect of *Chevron* is not due to *Chevron* itself; if the *Chevron* doctrine directly impacted deferential behavior as the extant literature suggests, we would observe a large change in the number of cases defined as deferential following the

Chevron decision. But in fact there is no large shift. Table 3o summarizes the deference types before and after *Chevron*.

Table 3o: Deference Rates Before and After *Chevron*

	Deference	Non-Deference
Before *Chevron*	38	19
After *Chevron*	33	26

In fact, there were *more* deferential cases before *Chevron*, not fewer. The effect of *Chevron*, then, is not the doctrine in itself, but instead the unintended consequences of the doctrine that shifted deferential behavior after the *Chevron* decision.

In short, from these data we observe *Chevron* did have an impact on judicial deference, but not in the way that the literature expects. Before *Chevron* we observe a moderate partisan impact on judicial decision making among court of appeals judges, and after *Chevron* we observe a strong *per curiam* effect. Before *Chevron* the partisanship of both the Board correlates with deference existence and the partisanship of the courts of appeals correlates with deference type to a statistically significant degree. After *Chevron* the correlations drop away completely. This suggests that *Chevron*, like *per curiam* opinions, serves as a method to obscure partisan motivations behind doctrinal strictures. I investigate deference before and after *Chevron* in Chapter 4 and suggest avenues for future research on the phenomenon in Chapter 5.

Chapter 4:
Active (Non-)Deference in Action: Opinion Language as Data

In Chapter 3 I considered two explanations for deferential behavior as described by the extant literature. First, I determined to what extent a match in partisanship between the BIA and the courts of appeals can predict the presence of deference. The regression analysis of all dyads showed little connection between partisan match and deference existence or type. Instead, there was a statistically significant relationship between deference and the presence of *per curiam* decision making. However, when cases are disaggregated into pre- and post-*Chevron* there are partisan variables that are statistically significant prior to *Chevron* and all but one *per curiam* variables are statistically significant after *Chevron*, some to a very high degree of significance. This suggests that *Chevron* provided circuit courts the ability to obscure their partisan motivations behind the strictures of precedent.

Given the insights provided by the regression data in Chapter 3, we can fill in the gaps with qualitative data on circuit court discussions of BIA behavior. This chapter seeks to answer the following question: how do courts of appeals, knowing now that they use the tools at their disposal to depoliticize their decision making in regards to immigration regulation, provide

guidance to the BIA on how best to act like courts to promote their deference goals? I argue that, in so doing, courts (either implicitly or explicitly) exhibit preferences for how other judiciary-adjacent institutions should function. I provide evidence that the text of opinions can provide insight into the ways the circuit courts provide guidance to the BIA on how to best act as a court. I suggest that in order to understand deferential behavior, we must reach beyond partisan and doctrinal lenses to determine what courts believe to be ideal judicial behavior by non-judicial bodies.

As discussed in Chapters 1 and 2, I mined dyads of BIA/courts of appeals cases for circuit court language that instructs the BIA how to best act as a court. In order to examine this, we must consider what courts do and how they function. Table 4a provides a sampling of court functions.

Table 4a: A Sample of Features and Functions of Courts

Features and Functions of Courts
Adjudicating disputes
Assigning legal right and wrong
Creating precedent
Fact-finding
Interpreting evidence
Interpreting statutes for application in disputes
Judicial review (at the appellate level)
Maintaining the rule of law
Protecting civil rights

To organize this inquiry, I selected three of these functions to investigate: interpreting evidence, interpreting statutes, and creating precedent. Using the text of circuit court opinions, I determined the extent to which (as interpreted and discussed by the circuit courts) the Board of Immigration Appeals acted as a court.

I organize this chapter into two sections. The first portion investigates the features that define courts and how circuit courts provide guidance to Board members. This includes discussions of evidentiary procedure, statutory interpretation, commitment to *stare decisis,* and the fact-finding process. The second section returns to *Chevron* and deference. There I discuss *Chevron* deference in practice with special focus put on congressional intent. In that section I pay special attention to the cases decided in the year before and the year after the *Chevron* decision to discern any differences between the pre- and post-*Chevron* eras.

But before we consider the qualitative data, by means of introduction and to introduce the observable implications I expect to see in cases where the circuit court is speaking explicitly about the Board's court-like prowess, let us consider the case of *Kulle v. Immigration and Naturalization*. *Kulle* is the prototypical example of the sort of language that I coded for in this chapter: the opinion's author explicitly reflects upon judicial prerogatives as exercised by the BIA, coming to the conclusion that the Board was correct in its judicial activities. As I will discuss shortly, the rules of evidentiary procedure for administrative courts is less extensive than the Federal Rules of Evidence that governs Article III courts. This direct consideration of the judicial role of immigration court members as evidentiary interpreters, then, is particularly important as it lays the groundwork for the court's interpretation of the few passages on evidence present in the APA. The government, as proxied by the INS, actively eschews the strictures that

are on judges as to evidentiary procedure in deportation hearings, arguing that since Board members are not judges in the constitutional sense they are not subject to those same evidentiary requirements. The court does not disagree that the Board is not an Article III court; even so, the court finds that the Board "established deportability by 'clear, unequivocal, and convincing evidence.'" Though the Board is not restricted by the extensive Federal Rules of Evidence, they nonetheless surpassed one of the stricter standards of proof.

The Board continues on to consider the role of judicial procedure in immigration court proceedings:

> "…we believe the hearing was conducted in accordance with the provisions of [U.S. Code]. According to the rules governing deportation proceedings, the respondent has 'a reasonable opportunity to examine and object to the evidence against him, and to present evidence in his own behalf and to cross-examine witnesses presented by the Government" (*Kulle*, 1194).

Though the evidentiary standards vary between the deportation proceedings before the BIA and adjudication before the circuit courts, all parties arguing in the Board have rights to examine and object to evidence used against them to examine and cross-examine witnesses. That the government was emphatic as to the evidentiary non-requirements and then the court went on to explicate the requirements speaks volumes as to the relationship between the court and the Board and the ways in which the court communicates its preferences.

In these passages,[70] the court has carefully asserted that the Board is court-like. The rest of the chapter will proceed in a similar manner.

The BIA as a Court

In providing guidance to the Board in identical disputes, we can consider how the two bodies come to their conclusions through excluding potential confounders implicit in examining case law. In nearly half of the cases in the dataset, the conclusions garnered by the courts and the Board are the same; these are deferential cases. But the other half come to opposite conclusions; these are non-deferential cases. One of the more common means for either agreeing or disagreeing with the Board is through considering how well the Board acts as a court. This flips the *Chevron* deference principle on its head – where federal courts, at times, defer to agencies because of their subject matter expertise, courts can assert their own subject matter expertise on acting judicially upon administrative courts. The deference, then, goes in both directions: from courts to agencies and from agencies to courts.

As explained throughout this dissertation, there are any number of reasons why a court would rule for or against an agency, and those reasons are likely less difficult (or at least time-consuming) than instructing another court-like body how to act judicially. The decision to provide instructions is a concerted one, and through examining those instructions we can understand the reasons through which courts decide to provide those instructions.

[70] Of note: the passages quoted in this chapter are a subset of the evidence identified in the opinion dyads. They are representative of the features discussed in this chapter, but they are by no means the only occurrences of each phenomenon. 29 of 81 (36%) "active" cases are quoted in this chapter and in the methods portion of Chapter 2.

Evidence, Evidentiary Procedure, and Fact-Finding

As stated above, federal courts and administrative courts are not beholden to the same rules of evidence and evidentiary procedure. Federal courts are subject to the guidance set out in the Federal Rules of Evidence. The Federal Rules, along with ample Supreme Court jurisprudence on the subject, amount to an intense and extensive evidentiary procedure canon. Stephenson suggests that the size and strength of evidentiary procedure requirements and guidance serve many functions, including minimizing decision, error, and information gathering costs; extracting information from the more prepared party; and influencing potential incentives that the parties might face (Stephenson 2008; see also Hay and Spier 1997, Milgrom and Roberts 1986, Posner 1973a, Rubinfeld and Sappington 1987, Sanchirico 2001).

A trend towards loosening evidentiary standards on administrative courts (as compared to the evidentiary strictures on Article III courts) began with *Interstate Commerce Commission v. Baird* (1904) and hit its apex with the passage of the Administrative Procedure Act of 1946. Kidane interprets the few provisions of the APA that refer to evidentiary procedure as a compromise between those who advocated for evidentiary rules that were analogous to those imposed on Article III courts and those who preferred a more lenient approach (Kidane 2008). The more lenient approach, according to Davis, allows the administrative process to continue the expediency and efficiency that characterizes it (Davis 1964).

The BIA exemplifies this move towards a less strict set of evidentiary procedures. The guidebook for the EOIR on evidence provides additional guidance beyond the brief passages in the Administrative Procedure Act. “Relevant and fundamental fairness,” notes the guidebook’s authors, “are the only bars to admissibility of evidence in deportation cases” (Executive Office of Immigration Review n.d., 2). Only common-sense restrictions define the use of evidence in

deportation proceedings: "as long as the evidence is shown to be probative of relevant matters and its use is fundamentally fair so as not to deprive the alien of due process of law" (*ibid.*, 3). Even hearsay, one of the prototypical features of evidentiary procedure for Article III courts, is allowed in deportation proceedings if the speech is "probative and not fundamentally unfair" (*ibid.*, 3). The burden of proof required to establish admissibility in the United States lies with the immigrant; this burden never shifts to the government (Immigration and Nationality Act, Section 212; *Matter of Walsh and Pollard*, 20 I&N Dec. 60, 63 (1989)).

That there are both similarities and differences in how administrative courts and Article III courts interpret and apply their respective evidentiary procedures suggests that the conversations the courts of appeals have with the BIA in case law will be illustrative in understanding how circuit courts view the evidentiary realities of administrative courts. Being able to assess and interpret evidence is a particularly important prerogative of courts harkening back to Shapiro's claim that courts consist of disinterested arbiters of disputes; by extension, courts must weigh the comparative value of evidence as it relates to the disputes being arbitrated (Shapiro 1981). It follows, then, that courts are well-situated to evaluate evidence as it arises.

The circuit courts, in these data, frequently speak on the demonstrated ability of the Board to be able to assess evidence and apply evidentiary standards. At the most basic level, the courts use language such as:

> "We think that on the record before us there is a lack of substantial evidence to support the Board's conclusion" (*Sawkow*, 37-38).

This suggests that the Board made a decision that was anathema to the evidence at hand; thus, it asserts a lack of ability of the Board to act court-like regarding the use of evidence in this case. More specifically, consider the court's argument in *Scythes v. Webb* regarding hearsay:

> "We think that the characterization of the Socialist Workers Party as an organization advocating violent overthrow of the Government on the basis of such passages would be a characterization based on what was not said rather than what was said" (*Scythes*, 908).

The Board, in *Scythes*, mistakenly interpreted the evidence in such a way as to try to rely on the non-existence of a phenomenon.

Beyond interpreting the use of evidence in Board arguments, the courts also reflect on Board usage of the various evidentiary standards of review. This is a frequent topic in court opinions, and it is particularly well-tailored to understanding how courts discuss the judicial features of administrative courts. In *Ah Chiu Pang v. Immigration and Naturalization Service*, the court states:

> "We agree with the BIA that the testimony of the Investigator as to the making, signing, and verifying of the statement by the petitioner, together with evidence by the interpreter of his regular routine in all cases gave ample authentication to the statement not only under the flexible rules regarding the admission of evidence before administrative tribunals in deportation proceedings, but would likely meet the stricter requirements of admissibility in

> court. The Government thus having shown that he was an alien, the burden shifted to the petitioner to justify his presence in the United States. This he failed to do" (*Ah Chiu Pang*, 639).

The court here explicitly discusses differences in the application of evidentiary standards in the Article III courts and the administrative courts. The Administrative Procedure Act does not speak to evidentiary standards. In *Director v. Greenwich Collieries* (512 U.S. 267 (1994)), the Supreme Court held that the Administrative Procedure Act does not define a uniform burden of proof to all administrative hearings; instead, due to the APA's goal of "greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other' (*Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950))", each agency's governing statute is tasked with defining the evidentiary standards that are imposed upon the administrative court in that agency (*Director*, 280). The Immigration and Nationality Act states that the burden of proof resides with the government to establish deportability by clear, unequivocal, and convincing evidence (Immigration and Nationality Act, Section 240).[71] Given this, the circuit court here is careful to explicate the evidentiary duties of both the Board and the immigrant and concludes that the Board correctly interpreted and applied their evidentiary standards correctly.

More specifically, the circuit courts frequently consider how well the Board fulfills its requirement to meet the "clear and convincing evidence" standard. The "clear and convincing" standard is a moderately strict hurdle that parties must surpass to successfully prove their case

[71] Note that deportability is different from inadmissibility: admissibility questions occur when a prospective immigrant is trying to enter the United States; deportability questions occur when an immigrant, already present, is facing removal from the United States.

with evidence.[72] In *Laipenieks v. Immigration and Naturalization Service*, we observe a typical discussion of the Board's "clear and convincing" requirements:

> "Laipenieks argues that the INS failed to prove deportability on the basis of Section 1251(a)(10) by clear, convincing, and unequivocal evidence" (*Laipenieks*, 1428).[73]

The *Laipenieks* opinion continues with a reflection on how immigration courts and the BIA have variable applications of the "clear and convincing" standard.

> "This court has observed that in a situation where the hearing examiner and the Agency have reached opposite results, the appellate court's reviewing eye may be more searching" (*Laipenieks*, 1430).

Thus, when there is a discord between the levels of administrative court, the federal courts may be more likely to give a more thorough review even if the standard of review does not change *per se*. The same process occurs in the various levels of the Article III judiciary: if a district court and a circuit court reach different conclusions even when (and perhaps especially

[72] If we consider the three standards of proof in terms of the percent of certainty the evidence must provide, "preponderance of the evidence" requires 50.1% certainty, "clear and convincing evidence" requires approximately 66.6% certainty, and "beyond a reasonable doubt" requires 99.9% certainty. Thank you to John Ryan, Esq. for guidance on standards of proof.

[73] The addition of "unequivocal" to the "clear and convincing" standard is unique to immigration law. It has also been widely debated in case law to confusing results. Walsh argues that the addition of "unequivocal" makes the "clear and convincing" standard more stringent, more akin to "beyond a reasonable doubt" though not as absolute. But the case law she cites, she admits, is contradictory and unclear (Walsh 2018). For the purposes of this dissertation it is not immediately important what the actual standard of proof is in practice; instead, we are primarily focused on the consistency of asserting that standard and explicating whether the Board successfully meets its requirements.

when) the courts ostensibly use the same evidentiary standards, the Supreme Court must then parse which court more successfully interpreted and applied that standard.

Before moving on, let us consider the review standards upon which the BIA assesses immigration court cases as well as the review standards upon which the federal courts assess BIA cases. Before the Ashcroft reforms of 2002 (discussed in Chapter 2), the BIA was granted the ability to review both the facts of a case and the legal interpretation in that case *de novo*, or with no reference to how the facts or law were initially interpreted (Ashcroft and Kobach 2009). Since 2002 the Board is still entitled to *de novo* review of law but can no longer interpret a case's facts *de novo* (DOJ Practice Manual).[74]

[74] To quote Ashcroft and Kobach's argument against *de novo* review of facts on appeal: "Most immigration cases involve a sparse paper record and very few corroborating witnesses or none at all. Often the only live testimony is provided by the alien himself.…The most salient evidence of a 'well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion,' which is the central requirement for the granting of asylum, is usually the testimony of the alien himself. Thus, if the system is to render a correct judgment, an accurate evaluation of the alien's credibility is essential. Only the immigration judge has the opportunity to look the alien in the eye to assess his or her credibility….By engaging in *de novo* review of factual findings on appeal, the BIA was giving aliens two bites at the apple--two opportunities to present their facts (Ashcroft and Kobach 2009, 1993)." The Board, and especially the courts of appeals, have regularly supported asylum claims on limited physical evidence because, as a result of the conditions that led the immigrant to seek asylum in the first place, it is common to not have access to the required documentation to support a claim of asylum. Ashcroft and Kobach recognize this but do not give immigration judges the benefit of the doubt in communicating an immigrant's testimony on their asylum eligibility. And there is something to be said of their assertion that giving an immigrant "two bites at the apple" will compromise the integrity of the immigration apparatus. Their argument is specious, relying on procedural formalities to argue against the rights of potential immigrants (especially those seeking asylum). Case in point: in a set of reforms ostensibly crafted to respond to a glut of cases before immigration judges and the BIA, they propose *decreasing* the number of immigration judges and BIA members. If their focus was truly on easing the burdens of the system, they would surely increase the number of personnel on hand.

But the federal courts have retained *de novo* review rights over the BIA throughout recent history. This is evident in *Diallo*, where the court rules against the Board on all fronts *except* for its fact-finding:

> "We see no reason to question the BIA's factual determinations here. Upon *de novo* review of the BIA's application of its corroboration standard in this case, however, we conclude that its decision cannot be sustained because the BIA failed to (1) rule explicitly on the credibility of Diallo's testimony; (2) explain why it was reasonable in this case to expect additional corroboration; or (3) assess the sufficiency of Diallo's explanations for the absence of corroborating evidence" (*Diallo*, 287).

The court distinguishes between two related but nonetheless distinct court functions: fact-*finding* and fact-*application*. The Board in *Diallo* was fully successful in the finding phase, but not in the application phase.

We observe the court-as-fact-finder/court-as-fact-applier question even when (and perhaps most explicitly when) the case is somewhat ambiguous. In *Pickering*, the circuit court eventually rules against the Board on the grounds that:

> "the record used by the BIA to determine that the Canadian court acted solely for immigration purposes appear[ed] to be incomplete" (*Pickering*, 267).

However, the opening lines of the opinion appears to offer positive reinforcement for the Board's ability to act court-like on their ability to interpret the law.

> "Pickering first argues that the BIA's decision fails as a matter of law. However, a review of that decision and the applicable case law reveals that the BIA correctly interpreted the law by holding that, when a court vacates an alien's conviction for reasons solely related to rehabilitation or to avoid adverse immigration hardships, rather than on the basis of procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes" (*Pickering*, 266).

Interpretation of Statutes and Jurisprudence

Beyond engaging in evidentiary procedure, courts are well-suited to interpret statutory law for application to conflicts. Both agencies and courts are experts in statutory interpretation but for different reasons. Agencies, per their Weberian characteristics, are highly specialized in one or a few policy areas; this specialization comes from a close reading and application of the statute that governs the agency. For the immigration apparatus,[75] there are two primary

[75] This includes the various offices in the Department of Homeland Security that were at home in the Department of Justice prior to the origins of Homeland Security in 2002: Customs and Border Protection (mission statement: to "protect the American people, safeguard our borders, and enhance the nation's economic prosperity" (Customs and Board Protection n.d.).); Immigration and Customs Enforcement (mission statement: "ICE stands at the forefront of our nation's efforts to strengthen border security and prevent the illegal movement of people, goods, and funds into, within, and out of the United States. The agency's broad investigative authorities are directly related to our country's ongoing efforts to combat terrorism at home and abroad." (Immigration and Customs Enforcement n.d.).); and Citizenship and Immigration Services (mission statement: "[to administer] the nation's lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values" (Citizenship and Immigration Services n.d.).) in addition to the EOIR, the only remaining immigration office in the Department of Justice.

governing statutes: the Immigration and Nationality Act of 1952 (as amended most significantly by the Immigration and Nationality Act of 1965 and the Immigration Act of 1990) and the Illegal Immigration Reform and Immigration Responsibility Act of 1996. The various arms of the bureaucratic immigration apparatus have interpreted and operationalized the features of these statutes. Additionally, the immigration apparatus and all its contemporaries in the bureaucracy are tasked with interpreting and applying the APA for the day-to-day functioning of their offices. The courts, most famously in *Chevron*, have protected this statutory interpretation and application power for the agencies of the bureaucracy.

But courts have statutory interpretation powers that are both similarly deep but much broader. There is an immeasurably large literature on statutory interpretation by courts reaching back nearly a century[76] and as such I will not attempt to summarize it here. Suffice it to say, courts, especially at the federal level but also at the state and local levels, enjoy the ability to parse statutory language, apply that interpretation to the appropriate dispute, and prescribe remedies as a result of those interpretations.

[76] Diver places the first extended scholarly debate on legislative intent and statutory interpretation with the debate between Landis and Radin in the Harvard Law Review in 1930 (Diver 1985, Landis 1930, Radin 1930). Radin provided the following truism on the nature of statutes: "A statute is neither a literary text nor a divine revelation. Its effect is therefore neither an expression laden with innumerable emotional overtones nor a permanent creation of infallible wisdom. It is a statement of a situation, or rather of a group of possible events within a situation, and as such is essentially ambiguous. This word is a pejorative expression in the mouths of most persons and seems to suggest that an ambiguous sentence can have two contradictory meanings; that, for example, it can permit what it seems to forbid. But of course that is not what the word 'ambiguous' ought to suggest. A statement is ambiguous if there are two possible meanings - any two - and it can make no difference whether or not they partially contradict each other" (868). Landis suggested that the emphasis must lie "upon the honest effort of courts to give effect to the legislature's aims, even though their perception be perforce through a glass darkly" (893). This debate, over what Diver defines as epistemological and institutional accounts, would continue on in the literature for decades to come.

In weighing these two complementary but divergent institutional prerogatives, Farina distinguishes between two early judicial attempts to weigh the bureaucratic and judicial statutory interpretation duties. One, with an emphasis on judicial statutory interpretation draws from *National Labor Relations Board v. Hearst Publications, Inc.* (322 U.S. 111 (1944)). To quote Farina, this "'independent judgment model' [finds] the agency's function...analogized to that of an expert witness: its view of the proper meaning becomes a factor in the court's analysis, to be given whatever persuasive effect it appears to merit in the circumstances" (453-4). This view is contingent on the court's interpretation of the agency's grasp on legislative intent and statutory purpose, and the court's perspective on the credibility of the agency as an expert (fn 8). The second model, the "deferential model," drawing from *Packard Motor Car Co. v. National Labor Relations Board* (330 U.S. 485 (1947)), places the interpretive onus on the agency: "the agency's function is to give meaning to the statute: the court determines only whether the interpretation the agency has chosen is a 'rational' reading, not whether it is the 'right' reading" (454). This second approach eventually became the governing attitude through the *Chevron* decision and its ubiquity in case law and legal literature.

Though the *Chevron* decision put some of these debates to rest (or at least on ice), the question of contrasting statutory interpretation prerogatives is a common topic of discussion in the courts of appeals jurisprudence examined here.[77] The courts take it upon themselves to reflect on the ability of the Board to interpret the governing statutes identified above even though, as aforementioned, debates over their right to do so are extant and ongoing. Some of

[77] A more thorough discussion of *Chevron* specifically follows later in this chapter.

these discussions are very narrow, such as this passage regarding the interpretation of the word "entry" in *Caudillo-Villalobos*:

> "Aside from procedural complaints which we find to be without merit, the only question of substance here is the correctness of the determination by the BIA that appellant made an 'entry' into the United States after his conviction of a crime abroad involving moral turpitude. We think it clear that such an entry was made when the facts are considered in light of the language in [the statute]" (*Caudillo-Villalobos*, 1).

The court here asserts that the Board should have interpreted "entry," in light of the facts of the case, in the positive (i.e. that an entry was made). The decision, then, should hinge on the Board's interpretation of the term.[78]

Further, the Board, in order to act best as a court, must have an advanced ability to interpret and apply "legal standards" such as statutory and doctrinal language.

> "Having corrected the BIA's legal errors, we could now remand for application of the identified legal standards" (*Canas-Segovia*, 727).

One of the best examples of this concern is in *Diallo*. Diallo, a Mauritanian national, applied for asylum and a withholding of deportation due to legitimate human rights concerns (the systemic shunting of Black Mauritanians by the white-dominated government to internment

[78] Of note: this is the entirety of the *per curiam* decision. The Board's decision was upheld due to their correct interpretation.

camps in neighboring Senegal frequently after torture and destruction of property and citizenship paperwork). Due to Diallo's refugee status and the unique hardships he faced in Mauritania, he was unable to produce the several pieces of evidence that the Board asked for to determine his asylum and deportation claims. Because of the unique human rights questions, the Board was required to consider international statutory language (the Handbook of the United Nations High Commissioner for Refugees) in addition to relevant domestic law. The Board found in favor of Diallo and against the Board as a result of many fatal errors in the Board's reasoning. I will not explicate all of the rationales here, but it is worth examining the following passage on the Board's inability to innovate as a result of governing domestic and international law as well as due to the intricacies of the case at hand:

> "The BIA only casually acknowledged the UNCHR's general explanation and, more importantly, wholly failed to acknowledge Diallo's own particular explanations for his inability to provide further corroboration. The BIA's failure to address Diallo's explanations violates both the letter and the spirit of its own standard, which specifically provides that, even under circumstances where corroboration may reasonably be expected, petitioners may meet their burden of proof by offering a believable and sufficient explanation as to why such corroborating evidence was not presented" (*Diallo*, 289-290).

By (intentionally or unintentionally) eschewing the considerations required of cases involving mitigating human rights concerns, the Board did Diallo a disservice.[79] The above statement is a particularly damning one, for it not only argues that the Board acted incorrectly as a court, but it also acted contrary to its own principles.

Another important and frequently occurring issue in statutory interpretation appears in the *Caudillo-Villalobos* decision: determining whether a crime of moral turpitude has been committed. Crimes of moral turpitude is a category of legal offenses that is primarily related to immigration, specifically as it relates to defining a rationale for denying entry or deportation. The definition of "crimes involving moral turpitude" is not entrenched in statute; instead, it has been explicated through federal case law.[80] Citizenship and Immigration Services, in their policy manual, points to *Medina v. United States* (259 F.3d 220 (2001)) as the source of their operational definition: "moral turpitude 'is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general'" (*Medina,* 227; Citizenship and Immigration Services n.d.). The agency, using this definition, suggests four primary categories: crimes against a person ("criminal intent or

[79] This is not to say that the courts of appeals, when assessing appeals from the Board, universally give human rights claims wide latitude. In *Mei Fun Wong v. Holder* (633 F.3d 64), the 2nd Circuit Court of Appeals held that forceable insertion of an intrauterine device (IUD) does not constitute involuntary sterilization and thus is not a legitimate grounds for granting asylum.

[80] This is by design: *Cabral v. INS* (15 F.3d 193 (1994)) cites a passage in the hearings before the House Committee on Immigration before the passage of the Immigration Act of 1917 where a congressman notes, "[y]ou know that a crime involving moral turpitude has not been defined. No one can really say what is meant by saying a crime involving moral turpitude…" and Justice Jackson's commentary in *Jordan v. De George* (341 U.S. 223 (1951), 233-4) on the statement: "despite this notice, Congress did not see fit to state what meaning it attributes to the phrase 'crime involving moral turpitude.'"

recklessness, or is defined as morally reprehensible by state (may include statutory rape)"), crimes against property ("involving fraud against the government or an individual (may include theft, forgery, robbery)"), sexual and family crimes ("It is difficult to discern a distinguishing set of principles that the courts apply to determine whether a particular offense involving sexual and family crimes is a CIMT….Offenses such as spousal or child abuse may rise to the level of CIMT, while an offense involving a domestic simple assault generally does not….In general, if the person knew or should have known that the victim was a minor, any intentional sexual contact with a child involves moral turpitude."), and crimes against authority of the government ("presence of fraud is the main determining factor (may include offering a bribe, counterfeiting)"; Citizenship and Immigration Services n.d.).

Since moral turpitude is a foundational concept in immigration case law, it follows that extended discussions of whether crimes rise to the level of moral turpitude and, more importantly, whether the BIA correctly makes that judgment are common in the case law. Consider *Goldeshtein*, a case involving a German national convicted of intent to defraud:

> "Even if intent to defraud is not explicit in the statutory definition, a crime nevertheless may involve moral turpitude if such intent is 'implicit in the nature of the crime'…*Matter of Flores*, 17 I & N Dec. 225, 228 (BIA 1980) ("where fraud is inherent in an offense, it is not necessary that the statute prohibiting it include the usual phraseology concerning fraud in order for it to involve moral turpitude"). The INA asserts that, despite the absence of intent to defraud in the statutory definition of Goldeshtein's offense, such

> intent is part of its 'essential nature.' We disagree" (*Goldeshtein*, 648).

The Board's misstep here was relying on incorrect analogies to define the crime at issue. The court argued that Goldeshtein's crime was not defined by the sort of fraudulent behavior required to be a crime of moral turpitude and thus is not a deportable offense. This exhibits, to the court, inadequate statutory action.

> "True, the government is deprived of information, but that is only a consequence of conduct that is not of a fraudulent character. We conclude that fraud is not inherent in the nature of this offense" (*Goldeshtein*, 649).

Thus, the Board's decision incorrectly interpreted the crime as one of moral turpitude.

A later application of the issue, in *Tejwani v. Attorney General of the United States*, explains how the Board interpreted the crime as one containing moral turpitude and how the Board's interpretation was incorrect:

> "Tejwani argues that the BIA erred in concluding that money laundering, evaluated under the categorical approach, met the definition of moral turpitude used by the BIA….These elements do not meet the criteria the BIA relied on in holding that Tejwani's offense met its definition of moral turpitude. The BIA focused on the fact that a money launderer takes 'affirmative steps to conceal or disguise the proceeds of criminal conduct[,] acts in an inherently deceptive manner and impairs governmental function, specifically

> the ability to detect and combat criminal activity.' The BIA further stated that 'such interference in governmental function is inherently dishonest and contrary to accepted moral standards.' Here, however, we have a problem: deception and knowingly or recklessly concealing criminal conduct from the government are neither elements of money laundering nor inherent characteristics of the offense" (*Tejwani*, 723).

This decision goes beyond the question of defining moral turpitude; in the final sentence of the passage the court alleges that the Board incorrectly interpreted the essential features of the crime itself.

Adherence to Precedent

Further, courts are called upon to remain faithful to (and, when necessary, to actively eschew) the precedent set by past and present courts.[81] This unique feature of courts that the other branches of the federal government are not beholden to (at least officially) is an important one; in fact, Justice Cardozo argued that "adherence to precedent must then be the rule rather

[81] The most widely cited modern defense of *stare decisis* comes from O'Connor's majority opinion in *Planned Parenthood v. Casey*: "[t]he rule of *stare decisis* is not an 'inexorable command'....Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case" (*Planned Parenthood*, 854).

than the exception if litigants are to have faith in the even-handed administration of justice" (1921, in Segal and Spaeth 2002). The question of precedent is inextricably entwined with the entrenched debates over what influences justices in their decision making. Those scholars who argue that the Supreme Court is beholden exclusively to law when deciding cases (fewer and further between in this era) are the strongest proponents of a theory that would find that justices are restricted by the strictures of precedent (Gillman 2001). I introduced the judicial decision making question earlier in this dissertation while discussing coding for a judge's political and partisan stature and thus will not reintroduce it here.

But we must reflect on how the question of precedent is dramatically different depending on which court we discuss. There are inherent differences in how the Supreme Court and the lower federal courts interact with precedent, let alone differences in how the Article III judiciary interacts with precedent as compared to the impact of precedent on administrative court decision making. Without entering feet-first into a literature that has been entrenched in debate for many decades, let us consider the legal forces which the Supreme Court is beholden to. As the highest court in the land, the Supreme Court's decisions are not immediately subject to review by any other judicial authority. Their decisions can be overturned over time through new interpretations of statutes by future iterations of the Court or through what Caminker defines as "a [lower court] judge simply [refusing] to follow a Supreme Court precedent that she considers lawless, aware that her decision will face reversal on appeal but nevertheless [committing] to exercising her small universe of judicial power in accord with her best legal skills and conscience" (1994, 818-9). Any non-Supreme Court federal court, in contrast, is accountable to at least one other higher court who can review and overturn their decision. Being able to decide a case without immediate accountability perhaps gives the Supreme Court more latitude in the rationales that undergird

their decision making behavior. According to Cross in his study of decision making in the courts of appeals, legal variables are far more explanatory than partisan ones (Cross 2007); this echoes the literature cited in chapters 1 and 2 on circuit court decision making. For the purposes of understanding precedential adherence in the courts of appeals, we can conclude (cautiously) that the judges on the courts of appeals hold a stronger fidelity to precedent due to their institutional stature in the Article III hierarchy.

The administrative judiciary's relationship with precedent is, as far as I can discern, unexamined in the literature and since I do not have data to support an argument I will not claim to have a measured conclusion. But the Board, if it is a court, should be able to follow the rules defining how precedent is followed or transcended.

In cases like *Dillingham* where the Board does not employ these principles of precedent, the circuit court is quick to note this and provide instructions moving forward.

> "The BIA erred when it found that 'the expungement of [Dillingham]'s conviction is akin to a foreign pardon and is therefore ineffective for immigration purposes. Ignoring our prior equal protection decisions in *Garberding, Paredes-Urrestarazu,* and *Lujan-Armendariz*, the Board ruled that Dillingham failed to satisfy the fourth criterion of *Manrique*, because he was rehabilitated under a foreign (as opposed to a state) statute, and because as a general policy matter the Board has never recognized foreign pardons of crimes as moral turpitude. By likening foreign expungements of simple drug possession offenses to foreign pardons of crimes of moral turpitude—a category of crimes for

> which Congress has not enacted a domestic rehabilitation statute analogous to the FFOA—the Board improperly skirted the constitutional issue of differential treatment in this case. Unfortunately, as a result of the Board's false comparison, we can glean little use from its opinion" (*Dillingham*, 1007).

We observe the court, who expected the Board to adhere to the precedent set out in the four cited opinions, excoriating the Board for not adhering to those doctrines. We observe a similar scenario in *Robles-Urrea*, though the court takes its precedent prescription one step further:

> "The BIA's holding would result in a peculiar rule: even where a principal offender has not committed a crime involving moral turpitude, a person who conceals that crime—and who thereby commits misprision of a felony—might be considered to have done so" (*Robles-Urrea*, 710).

Here the court does not consider the Board's adherence *to* precedent; instead, the court discusses how the Board could *create* precedent. The precedent that would have been created by the *Robles-Urrea* had the decision been upheld by the court would have been very strange; as such, the court was quick to overturn the decision. The court continued on to say:

> "We have severe doubts as to the merits of each of the government's arguments as to why the agency could conclude that, even if misprision of a felony is not categorically a crime involving moral turpitude, Robles-Urrea's conviction was for a morally

> turpitudinous crime. Nonetheless, we recognize that the BIA is entitled to conduct the analysis in the first instance. See *Ventura*, 537 U.S. at 16 ("Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands.") We therefore remand so that it may do so….On remand, the BIA may also consider whether Robles-Urrea is removable under [U.S. Code] as an alien who 'has been an illicit trafficker in any controlled substance,' and whether he may be entitled to any form of relief from removal" (*Robles-Urrea*, 712).

The court, here, provides explicit instructions as to what the Board must reconsider so that their decision falls in line with the court's interpretation. When the two passages from *Robles-Urrea* are taken in concert, the court provides the Board both a prescription of the issue and a suggestion for future action to avoid further shortcomings.

To conclude, let us return to the *Gertsenshteyn* opinion. While reflecting on Gertsenshteyn's alleged crime, the Board (according to the court) departed from both court and Board precedent without providing a sound reason for doing so.

> "In the precedential opinion that the BIA issued in this case, it has taken a new approach. But it has done so not by reinterpreting [U.S. Code], the provision whose wording let it—and us—to adopt the categorical approach in the first place. Rather, it has focused entirely on a subpart of Section 1101(a)(43), the provision of the INA that defines 'aggravated felony.' The BIA has authority to

> interpret that provision, and its interpretation—specifically, its sensible reading of the phrase 'commercial advantage'—may well merit deference should the BIA reassert in this case (on remand) or in others. But the BIA's discussion of Section 1101(a)(43)(K)(ii) gives us no reason to depart from its, and our own, precedents regarding the more fundamental question of what is required of the agency—in the interests of both fairness and efficiency—when an alien's removability hinges on the existence of a prior conviction, however that conviction is defined….The BIA's decision in this case departs, with insufficient reason, from the legal framework that we have long used to decide whether an alien charged with removability under [U.S. Code] has been convicted of an aggravated felony. And we are not confident of what result it would reach under the proper framework" (*Gertsenshteyn*, 146-149).

Even given all of these intra-opinion discussions about judicial activities and how the Board does or does not meet the expectations of a court, the courts of appeals generally provide the Board the benefit of the doubt regarding its ability to act court-like. In *Chun Hua Chen*, for example, the Board does not explicitly state that they addressed the exhibits provided in the affidavit, but the court nonetheless says:

> "Furthermore, while the BIA did not address each of the exhibits accompanying the Aird affidavit, was not required to do so, and

> there is no indication that it did not consider them in rendering its decision" (*Chun Hua Chen*, 653).

This is direct evidence that, in this case at least, the court has a great deal of trust in the Board and its ability to determine how best to provide a satisfactory decision and opinion. The same discussion occurred later in *Liadov*:

> "However, both the BIA and the Attorney General have steadfastly maintained that the time limit is mandatory, and the BIA's reference to its self-certification authority in this case was a reaction to the unwarranted judicial demand for an exception imposed by Oh and Sun rather than a change of agency position. Therefore, the refusal to self-certify may not be reviewed on the ground that the agency itself treats the appeal time limit as non-mandatory….Thus, the failure of a courier to make a timely delivery is not 'an extraordinary circumstance that would justify intervention by this court into the Board's exercise of discretion'" (*Anssari Gharachedaghy v. INS*; *Liadov*, 1011-1012).

This is suggestive of deference doctrine even though the court does not rely on *Chevron* in this case: the court is allowing the Board to dictate how it functions in the day-to-day without interference from the court telling the Board how, in fact, to function in the day-to-day.

But when the Board is not given the benefit of the doubt, it is typically because the court accuses the Board of assuming too much when interpreting facts, statutes, or doctrine. This is important: as powerful as suggestions on how to act like a court are for the Board, it is almost

more powerful when the court, in suggesting that the Board is taking their court-ness too much for granted, corrects the Board's course of action and redirects it towards the correct judicial path. Consider *Maldonado-Cruz* on this point:

> "The BIA based its decision solely on the legal issues considered above. The BIA's refusal to consider credibility leads to the presumption that it found the petitioner credible" (*Maldonado-Cruz*, 792).

A similar sentiment is communicated in *Canas-Segovia*:

> "Although the BIA considered the relevant Handbook provisions, it dismissed them as ambiguous and not dispositive. We disagree. The Handbook unambiguously supports the Canases' claims" (*Canas-Segovia*, 724).

In both cases, the court reminds the Board that there are steps that cannot regularly be overlooked when acting judicially. As well as the Board acts like a court, there still needs to be semi-regular reminders to stay abreast of the requirements of judicial actors.

Chevron and Deference in Action

It goes without saying that the question of deference, ubiquitous in discussions of administrative law, flourishes in primary and secondary source discussions of immigration law ("The history of immigration jurisprudence is a history of obsession with judicial deference" (Cox 2007, 1671).). Throughout the one hundred and sixteen dyads that comprise this dissertation's data, the courts constantly discuss the ways that deference restricts their behavior

and how particular circumstances arise that allow courts to transcend those restrictions, while noting that "[the courts'] review[s] of the interpretation of the Board 'is not a license for [the courts] to judge the wisdom, fairness, or logic of legislative choices'" (*Rivas*, 1330). The reflections on deference in the case law appear throughout the entire time period under analysis, but they find new purchase in the years after the *Chevron* decision. Further, these deference conversations also take place in post-*Chevron* cases that do not cite the doctrine. Consider this lengthy passage from *Castillo v. INS*, where the court discusses a claim of abuse of discretion by the BIA.

> "Petitioner recognizes that there can be no judicial interference with the discretionary action of the Board except on a showing of abuse of discretion or that discretion was, in fact, not exercised at all….He contents, however, that the Board did abuse its discretion when it relied upon the fact that he did not enter the United States as a bona fide nonimmigrant as a 'persuasive factor' in denying his application for status as a permanent resident under [statute]….Petitioner contends that Congress, by elimination of entry as a bona fide nonimmigrant as a statutory requirement of status under section 245, also made entry as a bona fide nonimmigrant without significance in the exercise of discretion under the section. By relying on a factor which Congress could not have intended to apply, the Board, petitioner contends, abused its discretion in denying his application. We do not agree….Petitioner further contends that, in fact, discretion has not been exercised at

> all in this case because his application was denied pursuant to an arbitrary policy of the BIA to exclude from the benefits of Section 245 all aliens who did not enter as bona fide nonimmigrants, and that his application was denied solely on that ground. We find no merit in this contention" (*Castillo*, 4).

The opening statement of this passage recognizes the privileged position the Board occupies wherein space is provided for the Board to adjudicate disputes without fear of retaliation unless there is a clear abuse of discretion that warrants a sanction. That said, Castillo argues that the Board *did* abuse its discretion and systematically documents each claim against the Board. But on each point the court returns with a brief but clear defense of the Board and its latitude to decide cases within their purview. This is a clear example of deference discussion independent of the *Chevron* lens.

These discussions become more explicit and clearer when *Chevron* is cited and interpreted. In *Mei Fun Wong v. Holder*, for example, the court quickly walks through *Chevron's* two steps (see Chapter 1).

> "In so holding, we observed, first, that the INA is silent as to whether IUD insertion constitutes sterilization. Second, we determined that the BIA's conclusion that involuntary IUD insertion did not constitute involuntary sterilization was reasonable and, therefore, entitled to deference" (*Mei Fun Wong*, 71).

A more robust example comes from *Lettman v. Reno*, where we observe the court fill in the interpretive gaps while applying *Chevron's* two steps.

> "We find nothing to compel the BIA to conclude that Congress intended those convicted of firearm offenses to be treated differently than those convicted of aggravated felonies. On the contrary, giving the grounds parallel treatment is consistent with Congress' intent to 'make the [INA] more rational and easier to understand.'…We also find nothing in IMMACT to compel the BIA to conclude that Congress meant to preserve and 'merely redesignate' the old version of the aggravated felony ground. Congress did not evince intent to make piecemeal changes, but rather intended to 'provide[] for a comprehensive revision of all the existing grounds for exclusion and deportation.' The BIA reasonably included the aggravated felony ground among those 'comprehensive revisions. Accordingly, we hold that, as with firearms offenses under *Lopez-Amaro*, the BIA reasonably concluded that an alien is deportable if convicted of an aggravated felony at the time of entry" (*Lettman*, 1372).

Here the court claims that it could compel the Board to interpret firearms offenses in one way under IMMACT, but it instead argued that the Board's interpretation of IMMACT to include firearms offenses under those "comprehensive revisions" was a perfectly sound interpretation under *Chevron* and thus the Board's interpretation stood against scrutiny. This is common in the post-*Chevron* era, though it is not unique to the post-*Chevron* era. As we found in chapter 3, deference was as common before the *Chevron* decision as it was after the *Chevron* decision. But

after *Chevron* we are privier to explicit discussions of deference since the courts were given a new language to discuss these issues.

Undergirding judicial discussions of deference are perspectives on Congress and congressional statutory intent. *King v. Katzenbach* is an excellent introduction to this, for its summary synthesizes debates over congressional intent and several other means through which a court could be given interpretive latitude under *Chevron*.

> "In summary, the rules of grammar, the administrative interpretation, the legislative history, and the leading commentators, all without exception, require the affirmance of the finding that the petitioner is statutorily ineligible…" (*King*, 307).

Complementing the *King* excerpt, the *Git Foo Wong v. INS* decision explicitly refers to the congressional language and the interpretation of that language that leads to an anti-Board decision.

> "We conclude, then, that it effectuates congressional purpose to construe the intent exception to section 101(a)(13) as meaning an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence" (*Git Foo Wong*, 153).

The combined effect of the *King* and *Wong Chevron* discussions is to take Congress seriously in the statutory process but not to over-rely on Congress' decision making posture when adjudicating a deference dispute; this is evidenced by the relatively short time spent by courts on *Chevron'*s first step. But the *Kofa* decision urges caution in over-exerting interpretive muscle at

the expense of Congress and its preferences. According to *Kofa*'s author, it is objectionable for anyone but Congress to extoll the requirements of any given statute.

> "Petitioners urge us to look at the legislative history surrounding, and some written even after, the passage of the 1990 amendments to Section 1253(h)(2). However, the first place where we must look to see if Congress has spoken to the issue with which we are concerned and whether Congressional intent in that regard is clear is on the face of the statute. Statutory construction must begin with the language of the statute….To do otherwise would assume that Congress does not express its intent in the words of statutes, but only by way of legislative history, an idea that hopefully all will find unpalatable" (*Kofa*, 1088).

Kofa is an important reminder that statutory interpretation is hardly a judiciary-only phenomenon, or, at the very least, that the other branches have similarly important roles to play in the statutory interpretation process. *Chevron*'s strength lies in its status as a doctrine that affects all branches of government. Thus, a discussion of *Chevron* is an opportunity for courts to reflect on their status in an interbranch administrative state. *Kofa's* assertive defense of Congress is one variety of these discussions, but the more common interbranch discussion takes the form of this paragraph in *Shaar*:

> "Perhaps, as the Shaars suggest, the INS and the BIA could manipulate the system so as to treat aliens unfairly for arbitrary or downright improper reasons. Perhaps those entities could do that by injecting unexpected delays into the setting of a hearing of a

> very timely petition to reopen, while denying extensions of time to depart. We, however, have no reason to think that the agencies will do so, nor is there the slightest hint that they did so here. If anyone has attempted to manipulate the system, it is the Shaars, who waited until the eve of their scheduled departure to ask for the relief they now seek. We can detect no violation of the Constitution" (*Shaar*, 958-959).

Here we observe a pointed defense of the immigration system against claims that the system is biased against immigrants and their claims, and it is clear evidence of an alliance between courts and agencies on immigration issues.

But just because *Chevron* could apply does not necessarily mean that *Chevron* will be applied in the agency's favor; given how ubiquitous and widely cited the doctrine is and given its reputation as a doctrine that far more often than not benefits agencies, this is important to recognize. As we observed in chapter 3, the presence of the *Chevron* doctrine does not mean that the courts will defer to agencies every time. The dataset includes several cases where *Chevron* analysis begins but does not complete to a satisfactory conclusion for the Board. Consider *Blake*, where the court was ready to apply *Chevron* but was stymied by the government and its failure to argue that an ambiguity exists:

> "If the statutory language is clear, however, 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' *Chevron*. The BIA, through powers delegated by the Attorney General, enforces and interprets the INA and thus the authority to fill statutory gaps with

> reasonable interpretations. The government would stand on firm *Chevron* ground, then, if it could point to an ambiguity in Section 212(C). But the government has failed to suggest one" (*Blake*, 100).

The *Ndayshimiye* court at least gets to Step 1 before concluding the Board acted incorrectly.

> "We conclude that the BIA's interpretation of the 'one central reason' standard is in error only to the extent that it would require an asylum applicant to show that a protected ground for persecution was not 'subordinate' to any unprotected motivation. That particular term is inconsistent with the plain language of the statute, cutting off our *Chevron* analysis at step one….Therefore, we hold that once the term 'subordinate' is removed, the BIA's interpretation constitutes a reasonable, valid construction of Section 208's 'one central reason' standard" (*Ndayshimiye*, 129).

What is interesting about the *Ndayshimiye* opinion, however, comes after the court stops at *Chevron* Step One. The court then provides a solution for the Board so that it can later surpass *Chevron* scrutiny. Here the court asserts its interpretive power over the Board, but also gives the Board the power to prevail in similar cases moving forward through identifying exactly what needs to be changed.

Bautista, in contrast, makes it to *Chevron* Step Two but ultimately rules against the interpretive prerogatives of agencies.

> "Here, we find that the BIA's construction with respect to the classification of state convictions as aggravated felonies under section 101(a)(43)(E)(i) is inconsistent with Congress' expressed intent. ¶ …While we sympathize with this view, not every difficult question of statutory construction amounts to a statutory gap for a federal agency to fill….To conclude otherwise would be to find that every time there is a disagreement about statutory construction, we accord deference to agencies. This is not what *Chevron* instructs us to do" (*Bautista*, 58).

According to the court here, just because an agency is entitled to deference under *Chevron* does not mean that the agency will win in every case where the decision is borderline. This is a careful reminder that *Chevron* is not a blunt-force tool for ceding interpretive power to agencies; instead, it is a deliberate and measured means to calculate the balance of interpretive power across institutions. Further, *Chevron* is not meant to legitimize the content of the agency's interpretations; instead, it is simply acknowledging correct interpretive procedure. We observe this distinction in *Mei Fun Wong*:

> "By deciding that the BIA reasonably resolved this statutory ambiguity, we do not suggest that the agency could not have made a different choice. We conclude only that the choice it made was not unreasonable. One reason courts do not second-guess a reasonable executive branch choice about the showing necessary to demonstrate persecution under the INA is that the answer necessarily implicates foreign relations, an area where, as the

> Supreme Court has cautioned, the "judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of [potential] diplomatic repercussions." (*INS v. Aguirre-Aguirre*, 526 U.S. at 425.) In such a context, we "must take appropriate account of the greater immigration-related expertise of the Executive Branch, of the serious administrative needs and concerns inherent in the necessarily extensive INS efforts to enforce this complex statute, and the Nation's need to speak with one voice in immigration matters." (*Zadvydas v. Davis*, 533 U.S. 678, 700, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001)). Of course, if Congress takes a different view, it remains free to amend the statute, as it did in 1996, to identify certain conduct as categorically persecutive" (*Mei Fun Wong*, 75).

Chevron simply requires a reasonable interpretation by the agency, not necessarily the "correct" decision, for only an expert in the subject area can speak conclusively as to the "correctness" of the decision. According to the court in *Mei Fun Wong*, those experts are all actors besides the court making the decision.

Before we conclude this section, let us take a closer look at the cases immediately preceding and following the *Chevron* decision. Table 4b lists the cases whose circuit court opinion was decided in the five years before and after *Chevron*.

Table 4b: Pre- and Post-*Chevron* Cases

Pre-*Chevron* Case	Year Decided		Post-*Chevron* Case	Year Decided
Ruangswang	1978		*Laipenieks*	1985
Lee	1978		*Kulle*	1987
Von Pervieux	1978		(Name Redacted)	1988
Wang	1979		*Maldonado-Cruz*	1989
McMullen	1981		*Canas-Segovia*	1990
Hill	*1983*			

Of the eleven cases, all but two (*Wang* and *Hill*) are active deference or active non-deference cases. (Note that these two came prior to *Chevron*.) The six pre-*Chevron* cases are divided evenly on deference and non-deference, and the five post-*Chevron* cases are coded as active non-deference except for *Kulle* (active deference). Three pre-*Chevron* cases (*Ruangswang, Lee,* and *McMullen*) are "application of statute" cases; only one (*McMullen*) is an "application of facts" case. In contrast, all six post-*Chevron* cases are "application of facts" cases.[82] This suggests that in the immediate term following *Chevron* the courts were particularly careful to parse the factual posture of the cases before them that could utilize *Chevron* deference. Two of the cases ((Name Redacted) and *Canas-Segovia*) are also coded as "application of statute" cases, which is to be expected after the development of a doctrine like *Chevron* whose goal is a standardized language for considering statutory application and interpretation.

To conclude this discussion of *Chevron* and this chapter on explicit guidance from courts to agencies on best judicial practice, let us dissect the final paragraph in the *Blake et al v. Carbone* opinion. After a decision ruling in favor of the immigrant petitioner, the court clearly discusses how the Board was deficient and what actions it can take moving forward to avoid

[82] See Appendix D for details.

anti-Board cases like this one in the future. The court leaves no room for interpretation on the BIA's mistakes.

> "The past thirty years have highlighted the difficulties that arise when constitutionally problematic legislation is juxtaposed with judicial stitchery and administrative attempts at coalescing the two. Francis expanded the sweep of § 212(c); Congress's only response was to limit and then repeal the statute; and the task of reconciliation unfortunately fell on the BIA. While hindsight might pin much of this confusion on Francis, we are bound to finish what our predecessors started. The BIA is therefore directed to determine whether petitioners' underlying aggravated felony offenses could form the basis for exclusion under § 212(a) of the INA as a crime of moral turpitude. In particular, the BIA must consider whether Blake's first degree sexual abuse of a minor conviction, Ho Yoon Chong's racketeering conviction, Foster's first degree manslaughter conviction, and Singh's second degree murder conviction, could each form the basis of exclusion as a crime involving moral turpitude. If so, the merits of each petitioner's § 212(c) applications should be considered. The petitions for review are GRANTED; and the cases are REMANDED to the BIA for further proceedings consistent with this opinion" (*Blake*, 105).

Chapter 5: Conclusion

This dissertation sought to understand deference in the administrative state through a close quantitative and qualitative examination of interpretive behavior in administrative courts and Article III courts' responses to those interpretive actions. Further, the dissertation provided a new methodological approach to understanding how disparate courts interact to (potentially) affect lasting change on the institutions in the process.

The project proceeded in four steps. The introduction and Chapter 1 explained the phenomenon under analysis and situated the project in both legal and political science literatures. I discussed the features of courts and agencies that undergird the relationship that lends itself to deferential behavior. I redefined deference, a term that has been topic of extensive discussion in the last forty years but that was missing a key feature: the *intent* of the deferrers. I suggested three reasons why judges may defer. First, an Article III court might defer to an administrative court by the advice of *Chevron v. National Resource Defense Council* (1984). *Chevron* was an explicit declaration in favor of deferring to agencies on the subject matters of which they are an expert. To do so, it introduced a two-step test to determine whether deference should be applied. The court must first determine whether the issue at hand has been preempted with congressional instructions. If Congress has already spoken to the issue, their prescription is used. But if Congress has not spoken to the issue, the court must determine whether the agency's solution is within the bounds of their governing statute. This is a low bar that agencies frequently surpass. A

doctrinal explanation would produce results that identify low levels of deference prior to the *Chevron* decision and high levels after *Chevron*.

Second, an Article III court might defer to an administrative court when the courts are staffed by co-partisans. The operating motivation here is not partisanship *per se*; instead, it is the perception across institutions that decisions made by one institution will find common ground with those comprising the companion institution. I reflect on the extensive literature on judicial decision making and the ways that partisanship is measured by political scientists; I find that the judicial decision making literature, though primarily focused on Supreme Court judicial behavior, can offer insights on how to assert a partisan identity on non-Supreme Court judges. A partisan explanation would produce results that identify low levels of deference among judges in different parties and high levels of deference among judges belonging to the same party.

Third, an Article III court might defer to an administrative court when the Article III court would like to communicate instructions on good judicial practice to administrative law judges. Drawing from interbranch institutionalism, this theory suggests that courts might abdicate some of their interpretive power to another judicial body to promote the interpretive acumen of the administrative state at large. Article III courts, according to the theory, provide instructions to agencies in opinions that are directly related to the functions the agency serves. A cooperative explanation would produce results that identify low levels of deference in opinions that do not feature active language for or against an agency and its actions and high levels of deference in opinions that do feature active language for or against an agency.

To test this novel theory, I utilize a new approach to identifying deference that is introduced and explained in chapter 2. Using the universe of precedent decisions at the Board of Immigration Appeals, I identified each decision where there was a companion case in the various

courts of appeals. This created dyads of cases (n = 116) that provide the opportunity to trace a dispute through two different judicial institutions. I coded each dyad on several variables (described in detail in Appendices C and D) that provided analytical leverage on all three theories.

Upon explicating the research design and case selection featured in this dissertation, I introduce the four forms of deference. If a court rules in favor of an agency and there is evidence in the text of the opinion that the court is actively deferring to the agency, then we can code this instance as "active deference." If a court rules in favor of an agency and there is no evidence in the text of the opinion that the court is actively deferring to the agency, then we can code this instance as "passive deference." If a court rules against an agency and there is no evidence in the text of the opinion that the court is actively not deferring to the agency, then we can code this instance as "passive non-deference." If a court rules against an agency and there is evidence in the text of the opinion that the court is actively not deferring to the agency, then we can code this instance as "active non-deference." In this deference scheme, even non-deference has theoretical significance. When a court provides rationales directly related to the actions of the agency, it is the rationale rather than the outcome that matters. When we combine an agency's outcome in court with active language either for or against the agency's actions, we can confidently make conclusions about judicial intent regarding administrative behavior in a way that is impossible when solely relying on win rates.

Chapters 3 and 4 use the coded data to test the three theories of judicial deference to administrative agencies. Chapter 3 investigates the partisan and doctrinal explanations. Prior to providing causal analyses, I introduce the dyadic data in tabular form. Of note: there are approximately the same number of cases decided before and after the *Chevron* decision. This

suggests that any differences between cases due to more deference cases after the *Chevron* decision are unlikely to occur. Utilizing logistic regression, I tested partisan variables for the entire time period under analysis (approximately 1940 to 2016). We observe no indications that partisanship has a causal effect on win rates or deference type. But when we disaggregate the data by pre- and post-*Chevron* status (read: cases before 1984 and cases after 1985), we observe moderate partisan effects prior to *Chevron* that disappear among cases after *Chevron.* The key observation of these doctrinal regressions is the strong causal relationship between win rates and deference type and whether a case is decided *per curiam*. Drawing on the literature on *per curiam* opinions, I argue that this suggests courts anonymize (or decide a case as an institutional unit rather than as individuals) in situations where the court is ruling in favor of an agency but not providing positive reinforcement for good judicial and administrative behavior by the BIA. But when the court feels compelled to comment on the Board's activity, the court will infrequently decide as one body and instead indicate an author.

Here it is important to reconsider the potential effect immigration as a policy area could have on deference behavior between the federal courts and the Board of Immigration Appeals. Since immigration policy is a cross-cutting political issue that does not always neatly fall along partisan lines, partisan match could be less explanatory for the Board than for another administrative court that litigates on an issue that is more distinct along partisan lines (such as the National Labor Relations Board and labor policy). Further, and as a result of the relative ambiguity of immigration policy, deference could serve political ends. Because of this, *Chevron* might be explanatory not because of the doctrine itself, but because it can provide a cover for more political reasons for deference. Another case study using an administrative court focused on a more politically binary issue could help tease this out in future research.

After considering the partisan and doctrinal explanations, chapter 4 investigates the interbranch theory of deference by courts to agencies. The first section examines three activities that are prototypical actions and prerogatives of courts: evidence and evidentiary procedure, statutory and jurisprudential interpretation, and adherence to precedent. I identified examples in the text of circuit court opinions that feature judicial instructions to the judges of the BIA. In each instance, the court of appeals either actively approved of or disapproved of how the Board engaged in these three judicial activities. The second section focuses on *Chevron* deference specifically. Echoing the insights garnered from the regression data in Chapter 3, the qualitative data suggest that *Chevron* did not automatically increase the number of cases where the Board was successful or where the circuit court spoke explicitly on the Board's actions. Examples of explanations on deferential behavior provided by the courts of appeals are provided throughout.

The two empirical chapters together provide a comprehensive examination of how deference occurs. Importantly, the two chapters suggest that no theory (of the three examined) completely explain why courts defer to agencies; instead, deference can be explained in the overlapping space between the three. We observe that partisan match does not explain agency outcomes in court or the presence/absence of explicit language on deference to a statistically significant degree, and we find that whether a circuit court decision is decided *per curiam* is explanatory throughout the universe of cases, but especially in the post-*Chevron* era for both dependent variables. When the qualitative insights from Chapter 4 are layered on top, we identify the features of the active deference and active non-deference that we cannot observe simply with the quantitative results. Together, then, the quantitative and qualitative chapters (1) consider why (non-)deference might occur, and (2) what that (non-)deference could look like in action.

Avenues for Future Inquiry

This dissertation provides significant theoretical and methodological insight on the presence and strength of deference in the years before and after *Chevron*. It also introduces new questions to investigate in subsequent studies.

How can we better measure agency/administrative court partisanship?

A methodological challenge arose when assigning partisanship to non-Supreme Court actors, particularly at the administrative court level. The literature discussed above on assigning partisanship to justices has been applied to other judges (Article III as well as state Supreme Court justices (Brace et al 2000, Hall 1985, Kang and Shephard 2016)) but the effect of partisanship (proxied by appointing president per Dahl) has been shown to be not nearly as explanatory at the non-Supreme Court level. I utilized the appointment proxy for court of appeals judges out of necessity and with great caution.

It was with even more reticence that I used the same method for assigning partisanship to BIA judges. This relied on a large assumption: presidents will appoint attorneys general who share their perspectives on Department of Justice prerogatives (notably immigration). A two-step proxy is used in this case: the president's partisan identity defines the attorney general's partisan identity which, in turn, defines the BIA member's partisan identity. This is an admittedly tenuous link, but it is the best approach given the data available. Future scholarship could probe this question deeper to determine (1) a better way to identify administrative law judge partisanship, and (2) whether administrative law judges exhibit partisan behavior in the first place. I suspect that administrative courts vary in their propensity to make partisan-motivated decisions. (The National Labor Relations Board is likely more "political" than the Bureau of Hearings and

Appeals in the Railroad Retirement Board, for example.) Interviews with past and current administrative law judges that discuss the political motivations of decision making in administrative courts is the best preliminary approach to study this phenomenon.

Do circuit court decisions impact future administrative court behavior? How did Chevron *impact judicial behavior?*

This study provides evidence that the courts of appeals provide guidance to administrative courts on how to act best as judicial actors. But the study does not probe into whether administrative court actors *actually* change as a result of circuit court opinions. It is not possible to determine changes in administrative court behavior with the data I utilized for this dissertation. Instead, future studies should interview administrative adjudicators to determine whether the theories introduced here play a role in their day-to-day operations. Additionally, a future study might appeal to agency archives for internal documentation indicating changes in agency business-as-usual as a result of judicial opinions with instructions for future administrative court activity. Access to these archives, if they exist, will be challenging to gain.

Can a court defer but rule against an agency?

This study asserts that deference by courts to agencies necessarily requires an agency win. But a case could be made that an agency could be unsuccessful in court but still subject to deference by courts. Consider, for example, levels of scrutiny. At the lowest level of scrutiny, rational basis, courts require that a statute simply be rationally related to a government interest in order to pass constitutional muster (*United States v. Carolene Products, Co.* (1938)). Under this

relaxed standard, it is conceivable that an agency could be ruled against in court while the court simultaneously supports the agency's statute under rational basis review. A future analysis could consider this possibility, identify instances of the phenomenon, and consider whether the conception of deference in this dissertation should be amended. A study investigating deference in losing cases could use the same basic method that was introduced in Chapter 2 by using the coding scheme from Appendices C and D but would require minor framing edits.

Appendix A: Administrative Courts

Below is a list of administrative courts present in the agencies of the executive branch bureaucracy. Administrative courts were identified through a personal survey of administrative agencies and complemented with a review of the database compiled pursuant to a joint study performed by the Administrative Conference of the United States and Stanford Law. Administrative courts were defined by the presence of two characteristics: (1) an adjudicative body composed of one or several administrative law judges/commission members who (2) make determinations on disputes between at least two parties. Boards that exclusively manage petitions for benefits are not considered administrative courts for the purposes of this dissertation since they do not resolve disputes. Administrative court websites that include a database of decisions constitutes an unnecessary but sufficient condition for defining the office as an administrative court; a narrative on the functions that the office provides and the process through which the administrative court functions is both necessary and sufficient.

1. *Administrative Appeals Office*
    a. Home agency: Citizenship and Immigration Services, Department of Homeland Security
    b. Subject area: immigration
    c. Mission statement: "Petitioners and applicants for certain categories of immigration benefits may appeal an unfavorable decision to the Administrative Appeals Office (AAO). We conduct administrative review of those appeals to ensure consistency and accuracy in the interpretation of immigration law and policy. We generally issue our appellate decisions as non-precedent decisions, which apply existing law and policy to the facts of a given case. After review by the Attorney General, we may also issue precedent decisions to provide guidance

to adjudicators and the public on the proper interpretation and administration of immigration law and policy (U.S. Citizenship and Immigration Services n.d.)."

2. *Administrative Law Judges*
    a. Home agency: National Transportation Safety Board
    b. Subject area: transportation
    c. Mission statement: "The Administrative Law Judges conduct formal hearings and issue initial decisions on appeals by airmen filed with the Safety Board. The NTSB serves as the "court of appeals" for any airman, mechanic or mariner whenever certificate action is taken by the Federal Aviation Administration or the U.S. Coast Guard Commandant, or when civil penalties are assessed by the FAA (National Transportation Safety Board n.d.)."

3. *Administrative Law Judges*
    a. Home agency: United States Coast Guard, Department of Defense
    b. Subject area: suspension and revocation of Coast Guard membership
    c. Mission statement: "CG ALJs preside over 600-900 Suspension and Revocation cases annually. In a fully-contested case, the ALJ presides over all aspects of the hearing including admitting or rejecting evidence, regulating the course of the hearing, ruling on motions, and issuing subpoenas for witnesses. The ALJ then reviews the evidence and testimony, finds the facts, and prepares a decision that applies the facts to the law and states the reasons for the ALJ's findings. In a non-contested case (settlement, admission, or default), the ALJ reviews the docket record, ensures that due process has been afforded the respondent, and then issues an appropriate order (United States Coast Guard n.d.)."

4. *Administrative Review Board*
    a. Home agency: Department of Labor
    b. Subject area: employment disputes
    c. Mission statement: "The Secretary of Labor has granted authority and assigned responsibility to the Board to issue final agency decisions after review or on appeal of matters arising under a wide range of employee protection laws. The jurisdiction of the Board includes, but is not limited to, the following areas of law: environmental, transportation, and securities whistleblower protection; temporary immigration programs; child labor; employment discrimination; job training; and federal construction and service contracts. The Board's cases generally arise on appeal from decisions by Department of Labor Administrative Law Judges or

determinations by the Administrator of the Department's Wage and Hour Division. Depending upon the statute at issue, parties may appeal the Board's decisions to federal district or appellate courts and ultimately to the United States Supreme Court. The mission of the Board is to do justice under the law by rendering legally correct and well-reasoned appellate decisions in a timely and efficient manner, treating all those who come before the Board fairly and impartially (U.S. Department of Labor n.d.)."

5. *Air Force Board for Correction of Military Records*
    a. Home agency: Department of the Air Force, Department of Defense
    b. Subject area: correcting records of airmen
    c. Mission statement: "The AFBCMR, established under Section 1552, Title 10, United States Code, is the highest level of administrative review within the Department of the Air Force. As such, applicants must first exhaust available administrative avenues of relief before applying to the AFBCMR. Otherwise, the Board will deny the case on that basis. The AFBCMR bases its decision on the evidence contained in the case file. The case file consists of military records, an advisory from the Office of Primary Responsibility and statements, arguments and documents provided by the applicant. The burden of proof of either error or injustice rests with the applicant. The AFBCMR's decision is final and conclusive (Air Force Personnel Center n.d.)."

6. *Army Review Boards Agency*
    a. Home agency: Department of the Army, Department of Defense
    b. Subject area: various Army personnel issues
    c. Mission statement: "The Army Review Boards Agency, acting on behalf of the Secretary of the Army, operating through Civilian and Military professionals, adjudicates Soldiers' and Veterans' cases in an impartial manner, ensuring each decision is fair, just and equitable, recognizing outcomes affect individual careers, livelihood, and public safety. Provide oversight of the Army Corrections system (U.S. Army n.d.)."

7. *Atomic Safety and Licensing Board*
    a. Home agency: Nuclear Regulatory Commission
    b. Subject area: nuclear industry disputes
    c. Mission statement: "The Atomic Safety and Licensing Board Panel (ASLBP) is the independent trial-level adjudicatory body of the NRC. Acting on behalf of the Commission, individual Licensing Boards conduct (1) public hearings concerning

contested issues that arise in the course of licensing and enforcement proceedings regarding nuclear reactors and the civilian use of materials in the United States; and (2) uncontested hearings regarding matters such as the construction of uranium enrichment facilities. As such, the ASLBP fulfills both the NRC's obligation to afford the public and those subject to agency enforcement actions an opportunity to challenge proposed licensing and enforcement activities as required by Section 189(a) of the Atomic Energy Act (AEA) and its responsibility under AEA Sections 189(a) and 193 to conduct a public hearing regarding the construction of certain types of facilities, even if there is not a challenge by any affected person or entity. These hearings are conducted in accordance with the Administrative Procedure Act and the Commission's implementing regulations, set forth at 10 CFR Part 2. A unique feature of the ASLBP that distinguishes it from similar federal regulatory or administrative tribunals is that each Licensing Board ordinarily is comprised of three administrative judges, usually consisting of one attorney skilled in the conduct of administrative hearings and two experts in scientific or technical areas relevant to the subject matter of the dispute. This scientific enhancement of the adjudicatory function is statutorily mandated by Section 191 of the AEA (U.S. Nuclear Regulatory Commission n.d.)."

8. *Benefit Review Board*
    a. Home agency: Department of Labor
    b. Subject area: worker's compensation
    c. Mission statement: "The U.S. Department of Labor's Benefits Review Board was created by Congress in 1972 to review appeals of administrative law judges' decisions arising under the Black Lung Benefits Act, Title IV of the Coal Mine Health and Safety Act, 30 U.S.C. §901 et seq., and the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq., and its extensions, including the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 et seq., the Defense Base Act, 42 U.S.C. §1651 et seq., and the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 et seq. The Board has authority to resolve appeals under these statutes, filed by any party-in-interest, which raise a substantial question of law or fact, and it reviews the decisions of administrative law judges in order to determine whether the findings are supported by substantial evidence and are in accordance with law. The Board's decisions may be appealed to the U.S. Courts of Appeals in the circuit where the injury arose, and from there to the U.S. Supreme Court. The Board, by statute, consists of five Members appointed by the Secretary of Labor, one of whom is designated as Chairman and Chief Administrative Appeals Judge (U.S. Department of Labor n.d.)."
9. *Board of Alien Labor Certification Appeals*

a. Home agency: Department of Labor
b. Subject area: employment visa denial review
c. Mission statement: “The Secretary of Labor is responsible under the Immigration and Nationality Act for administering labor certification and attestation programs which are generally designed to ensure that the admission of foreign workers into the United States on a permanent or temporary basis will not adversely affect the job opportunities, wages, and working conditions of U.S. workers (U.S. Department of Labor n.d.).”

10. Board of Contract Appeals

a. Home agency: United States Postal Service
b. Subject area: contract disputes with Post Offices
c. Mission statement: “The Postal Service Board of Contract Appeals has jurisdiction to consider and decide any appeal from a decision of a contracting officer of the United States Postal Service or the Postal Regulatory Commission relative to a contract made by either (United States Postal Service n.d.).”

11. Board for Corrections of Military Records of the Coast Guard

a. Home agency: Department of the Coast Guard, Department of Homeland Security
b. Subject area: correcting records of Coast Guard members
c. Mission statement: “The Board for Correction of Military Records (BCMR) of the Coast Guard is a board of civilians within the U.S. Department of Homeland Security, which has authority under Title 10, Section 1552, of the United States Code (10 U.S.C. Â§ 1552) to review and correct the personnel records of current and former members of the Coast Guard and Coast Guard Reserve. Such records include, but are not limited to, records regarding discharges, reenlistment codes, disciplinary matters, performance evaluations, selection for promotion, advancement, retirement, dates of service, disability ratings, medals, and various bonuses and benefits (United States Coast Guard n.d.).”

12. Board for Correction of Naval Records

a. Home agency: Department of the Navy, Department of Defense
b. Subject area: correcting records of Naval officers
c. Mission statement: “The United States Navy's Board for Correction of Naval Records (BCNR) is committed to providing current and former Navy and Marine Corps members the highest level of administrative review within the Navy to correct errors or injustices to their records (Department of the Navy n.d.).”

13. Board of Veterans Appeals

a. Home agency: Department of Veterans Affairs
b. Subject area: veterans' benefits
c. Mission statement: "The Board of Veterans' Appeals is an agency within the Department of Veterans Affairs (VA). Its mission is to conduct hearings and issue timely decisions for Veterans and other appellants in compliance with the law, 38 United States Code § 7101(a). The Board is responsible for making final decisions on behalf of the Secretary regarding appeals for Veterans' benefits and services from all three administrations: Veterans Benefits Administration (VBA), Veterans Health Administration (VHA), and National Cemetery Administration (NCA), as well as the Office of General Counsel (OGC) that are presented to the Board for appellate review. The Board's jurisdiction extends to all questions in a matter involving a decision by the Secretary under the law that affects a provision of benefits by the Secretary to Veterans, their dependents, or their survivors. Final decisions on appeals are made by the Board based on the entire record in the proceeding and all applicable provisions of law and regulation (Department of Veteran Affairs n.d.)."

14. Bureau of Hearings and Appeals

a. Home agency: Railroad Retirement Board
b. Subject area: appeals from retirement benefit determinations
c. Mission statement: "Persons claiming retirement, disability, survivor, unemployment, or sickness benefits from the Railroad Retirement Board (RRB) have the right to appeal unfavorable determinations on their claims (U.S. Railroad Retirement Board n.d.)."

15. Civilian Board of Contract Appeals

a. Home agency: General Services Administration
b. Subject area: disputes between government contractors
c. Mission statement: "The Civilian Board of Contract Appeals (CBCA) is an independent tribunal housed within the General Services Administration. The CBCA presides over various disputes involving Federal executive branch agencies. Its primary responsibility is to resolve contract disputes between government contractors and agencies under the Contract Disputes Act. For a full discussion of the CBCA and its jurisdiction and history, please see About The Board (General Services Administration n.d.)."

16. Departmental Appeals Board

a. Home agency: Department of Health and Human Services
b. Subject area: benefits appeals
c. Mission statement: “The Departmental Appeals Board (DAB) provides impartial, independent review of disputed decisions in a wide range of Department programs under more than 60 statutory provisions. The DAB generally issues the final decision for the Department, which may then be appealed to federal court. The DAB may issue a recommended decision for action by another official. The DAB has three broad areas of jurisdiction each with its own set of judges and staff. The DAB also has a leadership role in implementing Alternative Dispute Resolution (ADR) across the Department since the DAB Chair is the designated Dispute Resolution Specialist under the Administrative Dispute Resolution Act of 1996. DAB staff include trained mediators and facilitators. The DAB's ADR responsibilities include providing ADR services and training and coordinating and facilitating negotiated rulemaking committees. The DAB resolves disputes with outside parties such as state agencies, Head Start grantees, universities, nursing homes, doctors, and Medicare beneficiaries. In a single year, disputes heard by the DAB may involve as much as $1 billion in federal grant funds (U.S. Department of Health and Human Services n.d.).”

17. Departmental Cases Hearings Division

a. Home agency: Department of the Interior
b. Subject area: resource management
c. Mission statement: “The Departmental Cases Hearings Division serves as the Department's administrative trial court for cases involving lands and resources under the Department's jurisdiction. Through formal hearings conducted by administrative law judges under the Administrative Procedure Act, the Division decides grazing appeals, surface coal mining cases, civil penalty assessments under various wildlife and resource protection laws, certain cases involving the Indian Self-Determination and Education Assistance Act (ISDA), disputed issues of material fact with respect to conditions and prescriptions in hydropower licenses, and contests of mining claims, Alaska Native allotment applications, and other asserted interests in Federal land. The Division also conducts hearings on other matters upon request from a bureau or office, an OHA appeals board, or the Director. Examples include adjudications pertaining to oil and gas leases, rights-of-way, and alleged trespasses on Federal lands (U.S. Department of the Interior n.d.).”

18. Division of Enforcement

a. Home agency: Securities and Exchange Commission
b. Subject area: investor protection
c. Mission statement: “The Division of Enforcement was created in August 1972 to consolidate enforcement activities that previously had been handled by the various operating divisions at the Commission's headquarters in Washington. The Commission's enforcement staff conducts investigations into possible violations of the federal securities laws, and litigates the Commission's civil enforcement proceedings in the federal courts and in administrative proceedings (U.S. Securities and Exchange Commission n.d.).”

19. Employees’ Compensation Appeals Board

a. Home agency: Department of Labor
b. Subject area: worker’s compensation
c. Mission statement: “The Board's mission is to hear and decide cases on appeal from decisions of the Office of Workers' Compensation Programs (OWCP) in an impartial and expeditious manner. The decisions of the Board are made in accordance with its statutory mandate, based on a thorough review of the case record as compiled by OWCP. Injured federal workers have the opportunity for a full evidentiary hearing with OWCP's Branch of Hearings and Review prior to review of the record by the Board (U.S. Department of Labor n.d.).”

20. Environmental Appeals Board

a. Home agency: Environmental Protection Agency
b. Subject area: environmental sanction disputes
c. Mission statement: “The Appeals Board, which is located within the Office of Administration and Resources Management, is the final Agency decision maker on administrative appeals under all major environmental statutes that the Agency administers. The EAB hears permit and civil penalty appeals in accordance with regulations delegating this authority from the EPA Administrator. Appeals from permit decisions made by EPA's Regional Administrators (and in some cases, state permitting officials) may be filed either by permittees or other interested persons. A substantial additional portion of the EAB's caseload consists of petitions for reimbursement of costs incurred in complying with cleanup orders issued under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). The EAB decides these matters pursuant to a delegation of authority from the Administrator. The EAB is also authorized to hear appeals from various administrative decisions under the Clean Air Act's acid rain program at 40 C.F.R. Part 78 and appeals of federal Clean Air Act Title V

operating permits issued pursuant to 40 C.F.R. Part 71. More information about the EAB (United States Environmental Protection Agency n.d.)."

21. Executive Office of Immigration Review (BIA)

a. Home agency: Department of Justice
b. Subject area: immigration
c. Mission statement: "The primary mission of the Executive Office for Immigration Review (EOIR) is to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws. Under delegated authority from the Attorney General, EOIR conducts immigration court proceedings, appellate reviews, and administrative hearings (United States Department of Justice n.d.)."

22. Federal Mine Safety and Health Review Commission

a. Home agency: Federal Mine Safety and Health Review Commission
b. Subject area: mine and miner safety
c. Mission statement: "The Federal Mine Safety and Health Review Commission is an independent adjudicative agency that provides administrative trial and appellate review of legal disputes arising under the Federal Mine Safety and Health Act of 1977 (Mine Act)....Most cases deal with civil penalties assessed against mine operators and address whether the alleged safety and health violations occurred as well as the appropriateness of proposed penalties. Other types of cases include orders to close a mine, miners' charges of safety related discrimination and miners' requests for compensation after the mine is idled by a closure order (Federal Mine Safety and Health Review Commission n.d.)."

23. Federal Services Impasses Panel

a. Home agency: Federal Labor Relations Authority
b. Subject area: labor disputes within federal government
c. Mission statement: "The Panel resolves impasses between federal agencies and unions representing federal employees arising from negotiations arising under the Federal Service Labor-Management Relations Statute and the Federal Employees Flexible and Compressed Work Schedules Act. If bargaining between the parties, followed by mediation assistance, does not result in a voluntary agreement, then either party or the parties jointly may request the Panel's assistance (U.S. Federal Labor Relations Authority n.d.)."

24. Foreign Claims Settlement Commission

a. Home agency: Department of Justice
b. Subject area: claims by American citizens against foreign governments
c. Mission statement: “The Foreign Claims Settlement Commission of the United States (FCSC) is a quasi-judicial, independent agency within the Department of Justice which adjudicates claims of U.S. nationals against foreign governments, under specific jurisdiction conferred by Congress, pursuant to international claims settlement agreements, or at the request of the Secretary of State. Funds for payment of the Commission's awards are derived from congressional appropriations, international claims settlements, or liquidation of foreign assets in the United States by the Departments of Justice and the Treasury (United States Department of Justice n.d.).”

25. Foreign Service Grievance Board

a. Home agency: Department of State
b. Subject area: disputes arising from foreign service
c. Mission statement: “On March 26, 1976 Congress amended the Foreign Service Act of 1946 to establish a permanent grievance system. Although it retained many of the procedures of the earlier, interim system, the statutory system carried additional functions and authority. In particular, the new Board could order the suspension of agency actions pending the Board's decision in cases involving the separation or disciplining of an employee if it considered such action warranted. Further, the Board's recommendations to an agency head could be rejected only if they "would be contrary to law, would adversely affect the foreign policy or security of the United States, or would substantially impair the efficiency of the service (Department of State n.d.)."

26. Foreign Service Impasse Disputes Panel

a. Home agency: Federal Labor Relations Agency
b. Subject area: collective bargaining for foreign service employees
c. Mission statement: “Created under the Foreign Service Act of 1980, 22 U.S.C. §§ 4101-4118, the Foreign Service Impasse Disputes Panel assists in resolving impasses arising in the course of collective bargaining under the Act over conditions of employment affecting Foreign Service employees working for the U.S. Department of State, the U.S. Agency for Global Media (formerly the Broadcasting Board of Governors (BBG)), the U.S. Agency for International Development (USAID), the U.S. Department of Agriculture (USDA), and the U.S. Department of Commerce. The Act provides that the Chairperson of the Foreign Service Labor Relations Board – who concurrently serves as the FLRA

Chairman – appoints the five Foreign Service Impasse Disputes Panel members, and requires that it be composed of two members of the Foreign Service (who are not management officials, confidential employees, or labor organization officials); one member of the Federal Service Impasses Panel; one individual employed by the U.S. Department of Labor; and one public member who does not hold any other office or position in the government (U.S. Federal Labor Relations Authority n.d.)."

27. Foreign Service Labor Relations Board

a. Home agency: Federal Labor Relations Authority
b. Subject area: labor management for foreign service employees
c. Mission statement: "Created under the Foreign Service Act of 1980, 22 U.S.C. §§ 4101-4118, the Foreign Service Labor Relations Board (the FSLRB) administers the labor-management relations program for Foreign Service employees working for the U.S. Department of State, the U.S. Agency for Global Media (formerly the Broadcasting Board of Governors (BBG)), the U.S. Agency for International Development (USAID), the U.S. Department of Agriculture (USDA), and the U.S. Department of Commerce (U.S. Federal Labor Relations Authority n.d.)."

28. Interior Board of Indian Appeals

a. Home agency: Department of the Interior
b. Subject area: disputes arising out of Board of Indian Affairs regulations
c. Mission statement: "The Interior Board of Indian Appeals (IBIA) is an appellate review body that exercises the delegated authority of the Secretary of the Interior to issue final decisions for the Department of the Interior in appeals involving Indian matters. Located within the Department's Office of Hearings and Appeals, IBIA is separate and independent from the Bureau of Indian Affairs (BIA) and the Assistant Secretary - Indian Affairs (U.S. Department of the Interior n.d.)."

29. Interior Board of Land Appeals

a. Home agency: Department of the Interior
b. Subject area: disputes arising out of various Interior regulations
c. Mission statement: "The Interior Board of Land Appeals (IBLA) is an appellate review body that exercises the delegated authority of the Secretary of the Interior to issue final decisions for the Department of the Interior. Its administrative judges decide appeals from bureau decisions relating to the use and disposition of public lands and their resources, mineral resources on the Outer Continental Shelf, and the conduct of surface coal mining operations under the Surface

Mining Control and Reclamation Act. Located within the Department's Office of Hearings and Appeals, IBLA is separate and independent from the Bureaus and Offices whose decisions it reviews (U.S. Department of the Interior n.d.)."

30. International Trade Commision

a. Home agency: United States International Trade Commission
b. Subject area: trade
c. Mission statement: "The U.S. International Trade Commission (USITC or Commission) pursues its mission in three areas of U.S. international trade: adjudication, research and analysis, and maintaining the Harmonized Tariff Schedule. The Commission investigates and makes determinations in proceedings involving imports claimed to injure a domestic industry or violate U.S. intellectual property rights; provides independent analysis and information on tariffs, trade and competitiveness; and maintains the U.S. tariff schedule (United States International Trade Commission n.d.)."

31. Investigations and Hearings Division

a. Home agency: Federal Communications Commission
b. Subject area: communications
c. Mission statement: "The Investigations & Hearings Division is responsible for resolution of complaints against broadcast stations and other Title III licensees on non-technical matters such as indecency, enhanced underwriting, unauthorized transfer of control and misrepresentation. In addition, with regard to wireless licensees, the Division is responsible for enforcement of rules regarding auction collusion and misrepresentation. The Division also investigates industry allegations of violations of Title II of the Communications Act, as amended, and FCC rules and policies pertaining to common carriers. In addition, the Division conducts, or assists in, various other investigations being conducted by the Bureau and serves as trial staff in formal Commission hearings (Federal Communications Commission n.d.)."

32. Medicare Geographic Classification Review Board

a. Home agency: Centers for Medicare and Medicaid Services, Department of Health and Human Services
b. Subject area: rezoning Medicare providers
c. Mission statement: "The Medicare Geographic Classification Review Board ("MGCRB" or "Board") makes determinations on geographic reclassification requests of hospitals who are receiving payment under the inpatient prospective

payment system ("IPPS") but wish to reclassify to a higher wage area for purposes of receiving a higher payment rate. See 42 U.S.C. § 1395ww(d)(10) and 42 C.F.R. § 412.230 (Centers for Medicare and Medicaid Services n.d.)."

33. Merit Systems Protection Board

a. Home agency: Merit Systems Protection Board
b. Subject area: government employee rights protection
c. Mission statement: "The mission of the MSPB is to "Protect the Merit System Principles and promote an effective Federal workforce free of Prohibited Personnel Practices." MSPB's vision is "A highly qualified, diverse Federal workforce that is fairly and effectively managed, providing excellent service to the American people." MSPB's organizational values are Excellence, Fairness, Timeliness, and Transparency. MSPB carries out its statutory responsibilities and authorities primarily by adjudicating individual employee appeals and by conducting merit systems studies. In addition, MSPB reviews the significant actions of the Office of Personnel Management (OPM) to assess the degree to which those actions may affect merit (U.S. Merit Systems Protection Board n.d.)."

34. National Appeals Office

a. Home agency: National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce
b. Subject area: fisheries disputes
c. Mission statement: "NOAA Fisheries National Appeals Office provides administrative appeals services, conducts administrative inquiries, and manages Freedom of Information Act requests. NOAA Fisheries adjudicates appeals of persons affected by initial administrative determinations, including those related to the implementation of the Magnuson-Stevens Act (National Oceanic and Atmospheric Administration n.d.)."

35. National Labor Relations Board

a. Home agency: National Labor Relations Board
b. Subject area: labor disputes
c. Mission statement: "The NLRB is an independent federal agency enforcing the National Labor Relations Act, which guarantees the right of most private sector employees to organize, to engage in group efforts to improve their wages and working conditions, to determine whether to have unions as their bargaining representative, to engage in collective bargaining, and to refrain from any of these

activities. It acts to prevent and remedy unfair labor practices committed by private sector employers and unions (National Labor Relations Board n.d.)."

36. Pension Benefit Guaranty Corporation

a. Home agency: Pension Benefit Guaranty Corporation
b. Subject area: disputes over private-sector pensions
c. Mission statement: "The Pension Benefit Guaranty Corporation (PBGC) protects the retirement incomes of over 35 million American workers in private-sector defined benefit pension plans. A defined benefit plan provides a specified monthly benefit at retirement, often based on a combination of salary and years of service. PBGC was created by the Employee Retirement Income Security Act of 1974 to encourage the continuation and maintenance of private-sector defined benefit pension plans, provide timely and uninterrupted payment of pension benefits, and keep pension insurance premiums at a minimum (Pension Benefit Guaranty Corporation n.d.)."

37. Postal Regulatory Commission

a. Home agency: Postal Regulatory Commission
b. Subject area: oversight of the U.S. Postal Service
c. Mission statement: "The Commission is an independent agency that has exercised regulatory oversight over the Postal Service since its creation by the Postal Reorganization Act of 1970, with expanded responsibilities under the Postal Accountability and Enhancement Act of 2006 (Postal Regulatory Commission n.d.)."

38. Public Company Accounting Oversight Board

a. Home agency: Public Company Accounting Oversight Board (with oversight provided by the Securities and Exchange Commission)
b. Subject area: public company audits
c. Mission statement: "The PCAOB is a nonprofit corporation established by Congress to oversee the audits of public companies in order to protect investors and the public interest by promoting informative, accurate, and independent audit reports. The PCAOB also oversees the audits of brokers and dealers, including compliance reports filed pursuant to federal securities laws, to promote investor protection (Public Company Accounting Oversight Board n.d.)."

39. Occupational Safety and Health Review Commission

a. Home agency: Occupational Safety and Health Review Commission
b. Subject area: workplace safety
c. Mission statement: "The mission of the Occupational Safety and Health Review Commission is to provide fair and timely adjudication of workplace safety and health disputes between the Department of Labor and employers. In doing this, the Commission plays a vital role in encouraging safe and healthy workplaces for American workers. The cases in which the Review Commission renders decisions arise from inspections conducted by a Federal agency separate from the Review Commission, the Occupational Safety and Health Administration (OSHA), which is a part of the Department of Labor. OSHRC, or the Review Commission, and OSHA were created by the Occupational Safety and Health Act of 1970, but the Act mandated that the Review Commission be an independent agency (i.e., not part of another Federal department) to ensure that parties to agency cases receive impartial hearings (Occupational Safety and Health Review Commission n.d.)."

40. Office of Administrative Adjudication

a. Home agency: Consumer Financial Protection Bureau
b. Subject area: consumer protection
c. Mission statement: "Administrative adjudication proceedings are formal adversarial proceedings conducted by an administrative law judge, who issues a recommended decision to the CFPB director. The director issues a final decision, either adopting or modifying the administrative law judge's recommended decision. The Bureau initiates an administrative adjudication proceeding by filing a Notice of Charges alleging a violation of a consumer protection statute (Consumer Financial Protection Bureau n.d.)."

41. Office of Administrative Law Judges

a. Home agency: Drug Enforcement Administration, Department of Justice
b. Subject area: drug enforcement regulation
c. Mission statement: "The Administrative Law Judges at the Office of Administrative Law Judges (LJ) conduct formal hearings in accordance with the Administrative Procedure Act (5 U.S.C. § 551, et seq) in connection with enforcement and regulatory cases brought by the Drug Enforcement Administration (DEA) under the Controlled Substances Act (21 U.S.C. § 801, et seq) and its attendant regulations (21 C.F.R. § 1300, et seq) (Drug Enforcement Administration, n.d.)."

42. Office of Administrative Law Judges

a. Home agency: Department of Labor
b. Subject area: general labor concerns
c. Mission statement: "OALJ's mission is to provide a neutral forum to resolve labor-related administrative disputes before the Department of Labor in a fair, transparent and accessible manner, and to promptly issue sound decisions correct in law and fact. Department of Labor ALJs adjudicate complaints and claims in a wide variety of cases. Cases where individuals seek benefits under the Black Lung Benefits Act, the Longshore and Harbor Workers' Compensation Act and the Defense Base Act constitute the largest part of the office's workload. ALJs also hear and decide cases arising from over 80 other labor-related statutes, Executive Orders, and regulations, including such diverse subjects as: whistleblower complaints involving corporate fraud and violations of transportation, environmental and food safety statutes; alien labor certifications; actions involving the working conditions of migrant farm laborers; grants administration relating to preparation of workers and job seekers to attain needed skills and training; prohibition of workplace discrimination by government contractors; minimum wage disputes; child labor violations; mine safety variances; OSHA formal rulemaking proceedings; federal contract disputes; civil fraud in federal programs; certain recordkeeping required by ERISA; and standards of conduct in union elections (U.S. Department of Labor n.d.)."

43. Office of Administrative Law Judges

a. Home agency: Environmental Protection Agency
b. Subject area: environmental enforcement
c. Mission statement: "The Office of Administrative Law Judges (OALJ) is an independent office in EPA's Office of Mission Support. The Administrative Law Judges conduct hearings and render decisions in proceedings between the EPA and persons, businesses, government entities, and other organizations that are, or are alleged to be, regulated under environmental laws (United States Environmental Protection Agency n.d.)."

44. Office of Administrative Law Judges

a. Home agency: Federal Communication Commission
b. Subject area: communication
c. Mission statement: "The Office of Administrative Law Judges (OALJ) of the Federal Communications Commission is responsible for conducting the hearings ordered by the Commission. The hearing function includes acting on interlocutory requests filed in the proceedings such as petitions to intervene, petitions to enlarge

issues, and contested discovery requests (Federal Communications Commission n.d.)."

45. Office of Administrative Law Judges

a. Home agency: Federal Energy Regulatory Commission
b. Subject area: energy regulation
c. Mission statement: "The Office of Administrative Litigation litigates or otherwise resolves cases set for hearing. The lawyers & technical staff in this Office represent the public interest and seek to litigate or settle cases in a timely, efficient and equitable manner while ensuring the outcomes are consistent with Commission policy. Resolve disputes through settlement by: Developing and serving on all parties objective settlement positions, or top sheets; Conducting or participating in settlement processes with energy industry officials, state commissions, customers and other intervening parties; and Assisting the settlement judge and parties to ensure agreements are consistent with Commission policy (Federal Energy Regulatory Commission n.d.)."

46. Office of Administrative Law Judges

a. Home agency: Federal Labor Relations Authority
b. Subject area: general labor concerns
c. Mission statement: "FLRA Administrative Law Judges conduct hearings and issue recommended decisions on cases involving alleged unfair labor practices. Administrative Law Judges also render recommended decisions involving applications for attorney fees filed under the Back Pay Act and the Equal Access to Justice Act (U.S. Federal Labor Relations Authority n.d.)."

47. Office of Administrative Law Judges

a. Home agency: Federal Maritime Commission
b. Subject area: shipping disputes
c. Mission statement: "If a person or company is unable to settle a dispute that involves a possible violation of the Shipping Act, that person or company may file a complaint. The complaint will be referred to the Office of Administrative Law Judges (ALJ) (Federal Maritime Commission n.d.)."

48. Office of Administrative Law Judges

a. Home agency: Federal Trade Commission
b. Subject area: trade disputes

c. Mission statement: “The Office of Administrative Law Judges performs the initial adjudicative fact-finding in Commission administrative complaint proceedings, guided by the FTC Act, the Administrative Procedure Act, relevant case law interpreting these statutes, and the FTC's Rules of Practice, 16 C.F.R. Part 3. The administrative law judge assigned to handle each complaint issued by the Commission holds pre-hearing conferences; resolves discovery disputes, evidentiary disputes and procedural disputes; and conducts the full adversarial evidentiary hearing on the record. The administrative law judge issues an initial decision which sets out relevant and material findings of fact with record citations, explains the correct legal standard, applies the law to the facts, and, where appropriate, issues an order on remedy (Federal Trade Commission n.d.).”

49. Office of Administrative Law Judges

a. Home agency: United States Postal Service
b. Subject area: disputes arising under postal service legislation and Postmaster General regulations
c. Mission statements: “The Judicial Officer and Office of Administrative Law Judges perform quasi-judicial duties as designated by the Postmaster General, applicable statutes and regulations. The Judicial Officer is the agency for the purposes of chapter 5 of Title 5, to the extent those functions are delegated to him by the Postmaster General (United States Postal Service n.d.).”

50. Office of the Chief Administrative Hearing Officer

a. Home agency: Department of Justice
b. Subject area: oversight of immigration judges
c. Mission statement: “The Office of the Chief Administrative Hearing Officer (OCAHO) is headed by a Chief Administrative Hearing Officer who is responsible for the general supervision and management of Administrative Law Judges who preside at hearings which are mandated by provisions of law enacted in the Immigration Reform and Control Act of 1986 (IRCA (PDF)) and the Immigration Act of 1990 (PDF). These acts, among others, amended the Immigration and Nationality Act of 1952 (INA) (U.S. Department of Justice n.d.).”

51. Office of Disability Adjudication and Review

a. Home agency: Social Security Administration
b. Subject area: Social Security benefits hearings

c. Mission statement: "The Office of Hearings Operations (OHO) and the Office of Analytics, Review, and Oversight (OARO) are responsible for holding hearings, issuing decisions, and reviewing post-hearing appeals for claims filed under Titles II and XVI of the Social Security Act, as amended. Headquartered in Falls Church, Virginia, and Baltimore, Maryland, these components make up one of the largest administrative adjudication systems in the world (Social Security Administration n.d.)."

52. Office of Dispute Resolution for Acquisition

a. Home agency: Federal Aviation Commission, Department of Transportation
b. Subject area: aviation acquisition
c. Mission statement: "The Office of Dispute Resolution for Acquisition (ODRA) is the sole, statutorily designated tribunal for all contract disputes and bid protests under the FAA's Acquisition Management System. The ODRA dispute resolution process recognizes that it is in the best interests of the FAA and its private sector business partners to work collaboratively to avoid and, where possible, voluntarily resolve acquisition-related controversies in a timely and fair manner. To that end, consistent with its statutory mandate, the ODRA uses a variety of dispute avoidance and alternative dispute resolution (ADR) techniques to the maximum extent practicable. For those matters that cannot be avoided or resolved through the use of ADR, the ODRA provides a flexible and efficient adjudication process under the authority of the Administrative Procedure Act (United States Department of Transportation n.d.)."

53. Office of Employment Discrimination Complaint Adjudication

a. Home agency: Department of Veterans Affairs
b. Subject area: employment disputes in VA settings
c. Mission statement: "The Office of Employment Discrimination and Complaint Adjudication (OEDCA) is an independent Department of Veterans Affairs (VA) adjudicatory authority created by Congress. Established in February 1998, OEDCA's mission is to objectively review the merits of employment discrimination claims filed by present and former VA employees and non-agency applicants for employment (U.S. Department of Veteran Affairs n.d.)."

54. Office of Financial Institution Adjudication

a. Home agency: The Federal Reserve System
b. Subject area: financial institution disputes

c. Mission statement: " The Office of Financial Institution Adjudication (OFIA) is an inter-agency group of administrative law judges (ALJs), established pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), that presides over administrative enforcement proceedings brought by the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (FRB), or the National Credit Union Administration (NCUA), and issues recommended decisions to the relevant agency head (Office of Financial Institutional Adjudication n.d.)."

55. Office of Hearings

a. Home agency: Department of Transportation
b. Subject area: various transportation disputes
c. Mission statement: "The Office of Hearings (OH) is comprised of administrative law judges (ALJs) and support staff. Its ALJs conduct official hearings under the Administrative Procedure Act (5 U.S.C. § 551 et seq.) within the US Department of Transportation where formal APA hearings are required, including: air carrier citizenship determinations; fairness of airport landing rates and charges. OH ALJs also conduct hearings in civil penalty proceedings in cases including: discrimination against passengers; violation of travel agent regulations; improper shipment of hazardous materials; passenger misconduct on airlines; airlines' and motor carriers' failure to comply with regulations concerning inspection, maintenance, and hours of service (U.S. Department of Transportation n.d.)."

56. Office of Hearings and Appeals

a. Home agency: Department of Education
b. Subject area: educational institutions
c. Mission statement: "The Office of Hearings and Appeals hears cases arising under Title IV of the Higher Education Act of 1965, as amended (HEA). These cases include actions initiated by the U.S. Department of Education to terminate the eligibility of institutions to participate in the Title IV, HEA programs; actions to fine institutions; audit and program review actions to recover allegedly misspent funds; emergency actions to immediately suspend funding of such institutions; and actions to debar certain individuals from participating in various programs government-wide (U.S. Department of Education n.d.)."

57. Office of Hearings and Appeals

a. Home agency: Department of Energy
b. Subject area: all energy disputes except those arising under purview of Federal Energy Regulatory Commission
c. Mission statement: “The Office of Hearings and Appeals (OHA) is the quasi-judicial arm of the Department of Energy that conducts hearings and issues initial Departmental decisions with respect to any adjudicative proceedings which the Secretary may delegate, except those within the jurisdiction of the Federal Energy Regulatory Commission (FERC). OHA jurisdiction principally includes Personnel Security Hearing Officer functions (10 CFR Part 710) and "whistleblower" complaints filed under the DOE Contractor Employee Protection Program (10 CFR Part 708). The Office also analyzes and decides appeals requesting review of determinations reached by officials within the Department under the jurisdiction of the Secretary, including initial determinations under the Freedom of Information Act, 10 CFR 1004.1, the Privacy Act, 10 CFR 1008, the payments-equal-to-taxes (PETT) provisions of the Nuclear Waste Policy Act of 1982, as amended, and the Alternative Fuels Transportation Program (10 CFR Part 490). In addition, OHA is responsible for deciding Applications for Exception from generally applicable requirements of a rule, regulation or order of the Department, and analyzes Petitions for Special Redress seeking "extraordinary relief" apart from or in addition to any other remedy provided in the Department’s enabling statutes. Within OHA resides the Alternative Dispute Resolution Office whose mission is to promote the use of conflict management and alternative dispute resolution techniques at all levels of the DOE complex (Department of Energy n.d.).”

58. Office of Hearings and Appeals

a. Home agency: Small Business Administration
b. Subject area: disputes arising from SBA programs
c. Mission statement: “The Office of Hearings and Appeals (OHA) is an independent office of the Small Business Administration (SBA) established in 1983 to provide an independent, quasi-judicial appeal of certain SBA program decisions. OHA hears the following appeals: size determinations; contracting officer designations of North American Industry Classification System (NAICS) codes on federal contracts; eligibility determinations for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBC); eligibility of Women-Owned Small Businesses (WOSB); eligibility of Economically Disadvantaged WOSB (EDWOSB); and 8(a)BD eligibility determinations, suspensions and terminations (U.S. Small Business Administration n.d.).”

59. Office of Medicare Hearings and Appeals

a. Home agency: Department of Health and Human Services
b. Subject area: Medicare claims
c. Mission statement: "OMHA administers the nationwide Administrative Law Judge (ALJ) hearing program for appeals arising from individual claims for Medicare coverage and payment for items and services furnished to beneficiaries (or enrollees) under Medicare Parts A, B, C and D. OMHA also hears appeals arising from claims for entitlement to Medicare benefits and disputes of Part B and Part D premium surcharges. OMHA generally conducts the third level of a five-level appeals process, and operates separately from the other agencies involved in the Medicare claims appeal process (Department of Health and Human Services n.d.)."

60. Provider Reimbursement Review Board

a. Home agency: Centers for Medicare and Medicaid Services, Department of Health and Human Services
b. Subject area: Medicare provider reimbursements
c. Mission statement: "The Provider Reimbursement Review Board is an independent panel to which a certified Medicare provider of services may appeal if it is dissatisfied with a final determination by its Medicare contractor or by the Centers for Medicare & Medicaid Services ("CMS") (Centers for Medicare and Medicaid Services n.d.)."

61. Reparations Program

a. Home agency: Commodity Futures Trading Commission
b. Subject area: trading complaints
c. Mission statement: "The Reparations Program is designed to provide an inexpensive, expeditious, fair, and impartial forum to handle customer complaints. The Program aims to resolve disputes between futures customers and commodity futures trading professionals. The transactions involved can include futures contracts, options on futures contracts or on physical commodities, and leverage contracts (Commodity Futures Trading Commission n.d.)."

62. Surface Transportation Board

a. Home agency: Surface Transportation Board
b. Subject area: economic regulation of transportation
c. Mission statement: "The Surface Transportation Board is an independent federal agency that is charged with the economic regulation of various modes of surface

transportation, primarily freight rail. The STB exercises its statutory authority and resolves disputes in support of an efficient, competitive, and economically viable surface transportation network that meets the needs of its users (Surface Transportation Board n.d.)."

63. Trademark Trial and Appeals Board

a. Home agency: Patent and Trademark Office
b. Subject area: trademark disputes
c. Mission statement: "The TTAB is an administrative board that hears and decides adversary proceedings between two parties, namely, oppositions (party opposes a mark after publication in the Official Gazette) and cancellations (party seeks to cancel an existing registration). The TTAB also handles interference and concurrent use proceedings, as well as appeals of final refusals issued by USPTO Trademark Examining Attorneys within the course of the prosecution of trademark applications (U.S. Patent and Trademark Office n.d.)."

Appendix B: Meta-Analysis of Content Analysis of Legal Opinions

An analysis of the studies cited in Hall and Wright (2010) was conducted to craft the coding instrument used to evaluate the dyads of administrative court/court of appeals cases. I indicate whether the study is law-oriented (i.e. interpretive) or social science-oriented (i.e. empirical), the topic, the size of the sample (*n*), and a summary of the coding scheme used.

1. *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview with Recent Findings from Philadelphia* (Cornell Law Review, 1998)
    a. Authors: Baldus, Woodworth, Zuckerman, Weiner, and Broffitt
    b. Law/social science: law
    c. Topic: death penalty and prosecutorial discretion
    d. *N*: 425 cases
    e. Coding details: used court documents (i.e. jury sheets, appellate record, etc.); used a coding scheme that addressed all potential reasons why a trial is decided the way it is (i.e. aggravating and mitigating factors)

2. *An Empirical Study of the Multifactor Tests for Trademark Infringement* (California Law Review, 2006)
    a. Author: Beebe
    b. Law/social science: law
    c. Topic: multifactor tests re: consumer confusion
    d. *N*: 331 cases
    e. Coding details: district court cases between 2000-2004; codes for general case details, topic within trademark law

3. *Judicial Hostility Toward Labor Unions: Applying the Social Background Model to a Celebrated Concern* (Ohio State Law Journal, 1999)
    a. Authors: Brudney, Schiaroni, and Merritt
    b. Law/social science: both
    c. Topic: judicial decision making re: unfair labor practices
    d. *N*: 1224 cases
    e. Coding details: codes each National Labor Relations Act cases between 1986 and 1993 for judicial background factors

4. *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on Federal Courts of Appeals* (Yale Law Journal, 1998)
    a. Authors: Cross and Tiller
    b. Law/social science: law
    c. Topic: partisanship and difference
    d. N: approximately 170 cases
    e. Coding details: all D.C. circuit cases citing *Chevron* between 1991 and 1995; coded for deference, upholding agency policy, direction of outcome, partisanship

5. *"There is a Book Out…": An Analysis of Judicial Absorption of Legislative Facts* (Harvard Law Review, 1987)
    a. Author: Davis
    b. Law/social science: law
    c. Topic: judicial use of facts
    d. N: 193 cases
    e. Coding details: used Lexis/Westlaw to search for cases where applicable theory was cited; coded on nine case-level variables

6. *Overriding Supreme Court Statutory Interpretation Decisions* (Yale Law Journal, 1991)
    a. Author: Eskridge
    b. Law/social science: both
    c. Topic: override statutes
    d. N: 187 cases
    e. Coding details: identified all override activity using search terms in USCCAN between 1967 and 1990; codes case details

7. *Winners and Losers and Why: A Study of Defamation Litigation* (American Bar Foundation Journal, 1980)
    a. Author: Franklin
    b. Law/social science: law
    c. Topic: defamation law
    d. N: 534 cases
    e. Coding details: identified cases with "libel" and "slander" tag in West reporter; coded for media parties

8. *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation* (Stanford Law Review, 2002)
    a. Authors: Grundfest and Pritchard
    b. Law/social science: law
    c. Topic: statutory ambiguity

d. *N*: 167 cases
e. Coding details: Lexis/Westlaw search; codes for different levels of adherence to doctrine

9. *But Do They Have to See It to Know It? The Supreme Court's Obscenity and Pornography Decisions* (Western Political Quarterly, 1991)
    a. Author: Hagle
    b. Law/social science: social science
    c. Topic: judicial decision making re: obscenity and pornography cases in the Supreme Court
    d. *N*: 107 cases
    e. Coding details: Supreme Court Database search for obscenity/pornography cases; uses SCDB codes

10. *Antitrust, Health Care Quality, and the Courts* (Columbia Law Review, 2002)
    a. Authors: Hammer and Sage
    b. Law/social science: law
    c. Topic: antitrust law and health care
    d. *N*: 542 cases
    e. Coding details: Lexis keyword search, winnowed out irrelevant cases; refer to appendix for extensive and explicit coding scheme

11. *Questioning the New Consensus on Promissory Estoppel: An Empirical and Theoretical Study* (Columbia Law Review, 1998)
    a. Author: Hillman
    b. Law/social science: law
    c. Topic: promissory estoppel
    d. *N*: 362 cases
    e. Coding details: codes for general case details

12. *The Statute of Frauds and Business Norms: A Testable Game-Theoretic Model* (University of Pennsylvania Law Review, 1996)
    a. Author: Johnston
    b. Law/social science: law
    c. Topic: fraud in business agreements
    d. *N*: 25 cases
    e. Coding details: codes for evidence of relationship between business partners, complexity of case, detail in agreement, dispute-ending agreement

13. *The Evolution of State Supreme Courts* (Michigan Law Review, 1978)
    a. Authors: Kagan, Cartwright, Friedman, and Wheeler
    b. Law/social science: both
    c. Topic: caseload details re: state high courts
    d. *N*: 5904 cases
    e. Coding details: stratified random sample of states; code categories: procedural history, parties, area of law, outcome, style of decision

14. *Harmless Error and the Rights/Remedies Split* (Virginia Law Review, 2002)
    a. Author: Kamin
    b. Law/social science: law
    c. Topic: death penalty in California Supreme Court and harmless error doctrine
    d. *N*: 281 cases
    e. Coding details: coded for case details (outcome, jurisprudential details)

15. *Predicting Supreme Court Decisions Mathematically: A Quantitative Analysis of the "Right to Counsel" Cases* (American Political Science Review, 1957)
    a. Author: Kort
    b. Law/social science: social science
    c. Topic: right to counsel Supreme Court cases
    d. *N*: 28 cases
    e. Coding details: codes for pivotal factors in deciding rights to counsel cases (i.e. gravity of crime, procedural irregularities, etc.)

16. *Common-Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories* (Virginia Law Review, 2005)
    a. Authors: Krawiec and Zeiler
    b. Law/social science: law
    c. Topic: differential disclosures in common law relationships
    d. *N*: 466 cases
    e. Coding details: coded for type of transaction, undisclosed information to parties, behavior of parties

17. *The Influence of the Law in the Supreme Court's Search and Seizure Jurisprudence* (American Politics Research, 2005)
    a. Authors: Kritzer and Richards
    b. Law/social science: social science
    c. Topic: judicial decision making re: search and seizure
    d. *N*: 228 cases

e. Coding details: uses Supreme Court Database codes and codes re: search and seizure from Segal's 1986 Journal of Politics essay

18. *A Content Analysis of Judicial Decision Making: How Judges Use the Primary Caretaker Standard to Make a Custody Determination* (William and Mary Journal of Women and the Law, 1998)
    a. Author: Mercer
    b. Law/social science: law
    c. Topic: maternal preference in custody cases
    d. N: 49 cases
    e. Coding details: codes for differentiation/generality of legal norms, formality of decision making, case details

19. *Judicial Deference to Executive Precedent* (Yale Law Journal, 1992)
    a. Author: Merrill
    b. Law/social science: law
    c. Topic: deference doctrine
    d. N: 135 cases
    e. Coding details: all Supreme Court decisions from 1981-1990; superficial case-level codes

20. *Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13* (American Bankruptcy Law Review, 1999)
    a. Author: Norberg
    b. Law/social science: law
    c. Topic: Chapter 13 bankruptcy
    d. N: 71 cases
    e. Coding details: used final reports of each case, debtor's plan for repayment; coded for dollar amount, other details about decision

21. *The Future of School Desegregation* (Northwestern Law Review, 2000)
    a. Author: Parker
    b. Law/social science: law
    c. Topic: contemporary school desegregation cases
    d. N: 192 school districts
    e. Coding details: codes each opinion for outcome, time in jurisprudential history

22. *A Theory of Negligence* (Journal of Legal Studies, 1972)
    a. Author: Posner
    b. Law/social science: law

c. Topic: negligence in torts
d. *N*: 1528 cases
e. Coding details: one-thirtieth of all accident opinions during the defined period in appellate courts; coded for doctrinal approaches, facts of the case

23. Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit (NYU Law Review, 2001)
a. Author: Revesz
b. Law/social science: law
c. Topic: agency cases in the D.C. Circuit
d. *N*: 2144 votes
e. Coding details: all cases decided by the D.C. Circuit Court of Appeals between 1970 and 1996 re: health and safety; codes for case details

24. Environmental Regulation, Ideology, and the D.C. Circuit (Virginia Law Review, 1997)
a. Author: Revesz
b. Law/social science: law
c. Topic: role of ideology and judicial decision making in D.C. Circuit
d. *N*: approximately 250 cases with between 136 and 201 votes per period
e. Coding details: coded for panel details, partisanship, nature of objections, nature of parties, outcome

25. The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for Legislative History Debate (Stanford Law Review, 1998)
a. Author: Schacter
b. Law/social science: law
c. Topic: use of legislative history in statutory interpretation cases
d. *N*: 45 cases
e. Coding details: all opinions re: statutory interpretation in the Supreme Court's 1996 term; coded for use of legislative history, other resources judges use in statutory interpretation cases

26. Jackson's Judicial Philosophy: An Exploration in Value Analysis (American Political Science Review, 1965)
a. Author: Schubert
b. Law/social science: social science
c. Topic: judicial decision making at the Supreme Court (values)
d. *N*: 306 cases

e. Coding details: classified by type of decision, analyzed for value content; four types of variables: content, opinion, voting, chronology

27. *The 1960 Term of the Supreme Court: A Psychological Analysis* (American Political Science Review, 1962)
    a. Author: Schubert
    b. Law/social science: social science
    c. Topic: judicial decision making at the Supreme Court (psychology)
    d. *N*: 99 cases
    e. Coding details: vote matrix for each case for factor analysis

28. *Studying Administrative Law: A Methodology and Report on New Empirical Research* (Administrative Law Review, 1990
    a. Authors: Schuck and Elliott
    b. Law/social science: law
    c. Topic: descriptive statistics on administrative appeals
    d. *N*: 1676 cases
    e. Coding details: coded on descriptive details of the cases (introducing a larger study)

29. *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990* (Stanford Law Review, 1992)
    a. Authors: Schuck and Wang
    b. Law/social science: law
    c. Topic: change in immigration litigation
    d. *N*: 792 cases
    e. Coding details: 9th Circuit Court of Appeals cases re: immigration in 1979, 1985, 1989, 1990; coded for types of relief sought, success rates, how courts responded to appeal, *Chevron*

30. *Telling Stories About Women at Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument* (Harvard Law Review, 1990)
    a. Author: Schultz
    b. Law/social science: law
    c. Topic: employment discrimination opinions
    d. *N*: 54 cases
    e. Coding details: coded appellate cases on rhetorical and outcome (evidence affecting outcome) data

31. *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation* (University of Chicago Law Review, 1992)
    a. Authors: Schultz and Petterson
    b. Law/social science: law
    c. Topic: job discrimination cases
    d. *N*: 117 cases in original dataset; 1247 from American Bar Foundation database
    e. Coding details: codes for superficial case details

32. *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning* (NYU Law Review, 1998)
    a. Authors: Sisk, Heise, and Morriss
    b. Law/social science: law
    c. Topic: judicial decision making
    d. *N*: 293 judges
    e. Coding details: codes for judge demographics, case details

33. *The Strategy of Judging: Evidence from Administrative Law* (Journal of Legal Studies, 2002)
    a. Authors: Smith and Tiller
    b. Law/social science: social science
    c. Topic: judicial instrument use in judicial decision making
    d. *N*: 251 cases
    e. Coding details: Westlaw search in Courts of Appeals from 1981 to 1993; coded for case details, partisanship

34. *The Analysis of Behavior Patterns in the United States Supreme Court* (Journal of Politics, 1960)
    a. Author: Ulmer
    b. Law/social science: social science
    c. Topic: relationships between Supreme Court justices
    d. *N*: 42 cases
    e. Coding details: votes for each case for matrices of voting patterns

35. *Is the Federal Court Succeeding? An Empirical Assessment of Judicial Performance* (University of Pennsylvania Law Review, 2004)
    a. Authors: Wagner and Petherbridge
    b. Law/social science: law
    c. Topic: patent cases in federal circuit
    d. *N*: 413 cases

e. Coding details: created a taxonomy of approaches to opinion writing

36. *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts* (Vanderbilt Law Review, 2006)
    a. Author: Winkler
    b. Law/social science: law
    c. Topic: strict scrutiny
    d. N: 459 cases
    e. Coding details: coded to analyze strict scrutiny at both application and judge-level; judge-level data includes demographic information

37. *Counting Cases About Milk, Our "Most Nearly Perfect" Food, 1860-1940* (Law and Society Review, 2002)
    a. Authors: Wright and Huck
    b. Law/social science: law
    c. Topic: health regulation in Progressive era
    d. N: 440 cases
    e. Coding details: coded for case details, regulations, litigated, etc.

Appendix C: Coding Instrument

For BIA cases:

1. Name of case
2. Citation

Section 1: General Information

1. Decision date
2. Petitioner name
3. Petitioner type
    a. BIA/INS/Attorney General/Department of Justice/United States
    b. Immigrant
    c. Other
4. Respondent type
    a. Immigrant
    b. Other
5. Prior appellate activity (if applicable)
6. Future appellate activity

Section 2: Case Details

1. Disposition of case
    a. Significant judgment/verdict for petitioner
    b. Significant judgment/verdict for respondent
    c. Remand with instructions
    d. Dismissed without disposition
    e. Other
2. Remedy prescribed
    a. Change in party activity
    b. Cease-and-desist order
    c. Damages:
        - Compensatory
        - Punitive
    d. Decision without punitive measures
    e. Other
        - Deportation
        - Non-exclusion
3. Temporal relationship to *Chevron*
    a. Pre-*Chevron*

    b. Post-*Chevron*
        - If yes, does the case apply *Chevron*?
    c. Is there any reference to another deference scheme? (see Eskridge and Raso for details)
4. Reason for decision
    a. Violation of statutory requirements
    b. Non-violation of statutory requirements
    c. Adequate factual support for petitioner
    d. Adequate factual support for respondent
    e. Inadequate factual support for petitioner
    f. Inadequate factual support for respondent
5. Is the case *per curiam*?
6. Is there a concurring opinion(s)?
    a. If yes, concurring Board member
    b. If yes, concurring Board member party
7. Is there a dissenting opinion(s)?
    a. If yes, dissenting Board member
    b. If yes, concurring Board member party

Section 3: Partisanship

1. Attorney General
2. President
3. Partisanship of Attorney General and President
4. Name of Board members
5. Name of Board members' appointing president
6. Party of Board members' appointing president
7. Direction of opinion
    a. Pro-regulation of immigration
    b. Anti-regulation of immigration
    c. Other/mixed
8. Overall partisanship of Board (operationalized by appointing Attorney General)
9. Overall partisanship of contemporary Supreme Court (operationalized by appointing President)

Section 4: Additional Case-Specific Codes

1. Nation of origin
2. Type of case
    a. Removal proceedings
    b. Bond redetermination hearings
    c. Recission hearing

    d. Withholding-only hearing
    e. Asylum-only hearing
    f. Credible fear review
    g. Claimed status review
    h. *In absentia* hearing
    i. Other
3. Any additional notes

<u>For Court of Appeals cases</u>

1. Name of case
2. Citation

Section 1: General Information

1. Decision date
2. Circuit
3. Petitioner name
4. Respondent name
5. Petitioner type
    a. BIA/INS/Attorney General/Department of Justice/United States
    b. Immigrant
    c. Other
6. Respondent type
    a. BIA/INS/Attorney General/Department of Justice/United States
    b. Immigrant
    c. Other
7. Prior appellate activity
8. Future appellate activity (if any)

Section 2: Case Details

1. Appellate facts
    a. Appeal by petitioner
    b. Appeal by respondent
    c. Appeal by both parties
2. Disposition of case
    a. Significant judgment/verdict for petitioner
    b. Significant judgment/verdict for respondent
    c. Remand with instructions
    d. Dismissed without disposition
    e. Other

3. Remedy prescribed
    a. Explicit application of Board's remedy
    b. Explicit non-application of Board's remedy
    c. Damages
        - Compensatory
        - Punitive
4. Temporal relationship to *Chevron*
    a. Pre-*Chevron*
    b. Post-*Chevron*
        - If yes, does the case apply *Chevron*?
    c. Is there any reference to another deference scheme? (see Eskridge and Raso for details)
5. Reason for decision regarding the Board opinion
    a. Adequate fact-finding
    b. Inadequate fact-finding
    c. Adequate application of facts
    d. Inadequate application of facts
    e. Adequate application of statute
    f. Inadequate application of statute
    g. Adequate statutory interpretation
    h. Inadequate statutory interpretation
    i. Adequate application of doctrine
    j. Inadequate application of doctrine
6. Standard of review
    a. De novo
    b. Beyond a reasonable doubt
    c. Clear and convincing evidence
    d. Preponderance of the evidence
7. Is the decision *per curiam*?
8. Is there a concurring opinion(s)?
    a. If yes, concurring judge(s)
    b. If yes, concurring judge(s) party
9. Is there a dissenting opinion(s)?
    a. If yes, dissenting judge(s)
    b. If yes, concurring judge(s) party

Section 3: Partisanship

1. Attorney General
2. President
3. Partisanship of Attorney General and President

4. Name of judges on panel
5. Name of judges' appointing president
6. Party of judges' appointing president
7. Direction of opinion
    a. Pro-regulation of immigration
    b. Anti-regulation of immigration
    c. Other/mixed
8. Overall partisanship of circuit (operationalized by appointing president)
9. Overall partisanship of contemporary Supreme Court (operationalized by appointing President)

Section 4: Additional Case-Specific Codes

1. Nation of origin
2. Type of case
    a. Removal proceedings
    b. Bond redetermination hearings
    c. Rescission hearing
    d. Withholding-only hearing
    e. Asylum-only hearing
    f. Credible fear review
    g. Claimed status review
    h. *In absentia* hearing
    i. Other
3. Additional notes

Appendix D: Details on and Examples of Codes

Petitioner and Respondent Type

I distinguish between different types of litigants for both BIA and courts of appeals cases. This requires some assumptions, particularly regarding the BIA cases. Most BIA cases take the form of *In re Immigrant* or *Matter of Immigrant*. Though the traditional *Party v. Party* form is not followed, we can intuit that if the case name followed convention, it would look like *Agency v. Immigrant*; this is because the BIA, in the vast majority of cases, is suing the immigrant for some sort of activity that necessitates removal. The majority of BIA cases, then, have "BIA/INS/Attorney General/Department of Justice/United States" coded as the petitioner and "Immigrant" coded as the respondent.

Court of Appeals cases are invariably more clear on petitioner and respondent. Since the majority of cases coming out of the BIA are appeals of an anti-immigrant position, the petitioner code is typically "Immigrant" and the corresponding respondent code is "BIA/INS/Attorney General/Department of Justice/United States". There are no cases in the dataset that do not have either code.

Appellate Facts (for Courts of Appeals)

Here I indicate who appealed the BIA case to the geographically-appropriate court of appeals. As aforementioned, the majority of dyads in this dataset include BIA cases where the immigrant was unsuccessful in their attempt to receive aid from the BIA and who then appealed their case to the federal judiciary. Therefore, the majority of cases are coded as "appeal by immigrant."

There are no cases that are "appealed by both parties." There are no instances where the first appeal to the appropriate court of appeals is appealed by the BIA et al; however, there are a handful of instances where the government appeals on the second appeal, almost always to the Supreme Court. Since I limit the focus of this dissertation to the courts of appeals, there are no cases coded as "appealed by BIA/INS/Attorney General/Department of Justice/United States.

Disposition

This code provides a simple indication as to who was most successful in the case. The key here is most: I do not require that each case has one sole winner and one sole loser; instead I compare the extent to which each party was successful and indicated which party was more successful than the other. Fortunately most cases had one clear winner and one clear loser, but I indicate where this was not the case in the coding. All cases, then, include a code for "significant judgment/verdict for petitioner" or "significant judgment/verdict for respondent."

Remedy Prescribed

This is perhaps the most important code for it indicates what the court orders regarding what the BIA initially stated in the first case in the dyad. The two codes are "explicit application of ALC's remedy and "explicit non-application of ALC's remedy." There is also an "other" category where non-explicit prescriptions can be coded. It is here that we are able to discern whether the case is an instance of active deference, inactive deference, inactive non-deference, and active non-deference. As I have argued elsewhere, relying on the "disposition of the case"

code is inadequate for determining whether or not deference has occurred; instead the "disposition of case" code and the "remedy prescribed" code must be taken in tandem to determine deference.

Example of Explicit Application

In *Barragan-Sanchez v. Rosenberg*, the 9th Circuit Court of Appeals ruled in favor of the appellant. Barragan-Sanchez, a Mexico native, was disallowed re-entry into the United States after she returned to Mexico while on a non-resident visa. She left the United States on two occasions and, during each exit, she was warned that her exit would lead to deportation pursuant to the rules of her visa. The BIA affirmed that her exits constituted a deportable offense, and the court begrudgingly agreed. ("Although we sympathize with petitioner's unfortunate position, we are compelled to uphold the decision of the Special Inquiry Officer as affirmed by the Appeals Board. Unfortunately for petitioner, we do not act as a court of equity (*Barragan-Sanchez*, 760.") The majority of the court's opinion was dedicated to applying the Board's interpretation of the *Fleuti* doctrine.

Example of Explicit Non-Application

In *Diallo v. INS*, the 2nd Circuit Court of Appeals ruled in favor of the appellee. Diallo, a native of Mauritania, illegally entered the United States and applied for asylum out of fear of racial persecution in his home country. His asylum application was denied and he was thus referred to an immigration court to answer to a deportation order for his illegal entry. The Board ruled against Diallo, finding that his testimony was not credible by interpreting that the situation

Diallo cited in Mauritania was not dangerous enough to warrant asylum. The court, explicitly applying *Chevron*, ruled the opposite: though the Board's interpretation of the Mauritania facts could be accurate, they do not explain why Diallo's claims are insufficient. As a result, the court explicitly does not accept the Board's approach to the Diallo situation and rule in favor of Diallo with a remand to the Board.

Temporal Relationship to Chevron *and Reference to Other Doctrine Schemes*

This code indicates whether or not a case's opinion cites and/or applies Chevron doctrine. At first glance this appears to be a doctrine that only applies for cases decided after 1984; however Eskridge and Baer point to seven distinct deference doctrines that were implemented both before and after Chevron. The "pre-*Chevron*" and "post-*Chevron*" codes are self-explanatory and need no explication here, but if the "post-*Chevron*" code is indicated then I also determine whether or not the case applies *Chevron*, for just because a case occurs after *Chevron* that does not necessarily mean that the doctrine was applied. To code this, I do a text search for *Chevron*. If the text search elicits a *Chevron* reference, then I determine whether or not the case actively applies the doctrine. Those cases coded "*Chevron* non-application" are cases that are decided after 1984 that do not cite and/or apply *Chevron*.

Example of *Chevron* Application

In *Nwozuzu v. Holder*, the 2nd Circuit Court of Appeals ruled in favor of the appellee. Nwozuzu, originally from Nigeria though the parents of American citizens and present in the United States before he turned eighteen, was denied citizenship as a result of (1) committing a crime, and (2)

briefly leaving the United States to return to Nigeria and, thus, interrupting his presence in the United States. The Board claimed that Congress did not speak explicitly to this particularly circumstance. The Court disagreed wholeheartedly, citing *Chevron* and discussing their role pursuant to it. They argued that Congress did, in fact, explicitly discuss this issue and, in so doing, concluded that individuals like Nwozuzu were eligible for citizenship.

Further, I code for whether the case refers to another non-*Chevron* deference doctrine as defined by Eskridge and Baer: *Curtiss-Wright* deference, *Seminole Rock* deference, *Beth Israel* deference, *Skidmore* deference, consultative deference (*Smith v. City of Jackson*), or antideference (*PGA Tour, Inc. v. Martin*). This is also done through a text search of the opinion. Almost every case does not reference another doctrine besides *Chevron*: only one case cites another decision (*Skidmore*) but it is not applied.

Reason for Decision

This is by far the most complicated and subjective code and it required an extremely close reading of the text of the opinion to discern. In short, I code for why the case was decided as it was. This code varies across BIA and courts of appeals cases, and I will disaggregate all types here. Almost all cases include at least two codes.

BIA: Violation of Statutory Requirements

In cases where this was indicated, I (1) determine whether the immigrant was successful or unsuccessful at the BIA, and (2) determine if the reason for the decision was for a statutory

reason. This generally means that the immigrant was in violation of the INA or IIRIRA, oftentimes because of illegal entry or criminal activity that can lead to deportation. Since most cases before the BIA have outcomes that rule against the immigrant, there are very few cases coded as "non-violation of statutory requirements."

Example of Violation

In *In Re Gadda*, the Board ruled against Gadda. Gadda, an attorney who litigates immigration cases, was disbarred for "egregious and repeated acts of professional misconduct" by the Supreme Court of California. Even so, he continued to represent clients before the Board, arguing that since the Supreme Court of California is a state-level disbarment it has no implications on his ability to litigate before administrative courts. The Board disagreed, arguing that by Title 8 of the Code of Federal Regulations the Board has the authority to sanction attorneys as a result of disbarment proceedings in state courts.

BIA: (In)adequate Factual Support for Petitioner or for Respondent

These codes, though imperfect, offer a means for understanding *who* was the party at fault that led to the outcome of the decision. In short:

1. If the agency acted correctly leading to an anti-immigrant decision, then there was adequate factual support for the petitioner.

In *In Re Blake*, the Board ruled against Blake. Blake, a lawful permanent resident from an unnamed country, was convicted of sexual assault of a minor in violation of the New York Penal Code. He pleaded guilty and was called before an immigration court for removal to his home country. He requested a waiver allowing him to stay in the United States and when his request was unsuccessful he appealed to the BIA. In their decision, the Board affirmed the Immigration Judge's decision regarding the waiver, arguing that the waiver Blake requested is only available in very narrow situations and that Blake's context was not included.

2. <u>If the agency acted incorrectly leading to a pro-immigrant decision, then there was inadequate factual support for the petitioner</u>.

In *Marino v. INS*, the 2nd Circuit Court of Appeals ruled in favor of the appellant. Marino, an Italian national, was admitted to the United States as a non-resident visitor and later applied for an adjustment of status to permanent resident. His petition was denied due to conviction in Italy of "fraudulent destruction of his own property." On appeal, he argued that his crime was not one of moral turpitude and that the BIA ruled incorrectly due to a misapplication of the facts of his Italian crime. The court agreed, stating that by not exhausting his appeals in Italy the facts of the case have not been fully vetted and verified. Any conclusions drawn from the facts by the BIA, then, are not conclusive.

3. <u>If the immigrant acted correctly leading to a pro-immigrant decision, then there was adequate factual support for the respondent.</u>

In *Matter of Hill*, the INS appealed a decision in favor of Hill, an English national, who was ultimately unsuccessful before the Board. Hill voluntarily admitted to being a "practicing homosexual" when he was examined upon arrival in San Francisco. Under the Immigration and Nationality Act, homosexuality was prohibited among immigrants out of concerns for public health. The Board found that the Immigration Judge misapplied the facts of the case to allow Hill's entry and sustained the appeal. Though the immigrant was ultimately unsuccessful in this case, the Board ruled against the immigration court which constitutes this code.

4. <u>If the immigrant acted incorrectly leading to an anti-immigrant decision, then there was inadequate factual support for the respondent.</u>

In *Matter of Gonzalez De Lara*, the Board ruled against Gonzalez De Lara, a Mexican national convicted of marijuana possession. Gonzalez De Lara argued that his status as a child of a United States citizen even though she did not know the exact location of her birth and the fact that she did not obtain her citizenship certification until she was in her thirties. The Board picked up on some inconsistencies in Gonzalez De Lara's argument (i.e. that his mother's marriage certificate stated her birth location) that indicated that the claims of his mother's unknown citizenship were facetious and that, as a result, he was an alien who was eligible for deportation after his possession charge.

Rationales for Circuit Court Cases

The Courts of Appeals codes exclusively focus on the facts of the decision as they relate to the actions of the BIA; the facts of the case are only relevant as necessary to understand how

the administrative court made their decision in the first case of the dyad. As with the BIA codes, most cases have at least two codes indicated.

Court of Appeals (CA): (In)adequate Application of Facts

The courts of appeals have *de novo* discretion to review the facts of a case on appeal. This code captures whether the BIA correctly or incorrectly used the facts of the case correctly in order to draw conclusions regarding the case at hand. When this code is used, two things generally occur: the court state this very early in the decision, and the decisions are relatively short.

Example of Adequate Application

In *Von Pervieux v. INS*, the 3rd Circuit Court of Appeals found in favor of the appellant. The Von Pervieux family, originally from Argentina, sought to overstay their travel visa to remain permanently in the United States. On appeal from an anti-Von Pervieux decision, the 3rd Circuit actively affirmed, under *Chevron*, that the facts extolled in the Board decision clearly indicated that the Von Pervieux family, no matter their claims to the contrary, intended to circumvent the immigration process and were thus excludable under the governing immigration laws.

Example of Inadequate Application

In *McMullen v. INS*, the 9th Circuit Court of Appeals found in favor of the appellee. McMullen, an Irish national and IRA defector, sought refuge in the United States to avoid persecution and probable death at the hands of the IRA. When he relayed his story to the BIA, he was met with skepticism that his situation was as dire as he suggested. The Board, in particular, based their opinion on the fact that McMullen, under extant evidentiary rules, was responsible for bearing the burden of proof and fell short of proving his case. The 9th Circuit disagreed with this conclusion, stating that just because an immigrant may be tempted to lie to gain permanent entry does not mean that an immigrant is necessarily untrustworthy.

CA: (In)adequate Application of Statute

If this code is indicated, then the decision hinges at least in part on the BIA (1) using the correct statutory authority in a particular case, and (2) applying the statute correctly given the facts of the case.

Example of Adequate Application

In *Jolley v. Immigration and Naturalization Service*, the 5th Circuit Court of Appeals found in favor of the appellant. Jolley was born in the United States but defected to Canada to avoid compulsory military service. In so doing he renounced his U.S. citizenship. When he attempted to marry a U.S. citizen to regain his American citizenship, he was denied entry and citizenship as a result of his prior actions. The Board ruled against Jolley due to his violation of

the Immigration and Nationality Act, and the 5th Circuit actively affirmed that application of the statute.

Example of Inadequate Application

In *Blake v. Carbone* (the second half of the Blake dyad alluded to above), the 2nd Circuit Court of Appeals ruled in favor of the appellant. Blake, to refresh, pleaded guilty to statutory rape and requested a waiver that would allow him to remain in the United States. As aforementioned, the Board rejected his request on grounds that the waiver was only applicable in a very narrow set of circumstances. The court did not accept this argument: the Board's focus on the grounds for deportation rather than the particular circumstances under which the waiver is applicable was misplaced under the Immigration and Nationality Act.

CA: (In)adequate Statutory Interpretation

I borrow Black's definition of statutory interpretation as "the interpretation of a statute by the court, [and] principles developed for legislation interpretation by courts" and apply it using the following codes. If one of these codes is indicated, then the BIA has interpreted the statute in question correctly or incorrectly. In cases with this code decided after 1984, we often observe that *Chevron* is cited and discussed.

Example of Adequate Interpretation

In *Leal v. Holder*, the 9th Circuit Court of Appeals found in favor of the appellant. Leal, a native of Mexico who entered illegally but married a U.S. citizen and had four children with U.S. citizenship, was ordered deportable due to his frequent and nearly lethal tendency to drive while intoxicated. The Board found, and the court affirmed, that Leal's actions constituted moral turpitude and thus were deportable actions as defined by the Arizona criminal code and the Immigration and Nationality Act. The entirety of the opinion is dedicated to explicating the reasons why the Board's conclusions regarding moral turpitude were appropriate.

Example of Inadequate Interpretation

In *Goldeshtein v. INS*, the 9th Circuit Court of Appeals found in favor of the appellee. Goldeshtein, an Israeli national, was convicted of doctoring financial documents in order to avoid currency reports; he was sentenced to an extended period in prison and, upon the conclusion of his sentence, he was ordered deportable. The Board argued that his crimes necessarily constituted moral turpitude under the Immigration and Nationality Act since it required malicious intent. The court, in contrast, disagreed: "fraud is not inherent in the nature of the request....Accordingly, proof of intent was not required to convict Goldeshtein (*Goldeshtein*, 649-650)."

CA: (In)adequate Application of Doctrine

I borrow Black's definition of doctrine as "a rule, principle, theory, or tenet of the law" and apply it using the following codes. This code is very similar to the "application of statute" code but where the aforementioned code refers to statutory law, this code refers to law inscribed in court doctrine. This is a very common code in conjunction with the statutory interpretation codes.

Example of Adequate Application

In *Diaz-Casteneda v. Holder*, the 9th Circuit Court of Appeals ruled in favor of the appellant. Diaz-Casteneda and her husband, both Mexican nationals, entered the United States illegally, departed for Mexico, and subsequently attempted to re-enter the United States. Under the Immigration and Nationality Act, individuals who initially enter the United States illegally are ineligible for permanent residence; when the pair attempted re-entry, they were necessarily deportable. The court's decision revolved around the Board's interpretation of *In Re Briones*, a 2007 BIA precedent decision that declared that "recidivist immigration violators" are ineligible for an adjustment of status (*In re Briones*, 24 I&N Dec. 355 (2007)). The court argued that the Board's application of *Briones* was both appropriate and adequate.

Example of Inadequate Application

In *Lok v. INS*, the 2nd Circuit Court of Appeals ruled in favor of the appellee. Lok, a Chinese national from Hong Kong, initially overstayed a crewman's visa but followed all

channels required to become a legal resident of the United States upon marrying a U.S. citizen. Shortly following his legal status, he was convicted and pled guilty to distribution of a narcotic and was sentenced to five years in prison. He conceded deportability but requested a waiver under the Immigration and Nationality Act. The Board did not grant the waiver based on its long-standing reticence to rule against immigrants who have committed crimes that constitute moral turpitude. But the 2nd Circuit Court of Appeals, citing *Lennon v. Immigration and Naturalization Service* (which the Board also cited), stated that where an immigrant's situation is ambiguous the courts should rule in favor of the immigrant because "deportation is not, of course, a penal sanction. But in severity it surpasses all but the most Draconian criminal penalties (*Lennon*, 193)."

Per curiam *and concurring/dissenting opinions*

This dissertation does not use the text of concurring or dissenting opinions to interpret deferential intent *per se*; however, the authorial partisanship of those opinions is used to ascertain the partisan motivations of the case at hand. Conversely, indicating whether or not a case is *per curiam* indicates that determining the partisanship of the judicial panel will need to be calculated in a different way (i.e. through aggregate partisanship of the court in that year). By indicating the nature of the case, we can know that the partisan indication of the case is less exact.

Judges' names and partisanship of the panel

Coding decisions for partisanship presents a challenge. Since all measures are imperfect at best, I employ several different means for ascertaining partisanship. The first approach codes each judge's partisanship and aggregates partisanship of the judicial panel. To proxy partisanship, I identified each judge's appointing president and assigned the partisanship of the president to that judge. Where a judge was appointed by presidents of two parties, I code the judge as having the partisanship of the initial appointing president (though this is only the case in x% of cases).

I ascribe a +1 value for Democratic-appointed judges and a -1 value for Republican-appointed judges. I add the values for each panel and note the result. For the majority of cases each each panel is composed of three judges, and as such the most common values are +3 (three Democratic judges), +1 (two Democratic judges and one Republican judge), -1 (one Democratic judge and two Republican judges), and -3 (three Republican judges).

By noting the names of the judges in concert with the aggregate partisanship, I can easily indicate the partisanship of the author of the opinion. This provides the opportunity to more closely examine cases where the author of the opinion is of a different party than his or her peers on the panel.

Direction of Opinion

The second way I proxy partisanship is through determining whether the decision is "pro-immigrant" or "anti-immigrant" as defined by Epstein, Landes, and Posner. Again, this is imperfect and prone to overgeneralization. However, throughout the sixty years under

examination the Republican party has generally been in favor of restricting immigration bureaucratically while the Democratic party has generally been in favor of loosening regulatory restrictions on immigration.

Example of Anti-Immigrant:

In *Peignand v. Immigration and Naturalization Service*, the 1st Circuit Court of Appeals ruled in favor of the appellant. Peignand, a native of the Dominican Republic, was born out of wedlock to Dominican parents. The mother formally recognized the child and shortly thereafter became a naturalized U.S. citizen. Peignand was then convicted of possession of heroin and was sentenced to a prison term and deportation to the Dominican Republic. He argued that due to his mother's citizenship he is precluded from being deported since he is a U.S. citizen by extension. The court disagreed, stating that Peignand was never "legitimated" in the Dominican Republic due to his birth out of wedlock and thus his mother's citizenship could not be used as an argument for non-deportation.

Example of Pro-Immigrant:

In *Wong v. Immigration and Naturalization Service*, the 9th Circuit Court of Appeals ruled in favor of the appellee. Wong, a Chinese national who entered the United States illegally by claiming he was the child of American citizens, successfully resided in the United States continuously until a three-hour sight-seeing trip to Mexico. His military service ended one month too early to be an avenue towards becoming a legal resident. The Board ruled that his trip to Mexico was grounds for deportation since he was not continuously present in the United States;

the 9th Circuit disagreed, stating that a three-hour trip to Mexico did not constitute a meaningful absence in the United States.

Overall Partisanship of the Board/Court of Appeals/Supreme Court

I contextualize the aforementioned measures of partisanship through indicating the overall partisanship of the instant court and the Supreme Court at the time the decision is made. This aggregates the judge partisanship measure discussed above and takes into account the date a decision is made – using these data I can indicate the partisanship of a court down to the day.

Nation of Origin

The nation of origin of the immigrant at the center of each case is indicated with this code. For the vast majority of cases, this indicates the nationality of the immigrant. In a handful of circumstances the nation of origin code refers to the country the immigrant most recently came from but does not indicate the initial nationality of the immigrant. This is most common in cases involving refugee and Convention Against Torture (CAT) cases where an immigrant has left their country of origin out of safety concerns but is emigrating from a secondary country. This was also the case in the *Marks* series of cases where an American emigrated to Cuba to join revolutionary forces and was thus disallowed from re-entering the United States.

Type of Case

Here I code for the seven kinds of cases that the BIA are tasked with hearing as delineated by the IRIIRA (though they heard a similar set of cases prior to the passage of that statute. These cases are removal proceedings, bond redetermination hearings, rescission hearings, withholding-only hearing, asylum-only hearing, credible fear review, claimed status review, in absentia hearing, and other. With the exception of one case coded as "other" (a disbarment claim), all cases are coded as "removal". Though there are cases that involve asylum claims and credible fear concerns, they also involve removal considerations and are thus coded as removal cases.

Appendix E: Dyads Included in the Sample

To identify dyads, I examined each BIA precedent decision as catalogued in the Lexis Nexis "Immigration Precedent Decisions: BIA, AAO/AAU" database. Most, but not all, precedent decisions are available on the EOIR's website; all precedent decisions are available on Lexis Nexis. This made using the Lexis Nexis source the superior option. I then Shepardized each BIA precedent decision. Any precedent decision that had future appellate activity in the courts of appeals was identified as a dyad. Before beginning to read and code the decisions in earnest, I did an initial review of the dyads to ensure that the Shepardize feature correctly identified dyads. There were a handful of dyads (less than 5%) that were incorrectly identified as dyads by the Shepardize feature. The remainder of dyads identified constitutes the dataset used for this project.

The Circella Dyad	
In re C---- 5 I&N Dec. 370 (1953)	*United States* ex rel. *Circella v. Sahli* 216 F.2d 33 (7th Cir. 1954)
The Klapholz Dyad	
In re K---- 9 I&N Dec. 143 (1959)	*Klapholz v. Esperdy* 302 F.2d 928 (2nd Cir. 1962)
The Title Dyad	
In re T---- 9 I&N Dec. 127 (1960)	*Title v. INS* 322 F.2d 21 (9th Cir. 1963)
The Scythes Dyad	
In re S---- 9 I&N Dec. 252 (1961)	*Scythes v. Webb* 307 F.2d 905 (7th Cir. 1962)

The Marks Dyad	
In re M---- 9 I&N Dec. 452 (1961)	*United States* ex rel. *Marks v. Esperdy* 315 F.2d 673 (2nd Cir. 1963)
The Hernandez-Valensuela Dyad	
In re H--- V---- 9 I&N Dec. 428 (1961)	*Hernandez-Valensuela v. Rosenberg* 304 F.2d 639 (9th Cir. 1962)
The Sawkow Dyad	
In re S---- 9 I&N Dec. 613 (1962)	*Sawkow v. INS* 314 F.2d 34 (3rd Cir. 1963)
The Amarante Dyad	
In re A---- 9 I&N Dec. 705 (1962)	*Amarante v. Rosenberg* 326 F.2d 58 (9th Cir. 1964)
The Costello Dyad	
In re C---- 9 I&N Dec. 524 (1962)	*Costello v. INS* 311 F.2d 343 (2nd Cir. 1962)
The Garcia-Castillo Dyad	
In re Garcia-Castillo 10 I&N Dec. 516 (1964)	*Castillo v. INS* 350 F.2d 1 (9th Cir. 1965)
The Kinj/King Dyad	
In re Kinj 11 I&N Dec. 42 (1965)	*King v. Katzenbach* 360 F.2d 304 (5th Cir. 1966)
The G. Wong Dyad	
In re Wong 11 I&N Dec. 106 (1965)	*Git Foo Wong v. INS* 358 F.2d 151 (9th Cir. 1966)
The Lavoie Dyad	
In re Lavoie 11 I&N Dec. 224 (1965)	*Lavoie v. INS* 418 F.2d 732 (9th Cir. 1969)
The Caudillo-Villalobos Dyad	
In re Caudillo-Villalobos 11 I&N Dec. 259 (1965)	*Caudillo-Villalobos v. INS* 361 F.2d 329 (1st Cir. 1966)

The Pang Dyad	
In re Pang 11 I&N Dec. 489 (1966)	*Ah Chiu Pang v. INS* 368 F.2d 637 (3rd Cir. 1966)
The De Lucia Dyad	
In re De Lucia 11 I&N Dec. 565 (1966)	*De Lucia v. INS* 370 F.2d 305 (7th Cir. 1967)
The Talanoa Dyad	
In re Talanoa 11 I&N Dec. 630 (1966)	*Talanoa v. INS* 397 F.2d 196 (9th Cir. 1968)
The Ferrante Dyad	
In re Ferrante 12 I&N Dec. 166 (1967)	*Ferrante v. INS* 399 F.2d 98 (6th Cir. 1968)
The Talanoa Dyad	
In re Talanoa 12 I&N Dec. 187 (1967)	*Talanoa v. INS* 397 F.2d 196 (9th Cir. 1968)
The Nason Dyad	
In re Nason 12 I&N Dec. 452 (1967)	*Nason v. INS* 394 F.2d 223 (2nd Cir. 1968)
The Castillo-Godoy Dyad	
In re Castillo-Godoy 12 I&N Dec. 520 (1967)	*Godoy v. Rosenberg* 415 F.2d 1266 (9th Cir. 1969)
The Ho Dyad	
In re Ho 12 I&N Dec. 148 (1967)	*Ho Yeh Sze v. INS* 389 F.2d 978 (1968)
The Riva Dyad	
In re Riva 12 I&N Dec. 646 (1968)	*Riva v. Mitchell* 460 F.2d 1121 (3rd Cir. 1972)
The Yam Dyad	
In re Yam 12 I&N Dec. 676 (1968)	*Yam Sang Kwai v. INS* 411 F.2d 683 (D.C. Cir. 1969)

The Gonzalez de Lara Dyad	
In re Gonzalez de Lara 12 I&N Dec. 806 (1968)	*Gonzalez de Lara v. United States* 439 F.2d 1316 (5th Cir. 1971)
The Becerra Dyad	
In re Becerra 13 I&N Dec. 19 (1968)	*Becerra Monje v. INS* 418 F.2d 108 (9th Cir. 1969)
The Tsimbidy-Rochu Dyad	
In re Tsimbidy-Rochu 13 I&N Dec. 56 (1968)	*Tsimbidy-Rochu v. INS* 414 F.2d 797 (9th Cir. 1969)
The Lee F.C. Dyad	
In re Lee 13 I&N Dec. 236 (1969)	*Lee Fook Chuey v. INS* 439 F.2d 244 (9th Cir. 1970)
The Laqui Dyad	
In re Laqui 13 I&N Dec. 232 (1969)	*Laqui v. INS* 422 F.2d 807 (7th Cir. 1970)
The Au Dyad	
In re Au 12 I&N Dec. 294 (1969)	*Au Yi Lau v. INS* 445 F.2d 217 (D.C. Cir. 1971)
The Yaldo Dyad	
In re Yaldo 13 I&N Dec. 374 (1969)	*Yaldo v. INS* 424 F.2d 501 (6th Cir. 1970)
The Singh Dyad	
In re Singh 13 I&N Dec. 439 (1969)	*Singh v. INS* 456 F.2d 1092 (9th Cir. 1972)
The Martinez and Londono Dyad	
In re Martinez 13 I&N Dec. 483 (1970)	*Londono v. INS* 433 F.2d 635 (2nd Cir. 1970)
The Marin Dyad	
In re Marin 13 I&N Dec. 497 (1970)	*Marin v. INS* 438 F.2d 932 (9th Cir. 1971)

The Yanez-Jaquez Dyad	
In re Yanez-Jaquez 13 I&N Dec. 512	*Yanez-Jaquez v. INS* 440 F.2d 701 (5th Cir. 1971)
The Jolley Dyad	
In re Jolley 13 I&N Dec. 543 (1970)	*Jolley v. INS* 441 F.2d 1245 (5th Cir. 1971)
The Peignand Dyad	
In re Peignand 13 I&N Dec. 566 (1970)	*Peignand v. INS* 440 F.2d 757 (1st Cir. 1971)
The Solis-Davila Dyad	
In re Solis-Davila 13 I&N Dec. 694 (1971)	*Solis-Davila v. INS* 456 F.2d 424 (5th Cir. 1972)
The Barragan Dyad	
In re Barragan 13 I&N Dec. 759 (1971)	*Barragan-Sanchez v. Rosenberg* 471 F.2d 758 (9th Cir. 1972)
The L. Wong Dyad	
In re Wong 14 I&N Dec. 12 (1972)	*Lai Haw Wong v. INS* 474 F.2d 739 (9th Cir. 1973)
The Bark Dyad	
In re Bark 14 I&N Dec. 237 (1972)	*Bark v. INS* 511 F.2d 1200 (9th Cir. 1975)
The Khan Dyad	
In re Khan 14 I&N Dec. 397 (1973)	*Santiago* et al *v. INS* 526 F.2d 488 (9th Cir. 1975)
The Maldonado-Sandoval Dyad	
In re Maldonado-Sandoval 14 I&N Dec. 475 (1973)	*Maldonado-Sandoval v. INS* 518 F.2d 278 (9th Cir. 1975)
The Anaya Dyad	
In re Anaya 14 I&N Dec. 488 (1973)	*Anaya-Perchez v. INS* 500 F.2d 574 (5th Cir. 1974)

The Castro Dyad	
In re Castro 14 I&N Dec. 492 (1973)	*Castro-Guerrro v. INS* 515 F.2d 615 (5th Cir. 1975)
The Merced Dyad	
In re Merced 14 I&N Dec. 644 (1974)	*Merced v. INS* 514 F.2d 1070 (5th Cir. 1975)
The Quijencio Dyad	
In re Quijencio 15 I&N Dec. 95 (1974)	*Quijencio v. INS* 535 F.2d 501 (9th Cir. 1976)
The Marino Dyad	
In re Marino 15 I&N Dec. 284 (1975)	*Marino v. INS* 537 F.2d 686 (2nd Cir. 1976)
The Montemayor/Cacho Dyad	
In re Montemayor 15 I&N Dec. 353 (1975)	*Cacho v. INS* 547 F.2d 1057 (9th Cir. 1976)
The Von Pervieux Dyad	
In re Von Pervieux 15 I&N Dec. 406 (1975)	*Von Pervieux v. INS* 572 F.2d 114 (3rd Cir. 1978)
The S.N. Lee Dyad	
In re Shon Ning Lee 15 I&N Dec. 439 (1975)	*Shon Ning Lee v. INS* 576 F.2d 1380 (9th Cir. 1978)
The Rehman Dyad	
In re Rehman 14 I&N Dec. 505 (1975)	*Rehman v. INS* 544 F.2d 71 (2nd Cir. 1976)
The Lok Dyad	
In re Lok 15 I&N Dec. 720 (1976)	*Lok v. INS* 548 F.2d 37 (2nd Cir. 1977)
The Ruangswang Dyad	
In re Ruangswang 16 I&N Dec. 76 (1976)	*Ruangswang v. INS* 591 F.2d 39 (9th Cir. 1978)

The Wang Dyad	
In re Wang 16 I&N Dec. 528 (1978)	*Wang v. INS* 602 F.2d 211 (9th Cir. 1979)
The McMullen Dyad	
In re McMullen 17 I&N Dec. 542 (1980)	*McMullen v. INS* 658 F.2d 1312 (9th Cir. 1981)
The Hill Dyad	
In re Hill 18 I&N Dec. 81 (1981)	*Hill v. INS* 714 F.2d 1470 (9th Cir. 1983)
The Gunaydin Dyad	
In re Gunaydin 18 I&N Dec. 326 (1982)	*Gunaydin v. INS* 742 F.2d 776 (3rd Cir. 1984)
The Laipenieks Dyad	
In re Laipenieks 18 I&N Dec. 433 (1983)	*Laipenieks v. INS* 750 F.2d 1427 (9th Cir. 1985)
The Kulle Dyad	
In re Kulle 19 I&N Dec. 318 (1985)	*Kulle v. INS* 825 F.2d 1188 (7th Cir. 1987)
The (Name Redacted) Dyad	
In re A-G- 19 I&N Dec. 502 (1987)	*(Name Redacted) v. INS* 858 F.2d 210 (4th Cir. 1988)
The Maldonado-Cruz Dyad	
In re Maldonado-Cruz 19 I&N Dec. 509 (1988)	*Maldonado-Cruz v. Department of Immigration and Naturalization* 883 F.2d 788 (9th Cir. 1989)
The Canas-Segovia Dyad	
In re Canas 19 I&N Dec. 697 (1988)	*Canas-Segovia v. INS* 902 F.2d 717 (9th Cir. 1990)

The Goldeshtein Dyad	
In re Goldeshtein 20 I&N Dec. 382 (1991)	*Goldeshtein v. INS* 8 F.3d 645 (9th Cir. 1993)
The Kofa Dyad	
In re K- 20 I&N Dec. 418 (1991)	*Kofa v. INS* 60 F.3d 1084 (4th Cir. 1995)
The Garawan Dyad	
In re Garawan 20 I&N Dec. 938 (1995)	*Garawan v. INS* 91 F.3d 1332 (9th Cir. 1996)
The Shaar Dyad	
In re Shaar 21 I&N Dec. 541 (1996)	*Shaar v. INS* 141 F.3d 953 (9th Cir. 1998)
The Rivera Dyad	
In re Rivera 21 I&N Dec. 232 (1996)	*Rivera v. INS* 122 F.3d 1062 (4th Cir. 1997)
The Lettman Dyad, pt. 1	
In re Lettman 22 I&N Dec. 365 (1998)	*Lettman v. Reno* 168 F.3d 463 (11th Cir. 1999)
The Konstantinova Dyad	
In re L-V-K- 22 I&N Dec. 976 (1999)	*Konstantinova v. INS* 195 F.3d 528 (9th Cir. 1999)
The Diallo Dyad	
In re M-D- 21 I&N Dec. 1180 (1998)	*Diallo v. INS* 232 F.3d 279 (2nd Cir. 2000)
The Lettman Dyad, pt. 2	
In re Lettman 22 I&N Dec. 365 (1998)	*Lettman v. Reno* 207 F.3d 1368 (11th Cir. 2000)
The Dillingham Dyad	
In re Dillingham 21 I&N Dec. 1001 (1997)	*Dillingham v. INS* 267 F.3d 996 (9th Cir. 2001)

The Gadda Dyad	
In re Gadda 23 I&N Dec. 645 (2003)	*Gadda v. Ashcroft* 377 F.3d 934 (9th Cir. 2004)
The Agyeman Dyad	
In re Agyeman 1999 BIA LEXIS 52 (1999)	*Agyeman v. Gonzales* 155 Fed. Appx. 961 (9th Cir. 2005)
The Pickering Dyad	
In re Pickering 23 I&N Dec. 621 (2003)	*Pickering v. Gonzales* 454 F.3d 525 (6th Cir. 2006)
The Vargas-Sarmiento Dyad	
In re Vargas-Sarmiento 23 I&N Dec. 651 (2004)	*Vargas-Sarmiento v. Department of Justice* 448 F.3d 159 (2nd Cir. 2006)
The Ahmed Dyad	
In re Ahmed in Removal Proceedings 2005 BIA LEXIS 25 (2005)	*Ahmed v. Gonzales* 467 F.3d 669 (7th Cir. 2006)
The Maya-Cruz Dyad	
In re Maya-Cruz 2004 BIA LEXIS 20 (2004)	*Maya-Cruz v. Keisler* 252 Fed. Appx. 136 (9th Cir. 2007)
The Blake Dyad	
In re Blake 23 I&N Dec. 722 (2005)	*Blake v. Carbone* 489 F.3d 88 (2nd Cir. 2007)
The Smriko Dyad	
In re Smriko 23 I&N Dec. 836 (2005)	*Smriko v. Attorney General of the United States* 220 Fed. Appx. 103 (3rd Cir. 2007)
The Negusie Dyad	
In re Negusie 2006 BIA LEXIS 37 (2006)	*Negusie v. Gonzales* 231 Fed. Appx. 325 (5th Cir. 2007)

The Orozco-Solis Dyad	
In re Orozco-Solis 2006 BIA LEXIS 34 (2006)	*Orozco-Solis v. Mukasey* 270 Fed. Appx. 689 (9th Cir. 2008)
The Liadov Dyad	
In re Liadov 23 I&N Dec. 990 (2006)	*Liadov v. Mukasey* 518 F.3d 1003 (8th Cir. 2008)
The Gertsenshteyn Dyad	
In re Gertsenshteyn 24 I&N Dec. 111 (2007)	*Gertsenshteyn v. Department of Justice* 544 F.3d 137 (2nd Cir. 2008)
The Triumph Dyad	
In re Triumph 2006 BIA LEXIS 28 (2006)	*Triumph v. Holder* 314 Fed. Appx. 725 (5th Cir. 2009)
The Tejwani Dyad	
In re Tejwani 24 I&N Dec. 97 (2007)	*Tejwani v. Attorney General of the United States* 349 Fed. Appx. 719 (3rd Cir. 2009)
The Escobar Dyad	
In re Escobar 24 I&N Dec. 231 (2007)	*Escobar v. Holder* 567 F.3d 466 (2009)
The Ndayshimiye Dyad	
In re J-B-N- 24 I&N Dec. 208 (2007)	*Ndayshimiye v. Attorney General of the United States* 557 F.3d 124 (3rd Cir. 2009)
The Lemus-Losa Dyad	
In re Lemus-Losa 24 I&N Dec. 373 (2007)	*Lemus-Losa v. Holder* 576 F.3d 752 (7th Cir. 2009)
The Carachuri-Rosendo Dyad	
In re Carachuri-Rosendo 24 I&N Dec. 382 (2007)	*Carachuri-Rosendo v. Holder* 570 F.3d 263 (5th Cir. 2009)

The Chen Dyad	
In re C-C- 23 I&N Dec. 899 (2006)	*Chun Hua Chen v. Holder* 343 Fed. Appx. 652 (2nd Cir. 2009)
The Abreu Dyad	
In re Abreu 24 I&N Dec. 795 (2009)	*Cardenes Abreu v. Holder* 378 Fed. Appx. 59 (2nd Cir. 2010)
The Soriano-Vino Dyad	
In re Lourdes Soriano-Vino in Removal Proceedings 2003 BIA LEXIS 17 (2003)	*Soriano-Vino v. Holder* 653 F.3d 1096 (9th Cir. 2011)
The M.F. Wong Dyad	
In re M-F-W- 24 I&N Dec. 633 (2008)	*Mei Fun Wong v. Holder* 633 F.3d 64 (2nd Cir. 2011)
The Robles-Urrea Dyad	
In re Robles 24 I&N Dec. 22 (2006)	*Robles-Urrea v. Holder* 678 F.3d 702 (9th Cir. 2012)
The Monges-Garcia Dyad	
In re Monges 25 I&N Dec. 246 (2010)	*Monges-Garcia v. Holder* 482 Fed. Appx. 272 (9th Cir. 2012)
The Almanza-Arenas Dyad, pt. 1	
In re Almanza-Arenas 24 I&N Dec. 771 (2009)	*Almanza-Arenas v. Holder* 771 F.3d 1184 (9th Cir. 2014)
The Almanza-Arenas Dyad, pt. 2	
In re Almanza-Arenas 24 I&N Dec. 771 (2009)	*Almanza-Arenas v. Holder* 815 F.3d 469 (9th Cir. 2016)
The Diaz-Castaneda Dyad	
In re Diaz and Lopez 25 I&N Dec. 188 (2010)	*Diaz-Castaneda v. Holder* 540 Fed. Appx. 632 (9th Cir. 2013)

The Moody Dyad	
In re Moody 2012 BIA LEXIS 40 (2012)	*Moody v. Holder* 523 Fed. Appx. 88 (2nd Cir. 2013)
The Fernandez-Taveras Dyad	
In re Fernandez-Taveras 25 I&N Dec. 834 (2012)	*Taveras v. Attorney General of the United States* 731 F.3d 281 (3rd Cir. 2013)
The Akram Dyad	
In re Akram 25 I&N Dec. 874 (2012)	*Akram v. Holder* 721 F.3d 853 (7th Cir. 2013)
The Silva-Trevino Dyad	
In re Silva-Trevino 24 I&N Dec. 687 (2008)	*Silva-Trevino v. Holder* 742 F.3d 197 (5th Cir. 2014)
The Bautista Dyad	
In re Bautista 25 I&N Dec. 616 (2011)	*Bautista v. Attorney General of the United States* 744 F.3d 54 (3rd Cir. 2014)
The Leal Dyad	
In re Leal 26 I&N Dec. 20 (2012)	*Leal v. Holder* 771 F.3d 1140 (9th Cir. 2014)
The Rivas Dyad	
In re Rivas 26 I&N Dec. 130 (2013)	*Rivas v. United States Attorney General* 765 F.3d 1324 (11th Cir. 2014)
The Ortega-Lopez Dyad	
In re Ortega-Lopez 26 I&N Dec. 99 (2013)	*Ortega-Lopez v. Lynch* 834 F.3d 1015 (9th Cir. 2016)
The Enkui Li Dyad	
In re [Name Redacted by the Court] 2013 BIA LEXIS 25 (2013)	*Enkui Li v. Lynch* 633 Fed. Appx. 560 (2nd Cir. 2016)

The Hernandez Dyad	
In re Hernandez 26 I&N Dec. 464 (2015)	*Hernandez v. Lynch* 823 F.3d 279 (5th Cir. 2016)
The Esquivel-Quintana Dyad	
In re Esquivel-Quintana 26 I&N Dec. 469 (2015)	*Esquivel-Quintana v. Lynch* 810 F.3d 1019 (6th Cir. 2016)
The Garay-Reyes Dyad	
In re W-G-R- 26 I&N Dec. 208 (2014)	*Garay-Reyes v. Lynch* 842 F.3d 1125 (9th Cir. 2016)
The Obeya Dyad	
In re Obeya 26 I&N Dec. 856 (2016)	*Obeya v. Sessions* 884 F.3d 442 (2nd Cir. 2018)
The Richmond Dyad	
In re Richmond 26 I&N Dec. 779 (2016)	*Richmond v. Sessions* 697 Fed. Appx. 106 (2nd Cir. 2017)
The M. Hernandez Dyad	
Matter of M-H-Z- 26 I&N Dec. 757 (2016)	*Hernandez v. Sessions* 884 F.3d 107 (2nd Cir. 2018)
The Gomez-Sanchez Dyad	
In re G-G-S- 26 I&N Dec. 339 (2014)	*Gomez-Sanchez v. Sessions* 887 F.3d 893 (9th Cir. 2018)

Appendix F: Proportion of Law Review Citations on *Chevron*

To ascertain the ubiquity of discussions regarding the *Chevron* doctrine in the legal literature, I identified the number of mentions of *Chevron* in the text of law review articles between January 1, 1985 and December 31, 2019. I used Washington and Lee University School of Law's 2018 ranked list of law reviews and examined the twenty-five highest ranked publications. To determine the number of *Chevron* cites, I conducted a LexisNexis search for "*Chevron"* by journal between January 1, 1985 and December 31, 2019. To determine the number of total cites, I conducted a LexisNexis search for "law" by journal between January 1, 1985 and December 31, 2019.

Law Review by Rank	Total Cites since 1985	Total *Chevron* Cites	Proportion of *Chevron* Cites
Yale Law Journal	2683	210	7.83%
Harvard Law Review	4493	356	7.92%
Stanford Law Review	1506	91	6.04%
Columbia Law Review	1950	232	11.90%
Univ. of Pennsylvania Law Review	1798	144	8.01%
Texas Law Review	1820	135	7.42%
Georgetown Law Journal	1859	136	7.32%
Fordham Law Review	2857	187	6.55%

California Law Review	1771	98	5.53%
Supreme Court Review	204	33	16.18%
Iowa Law Review	1515	110	7.26%
Cornell Law Review	1340	114	8.51%
Vanderbilt Law Review	1730	122	7.05%
New York Univ. Law Review	1491	146	9.79%
Minnesota Law Review	1597	131	8.20%
Virginia Law Review	592	38	6.42%
UCLA Law Review	1386	92	6.64%
Univ. of Chicago Law Review	1851	169	9.13%
Boston Univ. Law Review	1562	107	6.85%
Boston College Law Review	1184	99	8.36%
Michigan Law Review	2620	164	6.26%
Notre Dame Law Review	1706	154	9.03%
Duke Law Journal	1333	187	14.03%
Southern California Law Review	1365	67	4.91%
William and Mary Law Review	1390	125	8.99%
Total	43603	3447	8.24%

Appendix G: χ^2 Results

Along with logistic regressions, I ran a series of χ^2 tests to ascertain the extent of the relationship between agency win/loss and deference type with a series of independent variables. The control variables used for each of the regressions were also used for the χ^2 tests; details can be found in footnotes in Chapter 3.

Effect of Numerous Variables on Agency Win or Loss: Universe

Independent Variable	χ^2	Degrees of Freedom	Significance
Panel Match	2.497	4	0.645
Court Match	0.749	3	0.862
Board of Immigration Appeals Panel Partisanship	0.902	2	0.637
Court of Appeals Panel Partisanship	2.856	4	0.582
Board of Immigration Appeals *Per Curiam*	5.381	2	0.068
Court of Appeals *Per Curiam*	16.496	3	0.001

Effect of Numerous Variables on Deference Type: Universe

Independent Variable	χ^2	Degrees of Freedom	Significance
Panel Match	1.627	4	0.804
Court Match	1.058	3	0.787
Board of Immigration Appeals Panel Partisanship	0.267	2	0.875
Court of Appeals Panel Partisanship	8.774	4	0.067
Board of Immigration Appeals *Per Curiam*	7.901	2	0.019
Court of Appeals *Per Curiam*	5.650	3	0.130

Effect of Numerous Variables on Agency Win or Loss: Pre-*Chevron*

Independent Variable	χ^2	Degrees of Freedom	Significance
Panel Match	n/a		
Court Match	11.184	3	0.011
Board of Immigration Appeals Panel Partisanship	2.837	2	0.242

Court of Appeals Panel Partisanship	3.591	4	0.464
Board of Immigration Appeals *Per Curiam*	n/a		
Court of Appeals *Per Curiam*	12.576	3	0.006

Effect of Numerous Variables on Deference Type: Pre-*Chevron*

Independent Variable	χ^2	Degrees of Freedom	Significance
Panel Match	n/a		
Court Match	0.201	3	0.977
Board of Immigration Appeals Panel Partisanship	0.823	2	0.663
Court of Appeals Panel Partisanship	6.824	4	0.146
Board of Immigration Appeals *Per Curiam*	n/a		
Court of Appeals *Per Curiam*	1.904	3	0.592

Effect of Numerous Variables on Agency Win or Loss: Post-*Chevron*

Independent Variable	χ^2	Degrees of Freedom	Significance
Panel Match	2.457	4	0.652
Court Match	1.540	3	0.673
Board of Immigration Appeals Panel Partisanship	1.553	2	0.460
Court of Appeals Panel Partisanship	1.729	3	0.631
Board of Immigration Appeals *Per Curiam*	4.573	2	0.102
Court of Appeals *Per Curiam*	18.217	3	0.000

Effect of Numerous Variables on Deference Type: Post-*Chevron*

Independent Variable	χ^2	Degrees of Freedom	Significance
Panel Match	2.994	4	0.559
Court Match	2.162	3	0.539
Board of Immigration Appeals Panel Partisanship	0.051	2	0.975
Court of Appeals Panel Partisanship	7.725	3	0.052

Board of Immigration Appeals *Per Curiam*	2.360	2	0.307
Court of Appeals *Per Curiam*	6.398	3	0.094

Bibliography

(Name Redacted) v. Immigration and Naturalization Service, 858 F.2d 210 (4th Cir. 1988).

A Bill to Reform the Process for the Selection and Oversight of Administrative Law Judges, H.R. 6768, 96th Congress (1980).

Aagaard, Todd. S. "Agencies, Courts, First Principles, and the Rule of Law." *Administrative Law Review,* 70, no. 4 (2018): 771-806.

Actions Against Administrative Law Judges, 5 U.S.C. § 7521 (2018).

Adjudications, 5 U.S.C. § 554 (2011).

Administrative Conference of the United States. "1987 Annual Report." Retrieved 2021. https://ia802607.us.archive.org/25/items/gov.acus.1987.report/gov.acus.1987.report.pdf.

Administrative Procedure Act of 1946, 5 U.S.C. § 551 *et seq.* (1946).

Agyeman v. Gonzales, 155 Fed. Appx. 961 (9th Cir. 2005).

Ah Chiu Pang v. Immigration and Naturalization Service, 368 F.2d 637 (3rd Cir. 1966).

Ahmed v. Gonzales, 467 F.3d 669 (7th Cir. 2006).

Air Force Personnel Center. "Records Correction." Accessed 2021. https://www.afpc.af.mil/Career-Management/Military-Personnel-Records/.

Akram v. Holder, 721 F.3d 853 (7th Cir. 2013).

Almanza-Arenas v. Holder, 771 F.3d 1184 (9th Cir. 2014).

Almanza-Arenas v. Holder, 815 F.3d 469 (9th Cir. 2016).

Amarante v. Rosenberg, 326 F.2d 58 (9th Cir. 1964).

Anaya-Perchez v. Immigration and Naturalization Service, 500 F.2d 574 (5th Cir. 1974).

Andreski, Stanislav (ed.). "Max Weber on Capitalism, Bureaucracy and Religion." 1st ed. Abington, UK: Taylor and Francis, 1983.

Anssari-Gharachedaghy v. Immigration and Naturalization Service, 246 F.3d 512 (6th Cir. 2000).

Ashcroft, John. D. and Kris W. Kobach. "A More Perfect System: The 2002 Reforms of the Board of Immigration Appeals." *Duke Law Journal* 58, no. 8 (2009): 1991-2011.

Au Yi Lau v. Immigration and Naturalization Service, 445 F.2d 217 (D.C. Cir. 1971).

Auer v. Robbins, 519 U.S. 452 (1997).

Baldus, David C., George Woodworth, David Zuckerman, and Neil A. Weiner. "Racial Discrimination and the Death Penalty in the Post-*Furman* Era: An Empirical and Legal Overview with Recent Findings from Philadelphia." *Cornell Law Review* 83, no. 6 (1998): 1638-1770.

Balla, Steven J. "Administrative Procedures and Political Control of the Bureaucracy." *American Political Science Review* 92, no. 3 (1998): 663-673.

Bamzai, Aditya. "The Origins of Judicial Deference to Executive Interpretation." *Yale Law Journal* 126, no. 4 (2017): 908-1001.

Bark v. Immigration and Naturalization Service, 511 F.2d 1200 (9th Cir. 1975).

Barnes, Jeb. "Bringing the Courts Back In: Interbranch Perspectives on the Role of Courts in American Politics and Policy Making." *Annual Review of Political Science* 10 (2007): 25-43.

Barnes, Jeb. *Overruled? Legislative Overrides, Pluralism, and Contemporary Court-Congress Relations*. Palo Alto, CA: Stanford University Press, 2004.

Barnett, Ken and Christopher J. Walker. "*Chevron* and the Circuit Courts." *Michigan Law Review* 116, no. 1 (2017): 1-73.

Barragan-Sanchez v. Rosenberg, 471 F.2d 758 (9th Cir. 1972).

Barron, David J. and Elena Kagan. "*Chevron*'s Nondelegation Doctrine." *Supreme Court Review* 2001 (2001): 201-265.

Bautista v. Attorney General of the United States, 744 F.3d 54 (3rd Cir. 2014).

Beebe, Barton. "An Empirical Study of the Multifactor Tests for Trademark Infringement." *California Law Review* 94, no. 6 (2006): 1581-1654.

Benesch, Susan. "Due Process and Decision Making in U.S. Immigration Adjudication." *Administrative Law Review* 59, no. 3 (2007): 557-567.

Beth Israel Hospital v. National Labor Relations Board, 437 U.S. 483 (1978).

Bickel, Alexander M. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. New Haven, CT: Yale University Press, 1962.

Blake v. Carbone, 489 F.3d 88 (2nd Cir. 2007).

Bowles v. Seminole Rock and Sand Company, 325 U.S. 410 (1945).

Brace, Paul, Laura Langer, & Melinda Gann Hall. "Measuring the Preferences of State Supreme Court Justices." *Journal of Politics* 62, no. 2 (2000): 387-413.

Bressman, Lisa S. "*Chevron*'s Mistake." *Duke Law Journal* 58, no. 4 (2009): 549-621.

Breyer, Stephen. G., Richard B. Stewart, Cass R. Sunstein, Adrian Vermeule, and Michael Herz. *Administrative Law and Regulatory Policy: Problems, Text, and Cases* (7th ed.). New York: Aspen, 2011.

Brudney, James J., Sara Schiavoni, Deborah J. Merritt. "Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern." *Ohio State Law Journal* 60, no. 5 (1999): 1675-1771.

Burke, Thomas F. *Lawyers, Lawsuits, and Legal Rights: The Battle Over Litigation in American Society*. Oakland, CA: University of California Press, 2002.

Burrows, Vanessa K. "CRS Report for Congress: Administrative Law Judges: An Overview." *Library of Congress, Congressional Research Service*. Accessed 2021. https://www.everycrsreport.com/files/20080805_RL34607_db6a56b2a1762a33c07a34f065b51b15175a82f7.pdf.

Cabral v. Immigration and Naturalization Service, 15 F.3d 193 (1st Cir. 1994).

Cacho v. Immigration and Naturalization Service, 547 F.2d 1057 (9th Cir. 1976).

Caminker, Evan H. "Why Must Inferior Courts Obey Superior Court Precedents?" *Stanford Law Review* 46, no. 4 (1994): 817-873.

Canas-Segovia v. Immigration and Naturalization Service, 970 F.2d 599 (1992).

Carachuri-Rosendo v. Holder, 570 F.3d 263 (5th Cir. 2009).

Cardenes Abreu v. Holder, 378 Fed. Appx. 59 (2nd Cir. 2010).

Cardozo, Benjamin N. *The Nature of the Judicial Process*. New Haven, CT: Yale University Press, 1921.

Carpenter, Daniel P. *Reputation and Power: Organizational Image and Pharmaceutical Regulation at the FDA*. Princeton, NJ: Princeton University Press, 2010.

Carpenter, Daniel P. *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928*. Princeton, NJ: Princeton University Press, 2001.

Castillo v. Immigration and Naturalization Service, 350 F.2d 1 (9th Cir. 1965).

Castro-Guerrro v. INS, 515 F.2d 615 (5th Cir. 1975).

Caudillo-Villalobos v. Immigration and Naturalization Service, 361 F.2d 329 (1966).

Centers for Medicare and Medicaid Services. "Medicare Geographic Classification Review Board." Accessed 2021. https://www.cms.gov/Regulations-and-Guidance/Review-Boards/MGCRB#:~:text=The%20Medicare%20Geographic%20Classification%20Review,of%20receiving%20a%20higher%20payment.

Centers for Medicare and Medicaid Services. "PRRB Review." Accessed 2021. https://www.cms.gov/Regulations-and-Guidance/Review-Boards/PRRBReview#:~:text=The%20Provider%20Reimbursement%20Review%20Board,Services%20(%22CMS%22).

Chabot, Christine K. "Selling *Chevron*." *Administrative Law Review* 67, no. 3 (2015): 481-550.

Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

Chun Hua Chen v. Holder, 343 Fed. Appx. 652 (2nd Cir. 2009)

Civil Service Regulations: Programs for Specific Positions and Examinations (Miscellaneous): Administrative Law Judge Program, 5 C.F.R. § 930.201 (2017).

Coate, Malcolm B. and Andrew N. Kleit. "Does It Matter That the Prosecutor is Also the Judge? The Administrative Complaint Process at the Federal Trade Commission." *Managerial and Decision Economics* 19, no. 1 (1998): 1-11.

Cohen, Mark A. "Explaining Judicial Behavior, or What's 'Unconstitutional' About the Sentencing Commission?" *Journal of Law, Economics, and Organization* 7, no. 1 (1991): 183-199.

Commodity Futures Trading Commission. "Reparations Program." Accessed 2021. https://www.cftc.gov/LearnAndProtect/reparationsprogram/OV_CFTC_008821.html.

Consumer Financial Protection Bureau. "Administrative Adjudication Proceedings." Accessed 2021. https://www.consumerfinance.gov/administrative-adjudication-proceedings/#:~:text=Administrative%20adjudication%20proceedings%20are%20formal,administrative%20law%20judge's%20recommended%20decision.

Costello v. Immigration and Naturalization Service, 311 F.2d 343 (2nd Cir. 1962).

Cox, Adam B. "Deference, Delegation, and Immigration Law." *The University of Chicago Law Review* 74 (2007): 1671-1687.

Cross, Frank B. and Emerson H. Tiller. "Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Court of Appeals." *Yale Law Journal* 107, no. 7 (1998): 2155-2175.

Cross, Frank B. and Emerson H. Tiller. "Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Court of Appeals." *The Yale Law Journal* 107, no. 7 (1998): 2155-2176.

Cross, Frank B. *Decision Making in the U.S. Court of Appeals*. Palo Alto, CA: Stanford University Press, 2007.

Crowley, Steven. "White House Review of Agency Rulemaking: An Empirical Investigation." *The University of Chicago Law Review* 70, no. 3 (2003): 821-885.

Dahl, Ronald A. "Decision Making in a Democracy: The Supreme Court as a National Policy Maker." *Journal of Public Law* 6 (1957): 279-295.

Davis, Kenneth C. "Hearsay in Administrative Hearings." *George Washington Law Review* 32, no. 4 (1964): 689-700.

Davis, Peggy C. "'There is a Book Out…': An Analysis of Judicial Absorption of Legislative Facts." *Harvard Law Review* 100, no. 7 (1987): 1539-1604.

De Figueiredo, Rui J.P., Jr., Pablo T. Spiller, and Santiago Urbiztondo. "An Informational Perspective on Administrative Procedures." *Journal of Law, Economics, and Organization* 15, no. 1 (1999): 283-305.

De Lucia v. INS, 370 F.2d 305 (7th Cir. 1967).

Department of Energy. "The Office of Hearings and Appeals." Accessed 2021. https://www.energy.gov/oha/office-hearings-and-appeals-0.

Department of Health and Human Services. "Organizational Chart." Accessed 2021. https://www.hhs.gov/about/agencies/omha/about/organizational-chart/index.html.

Department of Justice. "Annual Report of the Immigration and Naturalization Service, 1980." Accessed 2021. https://searchworks.stanford.edu/view/488273.

Department of Justice. "Immigration Court Practice Manual." Accessed 2021. https://www.justice.gov/eoir/page/file/1258536/download.

Department of State. "Foreign Service Grievance Board." Accessed 2021. https://www.fsgb.gov/fsgb_public?id=about_fsgb.

Department of the Navy. "Board for Correction of Naval Records." Accessed 2021. https://www.secnav.navy.mil/mra/bcnr/Pages/default.aspx.

Department of Veteran Affairs. "Board of Veterans' Appeals Annual Report: Fiscal Year (FY) 2019." Accessed 2021. https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2019AR.pdf.

Diallo v. Immigration and Naturalization Service, 232 F.3d 279 (2000).

Diaz-Castaneda v. Holder, 540 Fed. Appx. 632 (9th Cir. 2013).

Dillingham v. Immigration and Naturalization Service, 267 F.3d 996 (2001).

Director, Office of Worker's Compensation Programs v. Greenwich Collieries, 512 U.S. 267 (1994).

Diver, Colin S. "Statutory Interpretation in the Administrative State." *University of Pennsylvania Law Review* 133, no. 3 (1985): 549-599.

Dorsey and Whitney LLP. "Study Conducted for the American Bar Association Commission on Immigration Policy, Practice, and Pro Bono re: Board of Immigration Appeals: Procedural Reforms to Improve Case Management." Accessed 2021. https://www.supremecourt.gov/opinions/URLs_Cited/OT2007/06-1181/06-1181_2.pdf.

Drug Enforcement Administration. "Office of Administrative Law Judges." Accessed 2021. https://www.dea.gov/divisions/administrative-law-judges.

Dworkin, Ronald. "Hard Cases." *Harvard Law Review* 88, no. 6 (1975): 1057-1109.

Enkui Li v. Lynch, 633 Fed. Appx. 560 (2nd Cir. 2016).

Epstein, David and Sharyn O'Halloran. *Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers*. New York: Cambridge University Press, 1999.

Epstein, Lee and Jack Knight. *The Choices Justices Make*. Thousand Oaks, CA: Sage Publishing, 1997.

Epstein, Lee and Thomas G. Walker. "Positive Political Theory and the Study of U.S. Supreme Court Decision Making: Understanding the Sex Discrimination Cases." *New York City Law Review* 1, no. 1 (1996): 155-201.

Epstein, Lee, Andrew D. Martin, Kevin M. Quinn, and Jeffrey A. Segal. "Ideological Drift Among Supreme Court Justices: Who, When, and How Important?" *Northwestern University Law Review* 101, no. 4 (2007): 1483-1542.

Epstein, Lee, William M. Landes and Richard A. Posner. *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice*. Cambridge, MA: Harvard University Press, 2013.

Escobar v. Holder, 567 F.3d 466 (2009).

Eskridge, William N., Jr. "Overriding Supreme Court Statutory Interpretation Decisions." *Yale Law Journal* 101, no. 2 (1991): 331-455.

Eskridge, William N., Jr. and Lauren E. Baer. "The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*." *Georgetown Law Journal* 96, no. 4 (2008): 1083-1226.

Eskridge, William N., Jr. and Philip P. Frickey. "The Making of "the Legal Process". *Harvard Law Review* 107, no. 8 (1994): 2031-2055.

Esquivel-Quintana v. Lynch, 810 F.3d 1019 (6th Cir. 2016).

Executive Office of Immigration Review. "About the Office." Accessed 2021. https://www.justice.gov/eoir/about-office.

Executive Office of Immigration Review. "Evidence Guide." Accessed 2021. https://www.justice.gov/eoir/page/file/988046/download.

Executive Office of Immigration Review. "FY 2016 Statistics Yearbook." Accessed 2021. https://www.justice.gov/eoir/page/file/fysb16/download.

Executive Office of Immigration Review. "Statistical Yearbook 2000." Accessed 2021. https://www.justice.gov/sites/default/files/eoir/legacy/2001/05/09/SYB2000Final.pdf.

Farina, Cynthia R. "Statutory Interpretation and the Balance of Power in the Administrative State." *Columbia Law Review* 89, no. 3 (1989): 452-528.

Federal Communications Commission. "Administrative Law Judges." Accessed 2021. https://www.fcc.gov/administrative-law-judges.

Federal Communications Commission. “EB-IHD.” Accessed 2021. https://www.fcc.gov/eb-ihd.

Federal Energy Regulatory Commission. “Office of Administrative Litigation (OAL).” Accessed 2021. https://www.ferc.gov/about/offices/office-administrative-litigation-oal.

Federal Energy Regulatory Commission. “Office of Administrative Law Judges (OALJ).” Accessed 2021. https://www.ferc.gov/about/offices/office-administrative-law-judges-oalj.

Federal Maritime Commission. “Office of the Administrative Law Judges.” Accessed 2021. https://www.fmc.gov/about-the-fmc/bureaus-offices/administrative-law-judges/#:~:text=If%20a%20person%20or%20company,Administrative%20Law%20Judges%20(ALJ).

Federal Mine Safety and Health Review Commission. “Federal Mine Safety and Health Review Commission.” Accessed 2021. https://www.fmshrc.gov/.

Federal Trade Commission. “Office of Administrative Law Judges.” Accessed 2021. https://www.ftc.gov/about-ftc/bureaus-offices/office-administrative-law-judges.

Feeley, Malcolm M., and Edward L. Rubin. *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons*. New York: Cambridge University Press, 1998.

Ferejohn, John and Charles Shipan. “Congressional Influence on Bureaucracy.” *Journal of Law, Economics, and Organization* 6 (1990): 1-20.

Ferrante v. Immigration and Naturalization Service, 399 F.2d 98 (6th Cir. 1968).

Fischman, Joel B. “Estimating Preferences of Circuit Judges: A Model of Consensus Voting.” *The Journal of Law and Economics* 54, no. 4 (2011): 781-809.

Flemming, Gregory N., David B. Holian, and Susan G. Mezey. “An Integrated Model of Privacy Decision Making in State Supreme Courts.” *American Politics Research* 26, no. 1 (1998): 35-58.

Foote, Elizabeth V. "Statutory Interpretation or Public Administration: How *Chevron* Misconceives the Function of Agencies and Why It Matters." *Administrative Law Review* 59, no. 4 (2007): 673-724.

Foy, H. Miles, III. "On Judicial Discretion in Statutory Interpretation." *Administrative Law Review* 62, no. 2 (2010): 291-327.

Franklin, Marc A. "Winners and Losers and Why: A Study of Defamation Litigation." *American Bar Foundation Research Journal* 5, no. 3 (1980): 455-500.

Gadda v. Ashcroft, 377 F.3d 934 (9th Cir. 2004).

Galanter, Marc. "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society." *University of California Los Angeles Law Review* 31, no. 1 (1983): 4-71.

Garawan v. Immigration and Naturalization Service, 91 F.3d 1332 (9th Cir. 1996).

Garay-Reyes v. Lynch, 842 F.3d 1125 (9th Cir. 2016).

Garberding v. Immigration and Naturalization Service, 30 F.3d 1187 (9th Cir. 1994).

Garrett, Elizabeth. "Legislating *Chevron*." *Michigan Law Review* 101, no. 8 (2003): 2637-2676.

Gely, Rafael and Pablo T. Spiller. "The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt's Court-Packing Plan." *International Review of Law and Economics* 12 (1992): 45-67.

General Services Administration. "United States Civilian Board of Contract Appeals." Accessed 2021. https://www.cbca.gov/.

George, Alexander L. and Andrew Bennett. *Case Studies and Theory Development in the Social Sciences*. Cambridge, MA: MIT Press, 2005.

George, Tracey E. “Developing a Positive Theory of Decision Making on U.S. Courts of Appeals.” *Ohio State Law Journal* 58, no. 5 (1998): 1635-1696.

Gerber, Scott D. and Keeok Park. “The Quixotic Search for Consensus on the U.S. Supreme Court: A Cross-Judicial Empirical Analysis of the Rehnquist Court Justices.” *American Political Science Review* 91, no. 2 (1997): 390-408.

Gerring, John. “What is a Case Study and What is it Good For?” *American Political Science Review* 98, no. 2 (2004): 341-354.

Gersen, Jacob E. “Overlapping and Underlapping Jurisdiction in Administrative Law.” *The Supreme Court Review* 2006, no. 1 (2006): 201-247.

Gertsenshteyn v. Department of Justice, 544 F.3d 137 (2nd Cir. 2008).

Giles, Micheal W., Virginia A. Hettinger, Todd Peppers. “Picking Federal Judges: A Note on Policy and Partisan Selection Agendas.” *Political Research Quarterly* 54, no. 3 (2001): 623-641.

Gillman, Howard. “What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making.” *Law and Social Inquiry* 26, no. 2 (2001): 465-504.

Git Foo Wong v. Immigration and Naturalization Service, 358 F.2d 151 (9th Cir. 1966).

Godoy v. Rosenberg, 415 F.2d 1266 (9th Cir. 1969).

Goldeshtein v. Immigration and Naturalization Service, 8 F.3d 645 (9th Cir. 1993).

Goldman, Sheldon. “Voting Behavior on the United States Courts of Appeals Revisited.” *American Political Science Review* 69, no. 2 (1975): 491-506.

Gomez-Sanchez v. Sessions, 887 F.3d 893 (9th Cir. 2018).

Gonzalez de Lara v. United States, 439 F.2d 1316 (5th Cir. 1971).

Graber, Mark. "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary." *Studies in American Political Development* 7, no. 1 (1993): 35-73.

Graham, Cole B., Jr. "The Changing Role of the Administrative Law Judge." *Public Administration Quarterly* 9, no. 3 (1985): 260-273.

Grundfest, Joseph A. and A. C. Pritchard. "Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation." *Stanford Law Review* 54, no. 4 (2002): 627-736.

Grundstein, Nathan D. "Subdelegation of Administrative Authority." *George Washington Law Review* 13, no. 2 (1945): 144-196.

Hagle, Timothy M. "But Do They Have to See It to Know It? The Supreme Court's Obscenity and Pornography Decisions." *The Western Political Quarterly* 44, no. 4 (1991): 1039-1054.

Hall, Mark A. and Ronald A. Wright. "Systematic Content Analysis of Judicial Opinions." *California Law Review* 96, no. 1 (2008): 63-122.

Hall, Melinda Gann. "Docket Control as an Influence on Judicial Voting." *The Justice System Journal* 10, no. 2 (1985): 243-255.

Haltom, William and Michael McCann. *Distorting the Law: Politics, Media, and the Litigation Crisis*. Chicago: The University of Chicago Press, 2004.

Hammer, Peter J. and William M. Sage. "Antitrust, Health Care Quality, and the Courts." *Columbia Law Review* 102, no. 3 (2002): 545-649.

Hart, H. L. A. *The Concept of Law* (3rd ed., Clarendon Law Series). New York, NY: Oxford University Press, 2012.

Hay, Bruce L. and Kathryn E. Spier. "Burdens of Proof in Civil Litigation: An Economic Perspective." *The Journal of Legal Studies* 26, no. 2 (1997): 413-431.

Hernandez v. Lynch, 823 F.3d 279 (5th Cir. 2016).

Hernandez v. Sessions , 884 F.3d 107 (2nd Cir. 2018).

Hernandez-Valensuela v. Rosenberg, 304 F.2d 639 (9th Cir. 1962).

Higgins, Richard S. and Paul H. Rubin. "Judicial Discretion." *The Journal of Legal Studies* 9, no. 1 (1980): 129-138.

Hill v. Immigration and Naturalization Service, 714 F.2d 1470 (9th Cir. 1983).

Hillman, Robert A. "Questioning the 'New Consensus' on Promissory Estoppel: An Empirical and Theoretical Study." *Columbia Law Review* 98, no. 3 (1998): 580-619.

Ho Yeh Sze v. INS, 389 F.2d 978 (1968).

Hubbard, Bradley G. "Deference to Agency Statutory Interpretations First Advanced in Litigation? The *Chevron* Two-Step and the *Skidmore* Shuffle." *The University of Chicago Law Review* 80, no. 1 (2013): 447-486.

Huber, John D. and Charles R. Shipan. *Deliberate Discretion? The Institution Foundations of Bureaucratic Autonomy*. New York, NY: Cambridge University Press, 2002.

Hume, Robert J. "The Impact of Judicial Opinion Language on the Transmission of Federal Circuit Court Precedents." *Law and Society Review* 43, no. 1 (2009): 127-150.

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 2009-546 (1996).

Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952).

Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965).

Immigration and Naturalization Service v. Aguirre-Aguirre, 526 U.S. 415 (1999).

Immigration and Naturalization Service v. Ventura, 537 U.S. 12 (2002).

Immigration and Naturalization Service v. Ventura, 537 U.S. 12 (2002).

In re [Name Redacted by the Court], 2013 BIA LEXIS 25 (2013).

In re A----, 9 I&N Dec. 705 (1962).

In re Abreu, 24 I&N Dec. 795 (2009).

In re A-G-, 19 I&N Dec. 502 (1987).

In re Agyeman, 1999 BIA LEXIS 52 (1999).

In re Ahmed in Removal Proceedings, 2005 BIA LEXIS 25 (2005).

In re Akram, 25 I&N Dec. 874 (2012).

In re Almanza-Arenas, 24 I&N Dec. 771 (2009).

In re Anaya, 14 I&N Dec. 488 (1973).

In re Au, 12 I&N Dec. 294 (1969).

In re Bark, 14 I&N Dec. 237 (1972).

In re Barragan, 13 I&N Dec. 759 (1971).

In re Bautista, 25 I&N Dec. 616 (2011).

In re Becerra, 13 I&N Dec. 19 (1968).

In re Blake, 23 I&N Dec. 722 (2005).

In re Briones, 24 I&N Dec. 355 (2007).

In re C----, 5 I&N Dec. 370 (1953).

In re C----, 9 I&N Dec. 524 (1962).

In re Canas, 19 I&N Dec. 697 (1988).

In re Carachuri-Rosendo, 24 I&N Dec. 382 (2007).

In re Castillo-Godoy, 12 I&N Dec. 520 (1967).

In re Castro, 14 I&N Dec. 492 (1973).

In re Caudillo-Villalobos, 11 I&N Dec. 259 (1965).

In re C-C-, 23 I&N Dec. 899 (2006).

In re De Lucia, 11 I&N Dec. 565 (1966).

In re Diaz and Lopez, 25 I&N Dec. 188 (2010).

In re Dillingham, 21 I&N Dec. 1001 (1997).

In re Escobar, 24 I&N Dec. 231 (2007).

In re Esquivel-Quintana, 26 I&N Dec. 469 (2015).

In re Fernandez-Taveras, 25 I&N Dec. 834 (2012).

In re Ferrante, 12 I&N Dec. 166 (1967).

In re Gadda, 23 I&N Dec. 645 (2003).

In re Garawan, 20 I&N Dec. 938 (1995).

In re Garcia-Castillo, 10 I&N Dec. 516 (1964).

In re Gertsenshteyn, 24 I&N Dec. 111 (2007).

In re G-G-S-, 26 I&N Dec. 339 (2014).

In re Goldeshtein, 20 I&N Dec. 382 (1991).

In re Gonzalez de Lara, 12 I&N Dec. 806 (1968).

In re Gunaydin, 18 I&N Dec. 326 (1982).

In re H--- V----, 9 I&N Dec. 428 (1961).

In re Hernandez, 26 I&N Dec. 464 (2015).

In re Hill, 18 I&N Dec. 81 (1981).

In re Ho, 12 I&N Dec. 148 (1967).

In re J-B-N-, 24 I&N Dec. 208 (2007).

In re Jolley, 13 I&N Dec. 543 (1970).

In re K-, 20 I&N Dec. 418 (1991).

In re K----, 9 I&N Dec. 143 (1959).

In re Khan, 14 I&N Dec. 397 (1973).

In re Kinj, 11 I&N Dec. 42 (1965).

In re Kulle, 19 I&N Dec. 318 (1985).

In re Laipenieks, 18 I&N Dec. 433 (1983).

In re Laqui, 13 I&N Dec. 232 (1969).

In re Lavoie, 11 I&N Dec. 224 (1965).

In re Leal, 26 I&N Dec. 20 (2012).

In re Lee, 13 I&N Dec. 236 (1969).

In re Lemus-Losa, 24 I&N Dec. 373 (2007).

In re Lettman, 22 I&N Dec. 365 (1998).

In re Liadov, 23 I&N Dec. 990 (2006).

In re Lok, 15 I&N Dec. 720 (1976).

In re Lourdes Soriano-Vino in Removal Proceedings, 2003 BIA LEXIS 17 (2003).

In re L-V-K-, 22 I&N Dec. 976 (1999).

In re M----, 9 I&N Dec. 452 (1961).

In re Maldonado-Cruz, 19 I&N Dec. 509 (1988).

In re Maldonado-Sandoval, 14 I&N Dec. 475 (1973).

In re Marin, 13 I&N Dec. 497 (1970).

In re Marino, 15 I&N Dec. 284 (1975).

In re Martinez, 13 I&N Dec. 483 (1970).

In re Maya-Cruz, 2004 BIA LEXIS 20 (2004).

In re McMullen, 17 I&N Dec. 542 (1980).

In re M-D-, 21 I&N Dec. 1180 (1998).

In re Merced, 14 I&N Dec. 644 (1974).

In re M-F-W-, 24 I&N Dec. 633 (2008).

In re Monges, 25 I&N Dec. 246 (2010).

In re Montemayor, 15 I&N Dec. 353 (1975).

In re Moody, 2012 BIA LEXIS 40 (2012).

In re Nason, 12 I&N Dec. 452 (1967).

In re Negusie, 2006 BIA LEXIS 37 (2006).

In re Obeya, 26 I&N Dec. 856 (2016).

In re Orozco-Solis, 2006 BIA LEXIS 34 (2006).

In re Ortega-Lopez, 26 I&N Dec. 99 (2013).

In re Pang, 11 I&N Dec. 489 (1966).

In re Peignand, 13 I&N Dec. 566 (1970).

In re Pickering, 23 I&N Dec. 621 (2003).

In re Quijencio, 15 I&N Dec. 95 (1974).

In re Rehman, 14 I&N Dec. 505 (1975).

In re Richmond, 26 I&N Dec. 779 (2016).

In re Riva, 12 I&N Dec. 646 (1968).

In re Rivas, 26 I&N Dec. 130 (2013).

In re Rivera, 21 I&N Dec. 232 (1996).

In re Robles, 24 I&N Dec. 22 (2006).

In re Ruangswang, 16 I&N Dec. 76 (1976).

In re S----, 9 I&N Dec. 252 (1961).

In re S----, 9 I&N Dec. 613 (1962).

In re Shaar, 21 I&N Dec. 541 (1996).

In re Shon Ning Lee, 15 I&N Dec. 439 (1975).

In re Silva-Trevino, 24 I&N Dec. 687 (2008).

In re Singh, 13 I&N Dec. 439 (1969).

In re Smriko, 23 I&N Dec. 836 (2005).

In re Solis-Davila, 13 I&N Dec. 694 (1971).

In re T----, 9 I&N Dec. 127 (1960).

In re Talanoa, 11 I&N Dec. 630 (1966).

In re Talanoa, 12 I&N Dec. 187 (1967).

In re Tejwani, 24 I&N Dec. 97 (2007).

In re Triumph, 2006 BIA LEXIS 28 (2006).

In re Tsimbidy-Rochu, 13 I&N Dec. 56 (1968).

In re Vargas-Sarmiento, 23 I&N Dec. 651 (2004).

In re Von Pervieux, 15 I&N Dec. 406 (1975).

In re Wang, 16 I&N Dec. 528 (1978).

In re W-G-R-, 26 I&N Dec. 208 (2014).

In re Wong, 11 I&N Dec. 106 (1965).

In re Wong, 14 I&N Dec. 12 (1972).

In re Yaldo, 13 I&N Dec. 374 (1969).

In re Yam, 12 I&N Dec. 676 (1968).

In re Yanez-Jaquez, 13 I&N Dec. 512 (1969).

Interstate Commerce Commission v. Baird, 194 U.S. 25 (1904).

Johnston, Jason S. "The Statute of Frauds and Business Norms: A Testable Game-Theoretic Model." *University of Pennsylvania Law Review* 144, no. 5 (1996): 1859-1912.

Jolley v. Immigration and Naturalization Service, 441 F.2d 1245 (5th Cir. 1971).

Jordan v. DeGeorge, 341 U.S. 223 (1951).

Kagan, Robert A. *Adversarial Legalism: The American Way of Law* (1st ed.). Cambridge, MA: Harvard University Press, 2001.

Kagan, Robert A., Bliss Cartwright, Lawrence M. Friedman, and Stanton Wheeler. "The Evolution of State Supreme Courts." *Michigan Law Review* 76, no. 6 (1978): 961-1005.

Kaheny, Erin B., Susan B. Haire, and Sara C. Benesh. "Change Over Tenure: Voting, Variance, and Decision Making on the U.S. Courts of Appeals." *American Journal of Political Science* 52, no. 3 (2008): 490-503.

Kamin, Sam. "Harmless Error and the Rights/Remedies Split." *Virginia Law Review* 88, no. 1 (2002): 1-86.

Kang, Michael S. and Joanna M. Shepherd. "Judging Judicial Elections." *Michigan Law Review* 114, no. 6 (2016): 929-949.

Kastellec, Jonathan P. "Panel Composition and Judicial Compliance on the U.S. Courts of Appeals." *Journal of Law, Economics, and Organization* 23, no. 2 (2007): 421-441.

Keck, Thomas M. "Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?" *American Political Science Review* 101, no. 2 (2007): 321-338.

Kerr, Orin S. "Shedding Light on *Chevron*: An Empirical Study of the *Chevron* Doctrine in the U.S. Courts of Appeals." *Yale Journal on Regulation* 15, no. 1 (1998): 1-60.

Kidane, Won. "Revisiting the Rules of Procedure and Evidence Applicable in Adversarial Administrative Deportation Proceedings: Lessons from the Department of Labor Rules of Evidence." *Catholic University Law Review* 57 (2008): 93-164.

King v. Katzenbach, 360 F.2d 304 (5th Cir. 1966).

Klapholz v. Esperdy, 302 F.2d 928 (2nd Cir. 1962).

Kofa v. Immigration and Naturalization Service, 50 F.3d 1084 (4th Cir. 1995).

Konstantinova v. INS, 195 F.3d 528 (9th Cir. 1999).

Kort, Fred. "Predicting Supreme Court Decisions Mathematically: A Quantitative Analysis of the 'Right to Counsel' Cases." *The American Political Science Review* 51, no. 1 (1957): 1-12.

Krawiec, Kimberly D. and Kathryn Zeiler. "Common-Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories." *Virginia Law Review* 91, no. 8 (2005): 1795-1888.

Kritzer, Herbert M. and Mark J. Richards. "The Influence of Law in the Supreme Court's Search-and-Seizure Jurisprudence." *American Politics Research* 33, no. 1 (2005): 33-55.

Kulle v. Immigration and Naturalization Service, 825 F.2d 1188 (7th Cir. 1987).

Lai Haw Wong v. INS, 474 F.2d 739 (9th Cir. 1973).

Laipenieks v. Immigration and Naturalization Service, 750 F.2d 1427 (9th Cir. 1985).

Landes, William M. and Richard A. Posner. "Rational Judicial Behavior: A Statistical Study." *Journal of Legal Analysis* 1, no. 2 (2009): 775-831.

Landis, James M. "A Note on 'Statutory Interpretation'." *Harvard Law Review* 43, no. 6 (1930): 886-893.

Laqui v. Immigration and Naturalization Service, 422 F.2d 807 (7th Cir. 1970).

Lavoie v. Immigration and Naturalization Service, 418 F.2d 732 (9th Cir. 1969).

Lawson, Gary and Stephen Kam. "Making Law Out of Nothing At All: The Origins of the *Chevron* Doctrine." *Administrative Law Review* 65, no. 1 (2013): 1-75.

Leal v. Holder, 771 F.3d 1140 (9th Cir. 2014).

Lee Fook Chuey v. INS, 439 F.2d 244 (9th Cir. 1970).

Lemus-Losa v. Holder, 576 F.3d 752 (7th Cir. 2009).

Lennon v. Immigration and Naturalization Service, 527 F.2d 187 (1975).

Lens, Vicki. "Judge or Bureaucrat? Examining How Administrative Law Judges Exercise Their Discretion in Public Welfare Bureaucracies." *Social Service Review* 86, no. 2 (2012): 269-293.

Lettman v. Reno, 168 F.3d 463 (11th Cir. 1999).

Lettman v. Reno, 207 F.3d 1368 (11th Cir. 2000).

Liadov v. Mukasey, 518 F.3d 1003 (8th Cir. 2008).

Lieberman, Jethro K. *The Litigious Society*. New York, NY: Basic Books, 1981.

Liu, Frederick. "*Chevron* as a Doctrine of Hard Cases." *Administrative Law Review* 66, no. 2 (2014): 285-344.

Lok v. Immigration and Naturalization Service, 548 F.2d 37 (2nd Cir. 1977).

Londono v. Immigration and Naturalization Service, 433 F.2d 635 (2nd Cir. 1970).

Lopez-Amaro v. Immigration and Naturalization Service, 25 F.3d 986 (11th Cir. 1994).

Lujan-Armendariz v. Immigration and Naturalization Service, 222 F.3d 728 (9th Cir. 2000).

Lupia, Arthur and Mathew D. McCubbins. "Learning from Oversight: Fire Alarms and Police Patrols Reconstructed." *Journal of Law, Economics, and Organization* 10, no. 1 (1994): 96-125.

Macey, Jonathan R. "Judicial Preferences, Public Choice, and the Rules of Procedure." *Journal of Legal Studies* 23, no. 1 (1994): 627-646.

Maldonado-Cruz v. Department of Immigration and Naturalization, 883 F.2d 788 (9th Cir. 1989).

Maldonado-Sandoval v. Immigration and Naturalization Service, 518 F.2d 278 (9th Cir. 1975).

Manning, Bayless. "Hyperlexis: Our National Disease." *Northwestern University Law Review* 71, no. 6 (1977): 767-782.

Manning, John F. "Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules." *Columbia Law Review* 96, no. 3 (1996): 612-696.

Mantel, Jessica. "Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State." *Administrative Law Review* 61, no. 2 (2009): 343-406.

Marbury v. Madison, 5 U.S. 137 (1803).

Marin v. Immigration and Naturalization Service, 438 F.2d 932 (9th Cir. 1971).

Marino v. Immigration and Naturalization Service, 537 F.2d 686 (2nd Cir. 1976).

Marisam, Jason. "The President's Agency Selection Powers." *Administrative Law Review* 65, no. 4 (2013): 821-880.

Marquardt, Ronald and Edward M. Wheat. "The Developing Concept of an Administrative Court." *Administrative Law Review* 33, no. 3 (1981): 301-322.

Martin, Andrew D. and Kevin M. Quinn. "Assessing Preference Change on the U.S. Supreme Court." *Journal of Law, Economics, and Organization* 23, no. 2 (2007): 365-385.

Martin, Andrew D., Kevin M. Quinn, and Lee Epstein. "The Median Justice on the U.S. Supreme Court." *North Carolina Law Review* 83, no. 5 (2005): 1275-1321.

Mashaw, Jerry L. "Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability." *Law and Contemporary Problems* 57, no. 2 (1994): 185-257.

Matter of Flores, 17 I&N Dec. 225 (1980).

Matter of Manrique, 21 I&N Dec. 58 (1995).

Matter of M-H-Z-, 26 I&N Dec. 757 (2016).

Matter of Walsh and Pollard, 20 I&N Dec. 60 (1988).

Maya-Cruz v. Keisler, 252 Fed. Appx. 136 (9th Cir. 2007).

McCubbins, Mathew D., Roger G. Noll, and Barry R. Weingast. "Administrative Procedures as Instruments of Political Control." *Journal of Law, Economics, and Organization* 3, no. 2 (1987): 243-277.

McCubbins, Mathew D., Roger G. Noll, and Barry R. Weingast. "Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies." *Virginia Law Review* 75, no. 2 (1989): 431-482.

McMullen v. Immigration and Naturalization Service, 788 F.2d 591 (9th Cir. 1986).

Medina v. United States, 254 F.2d 228 (9th Cir. 1958).

Mei Fun Wong v. Holder, 633 F.3d 64 (2nd Cir. 2011).

Melnick, R. Shep. *Between the Lines: Interpreting Welfare Rights*. Washington, D.C.: Brookings Institute Press, 1994.

Merced v. INS, 514 F.2d 1070 (5th Cir. 1975).

Mercer, Kathryn L. "A Content Analysis of Judicial Decision-Making: How Judges Use the Primary Caretaker Standard to Make a Custody Determination." *William and Mary Journal of Race, Gender, and Social Justice* 5, no. 1 (1998): 1-149.

Merrill, Thomas W. "Judicial Deference to Executive Precedent." *Yale Law Journal* 101, no. 5 (1992): 969-1041.

Miles, Thomas J. and Cass R. Sunstein. "Do Judges Make Regulatory Policy? An Empirical Investigation of *Chevron*." *The University of Chicago Law Review* 73, no. 3 (2006): 823-881.

Miles, Thomas J. and Cass R. Sunstein. "The New Legal Realism." *The University of Chicago Law Review* 75, no. 2 (2008): 831-851.

Milgrom, Paul and John Roberts. "Relying on the Information of Interested Parties." *The RAND Journal of Economics* 17, no. 1 (1986): 18-32.

Miller, Geoffrey P. "The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation." *Cardozo Law Review* 15, no. 1-2 (1993): 201-218.

Moe, Terry M. "The Politics of Bureaucratic Structure" in *Can the Government Govern?*, edited by Paul E. Peterson and John E. Chubb, 267-329. Washington, DC: Brookings Institute Press, 1989.

Monges-Garcia v. Holder, 482 Fed. Appx. 272 (9th Cir. 2012).

Moody v. Holder, 523 Fed. Appx. 88 (2nd Cir. 2013).

Motor Vehicles Manufacturer's Association v. State Farm Mutual Automobile Insurance, Co., 463 U.S. 29 (1983).

Nason v. Immigration and Naturalization Service, 394 F.2d 223 (2nd Cir. 1968).

National Labor Relations Board v. Hearst Publications, Inc., 322 U.S. 111 (1944).

National Labor Relations Board. "Introduction to the NLRB." Accessed 2021. https://www.nlrb.gov/about-nlrb/what-we-do/introduction-to-the-nlrb.

National Oceanic and Atmospheric Administration. "Appeals." Accessed 2021. https://www.fisheries.noaa.gov/national/rules-and-regulations/appeals.

National Transportation Safety Board. "Administrative Law Judges." Accessed 2021. https://www.ntsb.gov/legal/alj/Pages/default.aspx.

Ndayshimiye v. Attorney General of the United States, 557 F.3d 124 (3rd Cir. 2009).

Negusie v. Gonzales, 231 Fed. Appx. 325 (5th Cir. 2007).

Norberg, Scott G. "Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13." *American Bankruptcy Institute Law Review* 7 (1999): 415-463.

Note. "The Two Faces of *Chevron*." *Harvard Law Review* 120, no. 6 (2007): 1562-1584.

Nygaard, Richard L. "The Maligned P*er Curiam*: A Fresh Look at an Old Colleague." *Scribes Journal of Legal Writing* 5, no. 1 (1994): 41-50.

Obeya v. Sessions, 884 F.3d 442 (2nd Cir. 2018).

Occupational Safety and Health Review Commission. "How OSHRC Works." Accessed 2021. https://www.oshrc.gov/about/how-oshrc-works/.

O'Connell, Anne J. "Agency Rulemaking and Political Transitions." *Northwestern University Law Review* 105, no. 2 (2011): 471-534.

O'Connell, Anne J. "Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State." *Virginia Law Review* 94, no. 4 (2008): 889-986.

Office of Financial Institutional Adjudication. "About OFIA." Accessed 2021. https://www.ofia.gov/.

Office of Personnel Management. "Services for Agencies: Administrative Law Judges." Retrieved 2021. https://www.opm.gov/services-for-agencies/administrative-law-judges/.

O'Keeffe, L. Hope. "Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence versus Employee Accountability." *George Washington Law Review* 54 (1986): 591-627.

Olson, Walter K. *The Litigation Explosion: What Happened When America Unleashed the Lawsuit*. New York, NY: Truman Talley Books, 1991.

Orozco-Solis v. Mukasey, 270 Fed. Appx. 689 (9th Cir. 2008).

Orren, Karen and Stephen Skowronek. *The Search for American Political Development*. New York, NY: Cambridge University Press, 2004.

Ortega-Lopez v. Lynch, 834 F.3d 1015 (9th Cir. 2016).

Packard Motor Car Co. v. National Labor Relations Board, 330 U.S. 485 (1947).

Paredes-Urrestarazu v. Immigration and Naturalization Service, 36 F.3d 801 (9th Cir. 1994).

Parker, Wendy. "The Future of School Desegregation." *Northwestern University Law Review* 94, no. 4 (1999): 1157-1227.

Peignand v. Immigration and Naturalization Service, 440 F.2d 757 (1st Cir. 1971).

Pension Benefit Guaranty Corporation. "Who We Are." Accessed 2021. https://www.pbgc.gov/about/who-we-are.

Peretti, Terri J. *In Defense of a Political Court*. Princeton, NJ: Princeton University Press, 1999.

PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001).

Pickering v. Gonzales, 454 F.3d 525 (6th Cir. 2006).

Pierce, Richard J., Jr. "What Do the Studies of Judicial Review of Agency Actions Mean?" *Administrative Law Review* 63, no. 1 (2011): 77-98.

Pierce, Richard J., Jr. and Joshua Weiss. "An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules." *Administrative Law Review* 63, no. 3 (2011): 515-523.

Pinello, Daniel R. "Linking Party to Judicial Ideology in American Courts: A Meta-Analysis." *The Justice System Journal* 20, no. 3 (1999): 219-254.

Posner, Richard A. "A Theory of Negligence." *The Journal of Legal Studies* 1, no. 1 (1972): 29-96.

Posner, Richard A. "An Economic Approach to Legal Procedure and Judicial Administration." *Journal of Legal Studies* 2, no. 2 (1973): 399-458.

Posner, Richard A. *Economic Analysis of Law*. Boston, MA: Little, Brown and Company, 1973.

Postal Regulatory Commission. "About the Postal Regulatory Commission." Accessed 2021. https://www.prc.gov/about.

Potter, Rachel A. "Slow Rolling, Fast-Tracking, and the Pace of Bureaucratic Decisions in Rulemaking." *Journal of Politics* 79, no. 2 (2017): 841-855.

Pritchett, C. Herman. "Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939-1941." *American Political Science Review* 35, no. 5 (1941): 890-898.

Public Company Accounting Oversight Board. "About." Accessed 2021. https://pcaobus.org/about#:~:text=The%20PCAOB%20is%20a%20nonprofit,accurate%2C%20and%20independent%20audit%20reports.

Quijencio v. Immigration and Naturalization Service, 535 F.2d 501 (9th Cir. 1976).

Radin, Max. "Statutory Interpretation." *Harvard Law Review* 43, no. 6 (1930): 863-885.

Raso, Connor N. and William N. Eskridge, Jr. "*Chevron* as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases." *Columbia Law Review* 110, no. 7 (2010): 1727-1817.

Raz, Joseph. *The Authority of Law: Essays on Law and Morality*. New York, NY: Oxford University Press, 1979.

Reform of Federal Regulation Act of 1979, S. 262, 96th Congress (1979). https://www.congress.gov/bill/96th-congress/senate-bill/262?q=%7B%22search%22%3A%5B%22s.262%22%5D%7D&s=6&r=1.

Regulation Reform Act of 1979, S. 755, 95th Congress (1979). https://www.congress.gov/bill/96th-congress/senate-bill/755?q=%7B%22search%22%3A%5B%22s.755%22%5D%7D&r=1&s=5.

Rehman v. Immigration and Naturalization Service, 544 F.2d 71 (2nd Cir. 1976).

Revesz, Richard L. "Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit." *New York University Law Review* 76, no. 4 (2001): 1100-1141.

Revesz, Richard L. "Environmental Regulation, Ideology, and the D.C. Circuit." *Virginia Law Review* 83, no. 8 (1997): 1717-1772.

Richards, Mark J. and Herbert M. Kritzer. "Jurisprudential Regimes and Supreme Court Decision Making." *American Political Science Review* 96, no. 2 (2002): 305-320.

Richards, Mark J., Joseph L. Smith and Herbert M. Kritzer. "Does *Chevron* Matter?" *Law and Policy* 28, no. 4 (2006): 444-469.

Richmond v. Sessions, 697 Fed. Appx. 106 (2nd Cir. 2017).

Riva v. Mitchell, 460 F.2d 1121 (3rd Cir. 1972).

Rivas v. United States Attorney General, 765 F.3d 1324 (11th Cir. 2014).

Rivera v. Immigration and Naturalization Service, 122 F.3d 1062 (4th Cir. 1997).

Robles-Urrea v. Holder, 678 F.3d 702 (9th Cir. 2012).

Rohde, David and Harold Spaeth. "*Supreme Court Decision Making*. San Francisco, CA: W.H. Freeman, 1976.

Rosenberg v. Fleuti, 374 U.S. 449 (1963).

Rosenblum, Victor G. "Contexts and Contents of "For Good Cause" as Criterion for Removal of Administrative Law Judges: Legal and Policy Factors." *Western New England Law Review* 6, no. 3 (1984): 593-642.

Ruangswang v. Immigration and Naturalization Service, 591 F.2d 39 (9th Cir. 1978).

Rubinfeld, Daniel L. David E. M. Sappington. "Efficient Awards and Standards of Proof in Judicial Proceedings." *RAND Journal of Economics* 18, no. 2 (1987): 308-315.

Sanchirico, Chris W. "Relying on the Information of Interested—and Potentially Dishonest—Parties." *American Law and Economics Review* 3, no. 2 (2001): 320-357.

Santiago et al *v. INS,* 526 F.2d 488 (9th Cir. 1975).

Sawkow v. Immigration and Naturalization Service, 314 F.2d 34 (3rd Cir. 1963).

Schacter, Jane S. "The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond." *Stanford Law Review* 51, no. 1 (1998): 1-71.

Schanzenbach, Max M. and Emerson H. Tiller. "Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform." *University of Chicago Law Review* 75, no. 2 (2008): 715-760.

Schubert, Glendon. "Jackson's Judicial Philosophy: An Exploration in Value Analysis." *The American Political Science Review* 59, no. 4 (1965): 940-963.

Schubert, Glendon. "The 1960 Term of the Supreme Court: A Psychological Analysis." *The American Political Science Review* 56, no. 1 (1962): 90-107.

Schuck, Peter H. and E. Donald Elliott. "Studying Administrative Law: A Methodology for, and Report on, New Empirical Research." *Administrative Law Review* 42, no. 4 (1990): 519-543.

Schuck, Peter H. and E. Donald Elliott. "To the *Chevron* Station: An Empirical Study of Federal Administrative Law." *Duke Law Journal* 1990, no. 5 (1990): 984-1077.

Schuck, Peter H. and Theodore Hsien Wang. "Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990. *Stanford Law Review* 45, no. 1 (1992): 115-183.

Schultz, Vicki and Stephen Petterson. "Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation." *The University of Chicago Law Review* 59, no. 3 (1992): 1073-1181.

Schultz, Vicki. "Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument." *Harvard Law Review* 103, no. 8 (1990): 1749-1843.

Scythes v. Webb, 307 F.2d 905 (7th Cir. 1962).

Segal, Jeffrey A. and Albert D. Cover. "Ideological Values and the Votes of U.S. Supreme Court Justices." *American Political Science Review* 83, no. 2 (1989): 557-565.

Segal, Jeffrey A. and Harold Spaeth. *The Supreme Court and the Attitudinal Model Revisited*. New York, NY: Cambridge University Press, 2002.

Shaar v. Immigration and Naturalization Service, 141 F.3d 953 (9th Cir. 1998).

Shapiro, Martin. *Courts: A Comparative and Political Analysis*. Chicago, IL: The University of Chicago Press, 1981.

Shapiro, Martin. *The Supreme Court and Administrative Agencies*. New York, NY: Free Press, 1968.

Shapiro, Sidney A. and Richard E. Levy. "Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions." *Duke Law Journal* 44, no. 6 (1995): 1051-1080.

Shon Ning Lee v. Immigration and Naturalization Service, 576 F.2d 1380 (9th Cir. 1978).

Silva-Trevino v. Holder, 742 F.3d 197 (5th Cir. 2014).

Simeone, Joseph J. "The Function, Flexibility, and Future of United States Judges of the Executive Department." *Administrative Law Review* 44, no. 1 (1992): 159-188.

Singh v. Immigration and Naturalization Service, 456 F.2d 1092 (9th Cir. 1972).

Sisk, Gregory C., Michael Heise, and Andrew P. Morris. "Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning." *New York University Law Review* 73, no. 5 (1998): 1377-1500.

Skidmore v. Swift, 323 U.S. 134 (1944).

Smith v. City of Jackson, 544 U.S. 228 (2005).

Smith, Joseph L. and Emerson H. Tiller. "The Strategy of Judging: Evidence from Administrative Law." *The Journal of Legal Studies* 31, no. 1 (2002): 61-82.

Smriko v. Attorney General of the United States, 220 Fed. Appx. 103 (3rd Cir. 2007).

Social Security Administration. "ALJ Disposition Data FY 2016." Retrieved 2021. https://www.ssa.gov/appeals/DataSets/archive/03_FY2016/03_September_ALJ_Disposition_Data-2.html.

Social Security Administration. "Hearing Office Workforce Data FY 2016." Retrieved 2021. https://www.ssa.gov/appeals/DataSets/archive/02_FY2016/02_September_HO_Workload_Data-2.html.

Social Security Administration. "Hearings and Appeals." Accessed 2021. https://www.ssa.gov/appeals/.

Solis-Davila v. INS, 456 F.2d 424 (5th Cir. 1972).

Songer, Donald R. and Susan B. Haire. "Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals." *American Journal of Political Science,* 36, no. 4 (1992): 963-982.

Songer, Donald R., Reginald S. Sheehan, and Susan B. Haire. *Continuity and Change on the United States Courts of Appeals*. Ann Arbor, MI: University of Michigan Press, 2000.

Soriano-Vino v. Holder, 653 F.3d 1096 (9th Cir. 2011).

Spence, David B. "Agency Discretion and the Dynamics of Procedural Reform." *Public Administration Review* 59, no. 5 (1999): 425-442.

Stephenson, Matthew C. "Evidentiary Standards and Information Acquisition in Public Law." *American Law and Economics Review* 10, no. 2 (2008): 351-387.

Stephenson, Matthew C. and Adrian Vermeule. "*Chevron* has Only One Step." *Virginia Law Review* 95, no. 3 (2009): 597-609.

Stewart, Richard B. "The Reformation of American Administrative Law." *Harvard Law Review* 88, no. 8 (1975): 1667-1813.

Strauss, Peter L. "The Place of Agencies in Government: Separation of Powers and the Fourth Branch." *Columbia Law Review* 84, no. 3 (1984): 573-669.

Sunstein, Cass R. "Beyond *Marbury*: The Executive's Power to Say What the Law is." *Yale Law Journal* 115, no. 9 (2006a): 2580-2610.

Sunstein, Cass R. "*Chevron* Step Zero." *Virginia Law Review* 92, no. 2 (2006b): 187-249.

Sunstein, Cass R. "Law and Administration after *Chevron*." *Columbia Law Review* 90, no. 8 (1990): 2071-2120.

Sunstein, Cass R. *One Case at a Time: Judicial Minimalism on the Supreme Court*. Cambridge, MA: Harvard University Press, 1999.

Surface Transportation Board. "About STB." Accessed 2021. https://prod.stb.gov/about-stb/.

Talanoa v. INS, 397 F.2d 196 (9th Cir. 1968).

Taveras v. Attorney General of the United States, 731 F.3d 281 (3rd Cir. 2013).

Tejwani v. Attorney General of the United States, 349 Fed. Appx. 719 (3rd Cir. 2009).

Title v. Immigration and Naturalization Service, 322 F.2d 21 (9th Cir. 1963).

Triumph v. Holder, 314 Fed. Appx. 725 (5th Cir. 2009).

Trump v. Hawaii, 585 U.S. ____ (2018).

Tsimbidy-Rochu v. INS, 414 F.2d 797 (9th Cir. 1969).

U.S. Army. "Army Review Boards Agency." Accessed 2021. https://arba.army.pentagon.mil/.

U.S. Citizenship and Immigration Services. "CIS Policy Manual." Accessed 2021. https://www.uscis.gov/policy-manual.

U.S. Citizenship and Immigration Services. "Mission and Core Values." Accessed 2021. https://www.uscis.gov/about-us/mission-and-core-values.

U.S. Citizenship and Immigration Services. “The Administrative Appeals Office (AAO).” Accessed 2021. https://www.uscis.gov/about-us/organization/directorates-and-program-offices/the-administrative-appeals-office-aao.

U.S. Customs and Border Protection. “About CBP.” Accessed 2021. https://www.cbp.gov/about.

U.S. Department of Education. “Office of Hearings and Appeals.” Accessed 2021. https://oha.ed.gov/.

U.S. Department of Health and Human Services. “Organizational Overview.” Accessed 2021. https://www.hhs.gov/about/agencies/dab/about-dab/organizational-overview/index.html.

U.S. Department of Justice. “Office of the Chief Administrative Hearing Officer.” Accessed 2021. https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer.

U.S. Department of Labor. “About the Office of Administrative Law Judges.” Accessed 2021. https://www.dol.gov/agencies/oalj/about/ALJMISSN.

U.S. Department of Labor. “Administrative Review Board.” Accessed 2021. https://www.dol.gov/agencies/arb.

U.S. Department of Labor. “ARB, BRB, ECAB, and OALJ.” Accessed 2021. https://www.dol.gov/appeals/aliens.htm.

U.S. Department of Labor. “Benefits Review Board.” Accessed 2021. https://www.dol.gov/agencies/brb/welcome.

U.S. Department of Labor. “Employees’ Compensation Appeals Board.” Accessed 2021. https://www.dol.gov/agencies/ecab/about#:~:text=The%20Board's%20mission%20is%20to,record%20as%20compiled%20by%20OWCP.

U.S. Department of the Interior. “About the Interior Board of Indian Appeals.” Accessed 2021. https://www.doi.gov/oha/organization/ibia.

U.S. Department of the Interior. “About the Interior Board of Land Appeals.” Accessed 2021. https://www.doi.gov/oha/organization/ibla.

U.S. Department of the Interior. “Office of Hearings and Appeals.” Accessed 2021. https://www.doi.gov/oha/organization/dchd.

U.S. Department of Transportation. “Office of Hearings.” Accessed 2021. https://www.transportation.gov/mission/administrations/administration/hearings.

U.S. Department of Veteran Affairs. “Office of Employment Discrimination and Complaint Adjudication.” Accessed 2021. https://www.oedca.va.gov/.

U.S. Federal Labor Relations Authority. “Office of Administrative Law Judges.” Accessed 2021. https://www.flra.gov/components-offices/offices/office-administrative-law-judges.

U.S. Federal Labor Relations Authority. “The Federal Service Impasses Panel (FSIP or the Panel).” Accessed 2021. https://www.flra.gov/components-offices/components/federal-service-impasses-panel-fsip-or-panel.

U.S. Federal Labor Relations Authority. “The Foreign Service Impasse Disputes Panel.” Accessed 2021. https://www.flra.gov/components-offices/components/federal-service-impasses-panel-fsip-or-panel/foreign-service-impasse.

U.S. Federal Labor Relations Authority. “The Foreign Service Labor Relations Board.” Accessed 2021. https://www.flra.gov/components-offices/components/authority/foreign-service-labor-relations-board.

U.S. Immigration and Customs Enforcement. “ICE’s Mission.” Accessed 2021. https://www.ice.gov/mission#.

U.S. Merit Systems Protection Board. “About MSPB.” Accessed 2021. https://www.mspb.gov/About/about.htm.

U.S. Nuclear Regulatory Commission. "Atomic Safety and Licensing Board Panel." Accessed 2021. https://www.nrc.gov/about-nrc/organization/aslbpfuncdesc.html.

U.S. Patent and Trademark Office. "Trademark Trial and Appeal Board." Accessed 2021. https://www.uspto.gov/trademarks/ttab#:~:text=About%20the%20Trademark%20Trial%20and,to%20cancel%20an%20existing%20registration).

U.S. Railroad Retirement Board. "Appeals." Accessed 2021. https://rrb.gov/Resources/Appeals.

U.S. Securities and Exchange Commission. "About the Division of Enforcement." Accessed 2021. https://www.sec.gov/enforce/Article/enforce-about.html.

U.S. Small Business Administration. "Office of Hearings and Appeals." Accessed 2021. https://www.sba.gov/about-sba/oversight-advocacy/office-hearings-appeals.

Ulmer, S. Sidney. "The Analysis of Behavior Patterns on the United States Supreme Court." *The Journal of Politics* 22, no. 4 (1960): 629-653.

United States Civil Service Commission. *Report of the Committee on the Study of the Utilization of Administrative Law Judges (La Macchia Commission Report)*, 1974.

United States Coast Guard. "Board for Correction of Military Records of the Coast Guard." Accessed 2021. https://www.uscg.mil/resources/legal/bcmr/.

United States Coast Guard. "United States Coast Guard Administrative Law Judges (ALJ)." Accessed 2021. https://www.uscg.mil/Resources/Administrative-Law-Judges/.

United States Courts. "Table B-1: U.S. Courts of Appeals Statistical Tables for the Federal Judiciary (December 31, 2017)." Retrieved 2021. https://www.uscourts.gov/statistics/table/b-1/statistical-tables-federal-judiciary/2017/12/31.

United States Department of Justice. "Executive Office for Immigration Review." Accessed 2021. https://www.justice.gov/eoir/about-office.

United States Department of Justice. "Foreign Claims Settlement Commission of the U.S." Accessed 2021. https://www.justice.gov/fcsc/about-commission.

United States Department of Transportation. "Office of Dispute Resolution for Acquisition (ODRA)." Accessed 2021. https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication/agc70/.

United States Environmental Protection Agency. "About the Environmental Appeals Board (EAB)." Accessed 2021. https://www.epa.gov/aboutepa/about-environmental-appeals-board-eab.

United States Environmental Protection Agency. "About the Office of the Administrative Law Judges (OALJ)." Accessed 2021. https://www.epa.gov/aboutepa/about-office-administrative-law-judges-oalj#:~:text=The%20Office%20of%20Administrative%20Law%20Judges%20(OALJ)%20is%20an%20independent,EPA's%20Office%20of%20Mission%20Support.&text=All%20litigants%20before%20the%20Administrative,resolution%20with%20a%20neutral%20mediator.

United States ex rel. *Circella v. Sahli,* 216 F.2d 33 (7th Cir. 1954).

United States ex rel. *Marks v. Esperdy*, 315 F.2d 673 (2nd Cir. 1963).

United States International Trade Commission. "About the USITC." Accessed 2021. https://www.usitc.gov/press_room/about_usitc.htm.

United States Postal Service. "Judicial Officer." Accessed 2021. https://about.usps.com/who/judicial/.

United States v. Carolene Products, Co., 304 U.S. 144 (1938).

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

Vargas-Sarmiento v. Department of Justice, 448 F.3d 159 (2nd Cir. 2006).

Von Pervieux v. Immigration and Naturalization Service, 572 F.2d 114 (3rd Cir. 1978).

Wagner, R. Polk and Lee Petherbridge. "Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance." *University of Pennsylvania Law Review* 152, no. 3 (2004): 1105-1180.

Waldman v. Immigration and Naturalization Service, 329 F.2d 812 (9th Cir. 1964).

Walsh, Hillary G. "Unequivocally Different: The Third Civil Standard of Proof." *University of Kansas Law Review* 66, no. 3 (2018): 565-602.

Wang v. Immigration and Naturalization Service, 602 F.2d 211 (9th Cir. 1979).

Watry, Ruth A. "*Chevron v. Natural Resources Defense Council*: Its Influence on Supreme Court Decision Making and Administrative Agency Behavior." Ph.D. diss., University of Delaware, 2000.

Winkler, Adam. "Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts." *Vanderbilt Law Review* 59, no. 3 (2006): 793-871.

Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

Wright, Ronald F. and Paul Huck. "Counting Cases About Milk, Our 'Most Nearly Perfect' Food, 1860-1940." *Law and Society Review* 36, no. 1 (2002): 51-112.

Yaldo v. Immigration and Naturalization Service, 424 F.2d 501 (6th Cir. 1970).

Yam Sang Kwai v. INS, 411 F.2d 683 (D.C. Cir. 1969).

Yanez-Jacquez v. Immigration and Naturalization Service, 440 F.2d 701 (5th Cir. 1971).

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

Zaring, David. "Reasonable Agencies." *Virginia Law Review* 96, no 1 (2010): 135-197.

Curriculum Vitae

Rachel M. MacMaster

Department of Political Science
Maxwell School of Citizenship and Public Affairs
Syracuse University

Office Address
Mott Community College
Curtice-Mott Complex, Rm. 1117B
Flint, MI 48503
rachel.macmaster@mcc.edu

Home Address
3070 Strong Heights
Grand Blanc, MI 48507
(989) 884-4607
rmmacmas@syr.edu

<>

Education

2014 – 2021	Doctor of Philosophy: **Maxwell School of Citizenship and Public Affairs, Syracuse University** (Syracuse, NY) – *Political Science* Subfields: American politics, law and courts Dissertation: "Judicial Deference to Administrative Statutory Interpretation in the Modern American Administrative State" (defended on April 26, 2021)
2014 – 2016	Master of Arts: **Maxwell School of Citizenship and Public Affairs, Syracuse University** (Syracuse, NY) – *Political Science* Subfields: American politics, law and courts
2010 – 2014	Bachelor of Arts: **Klingler College of Arts and Sciences, Marquette University** (Milwaukee, WI) – *Political Science, Women's and Gender Studies*

Service to Syracuse:

- Political Science Undergraduate Distinction Thesis Committee (2018)
- Future Professoriate Program (2016-17)
- Department of Political Science Promotion and Tenure Committee (2016)
- Political Science Graduate Student Association: pre-comprehensive exam representative (2014-15)

<>

Research Skills

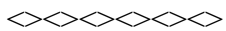
- Statistical software/languages:
  - Microsoft Excel (advanced fluency)
  - SPSS (working fluency)
  - Stata (basic knowledge)
  - R (basic knowledge)
  - SQL (basic knowledge)
- Other software:
  - IBM Cognos (working fluency)
  - Tableau (basic knowledge)
  - Remainder of Microsoft Office suite (advanced fluency)
  - iWorks productivity suite (basic knowledge)

<>

Work Experience and Training

2018 – present	**Charles Stewart Mott Community College** (Flint, MI) – *Senior Institutional Research Analyst*
2017	**University College, Syracuse University** (Syracuse, NY) – *Instructor of Record, Introduction to American National Government and Politics*
	Center for Qualitative and Multi-Method Inquiry, Syracuse University (Syracuse, NY) – *Institute for Qualitative and Mixed Methods Research, with coursework in computer-aided text analysis, multimethod research, small-*n *and within-case analysis, and ethnography*
2016 – 2017	**Maxwell School of Citizenship and Public Affairs, Syracuse University** (Syracuse, NY) – *Teaching Associate, MAX 123: Critical Issues in the United States*
	College of Arts and Sciences, Boston University (Boston, MA) – *Research Assistant for Dr. Spencer Piston*
2015 – 2016	**Campbell Public Affairs Institute, Syracuse University** (Syracuse, NY) – *Research Assistant for Dr. Spencer Piston and Dr. Quinn Mulroy*

2016	**Maxwell School of Citizenship and Public Affairs, Syracuse University** (Syracuse, NY) – *Research Assistant for Dr. Christopher Faricy*
2014 – 2016	**Maxwell School of Citizenship and Public Affairs, Syracuse University** (Syracuse, NY) – *Teaching Assistant for Dr. Christopher Faricy, Dr. Danielle Thomsen, and Dr. Quinn Mulroy*
2013	**Office of Foreign Assets Control, U.S. Department of the Treasury** (Washington, DC) – *History/Research Intern*
2012	**U.S. Senator Herb Kohl** (Milwaukee, WI) – *Congressional Intern*
2011	**Northeast Michigan Great Lakes Stewardship Initiative** (Alpena, MI) – *Summer Intern*
2010	**Elect Casey Viegelahn for Michigan House of Representatives, District 106** (Alpena, MI) – *Campaign Staff*



Awards

2018	**Maxwell School of Citizenship and Public Affairs, Syracuse University** (Syracuse, NY) – *Sawyer Summer Fellowship*
2017	**Maxwell School of Citizenship and Public Affairs, Syracuse University** (Syracuse, NY) – *Roscoe Martin Scholarship*
	Truman Library Institute (Independence, MO) – *John C. Hulston Scholarship*
	Maxwell School of Citizenship and Public Affairs, Syracuse University (Syracuse, NY) – *Kristi Anderson Award to Support Attendance at the Institute for Qualitative and Mixed Methods*
2016	**Graduate School, Syracuse University** (Syracuse, NY) – *Outstanding Teaching Assistant Award (nominee)*
2014, 2015	**Maxwell School of Citizenship and Public Affairs, Syracuse University** (Syracuse, NY) – *Kissel Fund Award for the Study of Civil Liberties*

2013 **Klingler College of Arts and Sciences, Marquette University** (Milwaukee, WI) – *Undergraduate Research Fellowship, Department of Women's and Gender Studies*

Les Aspin Center for Government, Marquette University (Milwaukee, WI) – *Scholarship for Summer Study in Washington, DC*

<>◇<>◇<>◇<>

Conference Participation

2017 **Political Science Research Workshop, Syracuse University** (discussant) (Syracuse, NY)

2016 **University of Texas Graduate Conference in Public Law** (Austin, TX)

Western Political Science Association Annual Meeting (San Diego, CA)

Political Science Research Workshop, Syracuse University (Syracuse, NY)

2015 **Northeast Political Science Association Annual Meeting** (Philadelphia, PA)

Law and Courts Research Workshop, Syracuse University (Syracuse, NY)

2014 **Undergraduate Humanities Conference, Marquette University** (Milwaukee, WI)

2013 **Women's and Gender Studies Undergraduate Research Colloquium, Marquette University** (Milwaukee, WI)