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RETHINKING RETROACTIVE RULEMAKING: SOLVING THE PROBLEM OF ADJUDICATIVE DEFERENCE

Gwendolyn Savitz *

INTRODUCTION

The *Chevron* doctrine enables courts to defer to authoritative, legally binding agency interpretations of ambiguous statutes.[1] Though more frequently applied when reviewing rulemaking, the doctrine is actually more powerful when applied to an adjudication. In an adjudication, the agency can attach consequences to past actions made before the interpretation announced in the adjudication itself. Since such a determination will receive deference on review, this declaration effectively becomes a new rule, having gone through neither public notice or public comment. Not only does it become a new rule, it becomes a new rule that is effective retroactively.

It is illogical to have a system that gives more power to a less democratic process, and *Chevron* deference should therefore not apply to adjudication.

The notice and comment process that *Chevron* more typically defers to is the best method yet devised to enable an agency to benefit from not only its own expertise but that of the general interested public as well. Public comment can point out potential problems with the agency's preferred approach that the agency has not otherwise foreseen as well as present solutions not yet considered by the agency.

This type of input could be beneficial for ambiguities that come to light in an adjudication as well as those initially addressed in rulemaking. Agencies should therefore be encouraged to undertake rulemakings when ambiguities arise in adjudications. But because of the retroactive nature of adjudication itself, these rules would

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1. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

need to (at least potentially) be used retroactively in the adjudication that gave rise to them, or there would be no incentive for the agency to undertake the delay and effort of the rulemaking.

This Article argues that not only should adjudications not receive *Chevron* deference, but a limited exception should also be created to the current ban on retroactive rulemaking to encourage agencies to engage in the rulemaking process to address ambiguities arising in adjudication. This exception could be specifically cabined to apply only in these unique situations. Enabling such an exception would provide the agency and the public with the benefits arising from public participation.

I. *CHEVRON* DEFERENCE IS A CRITICAL PART OF THE MODERN ADMINISTRATIVE STATE

Chevron deference forms the foundation of the modern administrative state. While in Part III this Article argues why *Chevron* deference should not be available when reviewing the results of an agency adjudication, it is not intended to discount the continuing importance of *Chevron*. This section begins by explaining what *Chevron* deference is before providing the reasons generally given for *Chevron* deference and finally ends by explaining what happens to agency decisions that are not entitled to *Chevron* deference.

A. *What* Chevron *Deference Means*

Chevron deference refers to the discretion potentially granted to an agency's legal interpretation of a statute it is charged with administering.[2]

Not every agency determination is entitled to *Chevron* deference. The agency must have engaged in sufficiently formal procedures when formulating the determination, as discussed in section II.A.1, and even then, deference is only granted provided certain conditions are met.

2. The distinction that it must be an agency's legal interpretation rather than an agency's factual finding is because *Chevron* deference applies only to questions of law rather than questions of fact, a distinction that is traditionally used in appellate review. *See* Nicholas J. Leddy, *Determining Due Deference: Examining When Courts Should Defer to Agency Use of Presidential Signing Statements*, 59 ADMIN. L. REV. 869, 877–79 (2007); *see also* Cheruku v. Att'y Gen. of U.S., 662 F.3d 198, 202 (3d Cir. 2011) (reciting the standard for review of questions of law).

Chevron was initially formulated as a two-part test.[3] In part one of the test, the court determines whether the statute is ambiguous—that is, whether the claimed ambiguous word or phrase is in fact ambiguous or should instead be interpreted in only one way.[4] When making this determination, the court is to use all available tools of statutory interpretation, as it normally would when interpreting a statute.[5]

If the court concludes during this part one analysis that the statute is ambiguous—it has been unable to discern the true meaning of Congress using the traditional tools of statutory construction—the analysis moves to step two.

In step two, the court determines whether the agency's interpretation is reasonable.[6] To be reasonable, the agency's interpretation must fall within the zone of ambiguity created by the statute.[7] If the agency interpretation is reasonable, it is upheld, even if it would not have been the court's preferred interpretation.[8]

While *Chevron* was initially formulated as a two-step test, some courts add an additional preliminary analysis, often referred to as step zero.[9] During this analysis the court determines whether the statute in question actually delegates authority to the agency to make the determination at issue.[10] While often not explicitly part of the *Chevron* analysis (and therefore only a determination that the statute implicitly does grant such authority), it is still referred to as part of the *Chevron* test since determining that no discretion was granted to the agency is a way for courts to avoid the remainder of the analysis altogether in cases where it might otherwise have been expected to apply.[11] This can make a big difference, since

3. *Chevron*, 467 U.S. at 842–43.

4. *Id.*

5. *See id.* at 843 & n.9.

6. *Id.* at 844–45.

7. Kisor v. Wilkie, 139 S. Ct. 2400, 2415–16 (2019).

8. Velásquez-García v. Holder, 760 F.3d 571, 578 (7th Cir. 2014).

9. *See generally* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006). The term "step zero" itself originated with Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833, 836, 873 (2001).

10. Gallardo v. Barr, 968 F.3d 1053, 1059 (9th Cir. 2020) ("We begin at *Chevron* Step Zero, where we determine 'whether the *Chevron* framework applies at all.'" (quoting Or. Rest. & Lodging Ass'n v. Perez, 816 F.3d 1080, 1086 & n.3 (9th Cir. 2016)).

11. *See* Michael Dorf, *The Triumph of* Chevron *Step Zero?*, DORF ON L. (July 27, 2015), https://www.dorfonlaw.org/2015/07/the-triumph-of-chevron-step-zero.html [https://perma.cc/UX2U-R36G] (describing cases where the Court would have been expected to side with the agency and yet still appeared to decide the case at the step zero stage).

when a court applies *Chevron* the agency action is generally upheld, particularly when the analysis reaches step two.[12]

Chevron deference, then, is a very deferential approach to agency statutory interpretation that is granted only when the court reaches step two of the *Chevron* test and has determined that the statute is ambiguous.

B. *Reasons for* Chevron *Deference*

Three main reasons are given for *Chevron* deference: separation of powers drawing from the Constitution and the corresponding comparative political accountability; the comparative expertise of the agency; and the increased efficiency and predictability if the law remains uniform throughout the country. This section discusses these factors beginning with the most important in the mind of Justice Scalia, the most vocal supporter of *Chevron*—the separation of powers, followed by agency expertise, and finally, legal predictability.

1. Separation of Powers and Political Accountability

The primary argument made in *Chevron* itself was that it upholds the separation of powers required by the Constitution.[13]

The Constitution allocates authority among the three branches of government. Congress, the legislative branch, is to "make all Laws which shall be necessary and proper for carrying into

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12. Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the* Chevron *Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 796–97 (2008) (noting the high rate at which agency action was upheld in general and particularly once the result reached step two, but noting that the rate of reversal at step one indicated that courts that may have otherwise determined the statute was unambiguously in favor of the agency's interpretation found it easier to carry the analysis through step two).

13. Interestingly, one of the most common complaints raised by those who oppose *Chevron* is that it violates the separation of powers by not requiring the judiciary to make the final determination on what the law means. *E.g.*, Michigan v. EPA, 576 U.S. 743, 761–62 (2015) (Thomas, J., concurring) ("Interpreting federal statutes—including ambiguous ones administered by an agency—'calls for that exercise of independent judgment.' *Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what they believe is 'the best reading of an ambiguous statute' in favor of an agency's construction. It thus wrests from Courts the ultimate interpretative authority to 'say what the law is' and hands it over to the Executive. Such a transfer is in tension with Article III's Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies." (citations omitted)). This misunderstands that the second step of *Chevron* means a court is not faced with meaning it can determine, that was the question in the first step, but with what is the best option available given this ambiguity. That is no longer what the law means but what the law should mean, which is a policy decision for the executive branch.

Execution" its specifically enumerated powers.[14] The President, as head of the executive branch, shall "take Care that the Laws be faithfully executed."[15] And the courts, as members of the judicial branch, oversee "all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States."[16]

While the final directive to the courts is not as specific as the other two, the Court clarified in *Marbury v. Madison* that constitutionally it was the courts rather than the other branches that were to have the final say on what the law meant.[17] This decision made the courts the final authority on legal issues while explicitly removing them from the political questions faced by other branches. This division is considered so fundamental that the courts will not consider cases that are deemed to involve a political question, reasoning that such issues are not properly the domain of the courts but rather that of the other branches.[18]

The structure of *Chevron* helps make this distinction clear. In step one, the court is trying to determine what the law means.[19] If such a determination is made, the court, as the final arbiter of what the law means, is constitutionally obligated to use that interpretation.[20]

When a court is unable to determine what Congress meant in step one, that means that the remaining question is no longer what the law means, but rather what the best policy choice should be, and such decisions are delegated to other branches.[21] A related

14. U.S. CONST. art. I, § 8.

15. U.S. CONST. art. II, § 3.

16. U.S. CONST. art. III, § 2.

17. 5 U.S. 137, 177–78 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

18. Carmichael v. Kellogg, Brown & Root Servs., Inc., 572 F.3d 1271, 1292 (11th Cir. 2009) (finding that even asking the military for money damages in a negligence case would force the courts into the domain of another branch).

19. *See* discussion *supra* section I.A.

20. *Marbury*, 5 U.S. at 177. This also allows the *Chevron* doctrine to align with the general assumption that questions of law should receive de novo review. To the extent that the court determines the question is one properly dealt with first by the court, determining what the law means is effectively de novo review. It is only once the analysis proceeds to part two, where the court is no longer trying to determine what the law actually means (the goal of de novo review) but rather the best policy option that deference is granted to the agency. United States v. Haggar Apparel Co., 526 U.S. 380, 391 (1999) ("*De novo* proceedings presume a foundation of law. The question here is whether the regulations are part of that controlling law. Deference can be given to the regulations without impairing the authority of the court to make factual determinations, and to apply those determinations to the law, *de novo*.").

21. *Cf.* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1630 (2018) (declining to defer to the

argument is that it makes sense for the courts, which are not accountable to the public through any electoral system, to defer to the branches that do have to answer to the public.[22] As the Court said in *Chevron*:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.[23]

Some have argued that agencies are really a fourth branch of government.[24] However, executive agencies fall within the oversight of the President.[25] And this is not merely nominal. Changes in administration mean changes in the high-level personnel within an agency, the people who are put in place to help guide the goals of the president.[26] Major decisions of agencies also must be approved by the Office of Management and Budget, an office that exists explicitly to exert presidential oversight over agency action.[27]

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executive branch when it had separately argued both sides of an issue since that went against any political rational for deference to the executive).

22. *See, e.g.*, Amgen, Inc. v. Hargan, 285 F. Supp. 3d 351, 370–71 (D.D.C. 2018) ("Because the phrase 'fairly respond' is ambiguous, *Chevron* teaches that Congress 'has implicitly delegated the authority' to interpret this term to the FDA. That conclusion is particularly apt, moreover, because—as this case demonstrates—the meaning attached to that phrase implicates the type of policy-laden judgment that is better left to the politically accountable executive branch than to the unelected judiciary." (citation omitted)).

23. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984).

24. *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984). Some treat all agencies as members of the fourth branch, while others focus more specifically on independent agencies. Process Gas Consumers Grp. v. Consumer Energy Council, 463 U.S. 1216, 1219 (1983) (White, J., dissenting) (referring to independent agencies as a fourth branch).

25. Seila L., L.L.C. v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192 (2020) ("While we need not and do not revisit our prior decisions allowing certain limitations on the President's removal power, there are compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director. Such an agency lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control."). The Court follows *Seila* the following year when it held a provision limiting the removal of the head of the Federal Housing Finance Agency was also invalid. Collins v. Yellen, 141 S. Ct. 1761, 1783–84 (2021) ("The Recovery Act's for-cause restriction on the President's removal authority violates the separation of powers. Indeed, our decision last Term in *Seila Law* is all but dispositive.").

26. On June 23, 2021, the day that *Collins v. Yellen* was issued, President Biden removed the head of the Federal Housing Finance Agency to instead install his own pick. Matthew Goldstein, Adam Liptak & Jim Tankersley, *Biden Removes Chief of Housing Agency After Supreme Court Ruling*, N.Y. TIMES (June 23, 2021), https://www.nytimes.com/2021/06/23/us/biden-housing-agency-supreme-court.html [https://perma.cc/N94X-M2PJ].

27. *Office of Management and Budget*, WHITE HOUSE, https://www.whitehouse.gov/omb [https://perma.cc/KQ4M-YE4Q] ("The Office of Management and Budget (OMB) serves

This distinction becomes important because agency actions and interpretations can and do change with a change in administration.[28] Despite occasional language indicating otherwise,[29] *Chevron* specifically allows an agency to change its interpretation of a statute, meaning that the agency interpretation can be more directly responsive to the will of the people as expressed in their choice of president.[30]

2. Expertise

While the constitutional aspect of political accountability described in the prior section provides a systemic reason to defer, the fact that the agency is likely in a better position than the court to be making the final determination is another important rationale for *Chevron*.

Agency employees are highly trained in specialized areas and often spend their entire professional careers working within one specific area.[31] Courts, on the other hand, are generalists in most areas.[32]

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the President of the United States in overseeing the implementation of his or her vision across the Executive Branch. OMB's mission is to assist the President in meeting policy, budget, management, and regulatory objectives and to fulfill the agency's statutory responsibilities."). It is OMB that is responsible for many of the requirements that make rulemaking so burdensome for agencies as discussed in section II.A.1.

28. Yehonatan Givati & Matthew C. Stephenson, *Judicial Deference to Inconsistent Agency Statutory Interpretations*, 40 J. LEGAL STUD. 85, 91 (2011) ("[C]hanges in an agency's interpretive position may reflect changes in the agency's political priorities—often triggered by a change in the presidential administration.").

29. OSG Bulk Ships, Inc. v. United States, 921 F. Supp. 812, 824 & n.11 (D.D.C. 1996), *aff'd*, 132 F.3d 808 (D.C. Cir. 1998) ("[A preamble could] be considered for *Chevron* purposes in deciding whether the agency has had a consistent and long-standing interpretation of a statute.").

30. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981–82 (2005) ("'On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis,' for example, in response to changed factual circumstances, or a change in administrations." (citations omitted)).

31. Jarrod Shobe, *Agencies As Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451, 499 (2017) ("[T]he vast majority of agency staffers are career employees who spend the bulk of their career working for one agency."). In the Article, which included quotes from direct interviews with agency employees, one employee stated, "[p]eople like it here and have an interest in the agency's mission, so they tend to stick around." *Id.*

32. Courts would, however, be considered to have greater expertise in interpreting criminal statutes than an agency would. United States v. Apel, 571 U.S. 359, 369 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference.").

And it is not merely the knowledge of the individuals at the agency that go into many agency decisions. The type of decisions most likely to get deference are those where the agency has had its views tested in some way, whether through an adverse proceeding or, more commonly, by soliciting the feedback of the general public in the comment process.[33]

In addition to formal measures like the comment process, agencies also routinely reach out to third parties for feedback when formulating policy in the early stages of the rulemaking process.[34] All of this means that the final agency determination is not merely the agency's initial thoughts on the matter but rather the result of a reasoned process.

The fact that there are political dimensions to many of the decisions does not eliminate the need for informed actors to play a role in the determinations. *Chevron* also answers the question of who is better prepared to interpret the data generated during the review process. As has been stated, between the agency and the court, the agency is in the superior position given its greater expertise to be making specific determinations within the discretion delegated by Congress.

There is one final rational to *Chevron*, one that has become increasingly obvious as cases have played out in the courts. *Chevron* leads to greater uniformity in decisions among the circuits, as explained in the next section.

3. Predictability

The final reason why *Chevron* deference is important is because it provides greater predictability for laws that are intended to be applicable nationwide.

Because *Chevron* only applies when the statute is determined to be ambiguous,[35] *Chevron* applications are going to be cases where courts would likely otherwise go in different directions, as different circuits would not be expected to interpret an ambiguous statute

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33. The different types of administrative action are discussed in greater detail in sections II.A.1 and II.B.1.

34. Gwendolyn McKee Savitz, *The Key to Solving Agency Lock-in: Prepublication Regulatory Discussions (Pre Reg)*, 73 ADMIN. L. REV. 255, 259 (2021) ("The agency often reaches out to groups it knows will be interested in the regulation and solicits their input ahead of time. Interest groups know this is the most critical time to be in contact with the agency, and those with connections often can be.").

35. The *Chevron* analysis is described in section I.A.

in an identical manner.[36] These are therefore the cases where a law deferring to uniformity will make the largest difference. Or, as Justice Scalia noted in 2013, "Thirteen Courts of Appeals applying a totality-of-circumstances test would render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron*."[37]

Much of our legal system functions perfectly well with different rules that apply in different locations. Oregon, for instance, can use a modified comparative negligence standard,[38] while its next-door neighbor, Washington, can use a pure comparative negligence standard.[39] In this instance, an Oregon attorney can use the Oregon law to warn a potential client who would be more than fifty percent at fault that they would be unlikely to recover, without having to consider that the result would be different had it happened on the other side of the Columbia River. But, there are different concerns when everything must be regulated by a national organization.

An agency will have a substantially harder time regulating the broader public when different laws apply in different circuits.[40] And, in many instances, it will be required to apply different laws in order to eventually be able to seek higher review. If one circuit decides to go against an agency, for the agency to even have a realistic chance of having that opinion reviewed in the Supreme

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36. For example, this series of cases regarding whether to defer to the BIA on sexual abuse of minors demonstrates the inconsistencies in the various circuits' approaches. Some courts explicitly deferred to the agency under *Chevron*. *See, e.g.*, Velasco-Giron v. Holder, 773 F.3d 774, 778 (7th Cir. 2014); Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1024–25 (6th Cir. 2016), *rev'd sub nom.* Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017); Mugalli v. Ashcroft, 258 F.3d 52, 60 (2d Cir. 2001). Other courts did not apply *Chevron* and did not uphold the agency's interpretation. *See, e.g.*, Amos v. Lynch, 790 F.3d 512, 520 (4th Cir. 2015); Estrada-Espinoza v. Mukasey, 546 F.3d 1147, 1158 (9th Cir. 2008). Ultimately, the Supreme Court held that the statute was unambiguous. Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1572 (2017) ("We have no need to resolve whether the rule of lenity or *Chevron* receives priority in this case because the statute, read in context, unambiguously forecloses the Board's interpretation.").

37. City of Arlington v. FCC, 569 U.S. 290, 307 (2013).

38. OR. REV. STAT. § 31.600 (2021) (looking at whether "the fault attributable to the claimant was not greater than the combined fault of all" other parties).

39. WASH. REV. CODE § 4.22.005 (2021) ("[A]ny contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury . . . .").

40. Richard J. Pierce, Jr., *The Future of Deference*, 84 GEO. WASH. L. REV. 1293, 1296 (2016) ("By giving agencies the discretion to choose among several 'reasonable' interpretations of an ambiguous statute, the *Chevron* test reduced geographic differences in the interpretation of national statutes by reducing the number of splits among the circuits produced by circuit court applications of the less deferential *Skidmore* test.").

Court of the United States, it must continue to fight similar challenges in all other circuits, as the Court will generally not even take an issue until multiple circuits are in conflict.[41] This means that the agency must continue enforcing different laws in different places before it can realistically seek review.

We have known for decades how much harder it is for an organization to function when different laws apply in different states. Creating uniformity among state laws was one of the underlying purposes of the Uniform Commercial Code back in the 1950s.[42]

The fact that those challenging the agency action must overcome this deferential review helps ensure that the law is uniform, provided the agency has indeed stayed within the zone of ambiguity created by the statute.[43] Granting deference to agencies when they are acting within congressionally delegated discretion helps ensure that laws intended to apply to the entire country do not splinter into unique laws in each circuit since agency action reviewed in cases entitled to *Chevron* will likely receive deference and be upheld.

The discussion thus far has centered on when and why courts grant agencies *Chevron* deference. But, not every agency determination is analyzed using *Chevron*. The next section discusses what happens to agency determinations that do not qualify for the *Chevron* analysis.

C. Skidmore—*the Alternative to* Chevron *Deference*

Agency interpretations that are not entitled to *Chevron* deference instead receive what is generally referred to as *Skidmore*[44] or *Mead*[45] deference.

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41. Max Huffman, *Judge Painter's Forty Rules: A Review of Judge Mark Painter, the Legal Writer: 40 Rules for the Art of Legal Writing (2d ed. 2003)*, 72 U. CIN. L. REV. 1011, 1015 & n.28 (2004) (book review) ("In Supreme Court litigation, multiple citations may be required to demonstrate the depth of a circuit split, warranting a grant of certiorari.").

42. Stephen P. Tarolli, Comment, *The Future of Information Commerce Under Contemporary Contract and Copyright Principles*, 46 AM. U. L. REV. 1639, 1646 (1997) (stating that the code was created in 1951 but it was not until 1968 that it had been adopted by all states other than Louisiana). See also the third stated purpose in the UCC itself. U.C.C. § 1-103(a)(3) (AM. L. INST. & NAT'L CONF. COMM'RS ON UNIF. STATE L. 2020) ("[T]o make uniform the law among the various jurisdictions.").

43. *See supra* note 7 and accompanying text.

44. Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

45. United States v. Mead Corp., 533 U.S. 218, 221 (2001). While this type of deference is referred to using both terms, I will use *Skidmore* as that was the case cited in *Mead* itself

The *Skidmore* analysis does not proceed in a series of steps like *Chevron* but instead provides the court with a variety of factors to consider when determining whether or not to defer to an agency interpretation.[46] More specifically, deference "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[47]

Given the degree to which the court is tasked to analyze the agency's action, *Skidmore* deference can really be thought of as a requirement that the agency convince the court that its position is correct. But the agency's argument is not merely made in a brief, and, in fact, can be disregarded if made for the first time in a brief.[48] Instead, the main factors available to the agency to convince the court are factors within the control of the agency earlier in the process. For instance, a longstanding interpretation will receive greater deference than a recent change.[49] This is a choice at odds with *Chevron*, which grants agencies leeway to change statutory interpretations.[50] The reasoning used in the decision itself will also be an important factor in *Skidmore* review, rather than the degree to which the determination can be justified at a later point.[51]

Given the degree to which the court is directed to scrutinize the agency's activity and reasoning in *Skidmore* review, it is not really

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for the level of deference. *Id.* at 227–28. *Mead* itself was an important case because it had not been totally clear until that point (more than fifteen years after *Chevron* was decided) that not every agency interpretation would be automatically entitled to deference, so *Mead* effectively resurrected *Skidmore*. *Id.* at 240–41 (Scalia, J., dissenting).

46. *Skidmore*, 323 U.S. at 140.

47. *Id.*

48. Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 156 (1991) ("Our decisions indicate that agency 'litigating positions' are not entitled to deference when they are merely appellate counsel's '*post hoc* rationalizations' for agency action, advanced for the first time in the reviewing court.").

49. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 857 & n.130 (2001) (noting that this factor predates even *Skidmore*, since "nineteenth century justices recognized the importance of respecting certain longstanding and consistent executive branch interpretations of statutes.").

50. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 838 (1984) ("The fact that the EPA has from time to time changed its interpretation of the term 'source' does not lead to the conclusion that no deference should be accorded the EPA's interpretation of the statute. An agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.").

51. Packard v. Pittsburgh Transp. Co., 418 F.3d 246, 253 (3d Cir. 2005). The *Packard* court refused to grant deference to an agency letter because "[t]he materials at issue here simply provide no reasoning or analysis that a court could properly find persuasive." *Id.*

correct to call this a form of deference.[52] Instead, the court is upholding an agency interpretation it has independently found persuasive.

The distinction between *Chevron* and *Skidmore* becomes most relevant when the court disagrees with the agency's determination. Analyzed under *Skidmore*, the agency's action would not be upheld as the court would instead insert its preferred interpretation, having found the agency's argument unpersuasive.[53] But, analyzed under *Chevron*, if the agency action was a reasonable interpretation of an ambiguous statute, the court would have to uphold it, even if the court disagreed.[54]

Chevron deference, then, can require a court to uphold an interpretation with which it disagrees, while *Skidmore* requires the agency to convince the court its view is correct. Currently, determinations that were made in both rulemakings and adjudications are potentially eligible for *Chevron*, as described in Part II, although if adjudication were no longer eligible for *Chevron* deference, as argued for in Part III, they would instead be analyzed under *Skidmore*.

II. *CHEVRON* IS CURRENTLY USED WHEN REVIEWING BOTH RULEMAKING AND ADJUDICATION

Chevron originated in a rulemaking case but was very quickly used when reviewing agency adjudications as well. That does not mean that the two types of agency action are equivalent, however. This Part begins by describing in more detail what agency rulemaking entails. It then provides two examples of judicial review of rulemaking using *Chevron*. The pattern is then repeated for adjudication, starting with an explanation of the process before providing two examples of judicial review of adjudication using *Chevron*.

52. Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1467 & n.155 (2005) ("[T]he phrase *Skidmore* 'deference' is misleading. A court granting *Skidmore* deference does not actually relinquish interpretive power to the agency but recognizes the agency as a kind of expert witness, particularly useful in rendering its own interpretive judgment.").

53. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

54. *Chevron*, 467 U.S. at 865–66.

A. *Reviewing Rulemaking with* Chevron

This section begins with an overview of rulemaking—the most common type of agency action reviewed using *Chevron*, before providing examples of *Chevron* review in action in both the Supreme Court and a circuit court.

1. An Overview of Rulemaking

Rulemaking is defined by the Administrative Procedure Act ("APA") as the "agency process for formulating, amending, or repealing a rule."[55] A rule, in turn, is "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."[56]

The term "rule" can encompass documents that are understood not to be legally binding, like a guidance document, as well as the formal codification of legally binding requirements created by an agency—a regulation.[57]

While rulemaking technically refers to the process by which any rule is created, it is used generally and in this Article more specifically as a shorthand to refer to the primary way that agencies create regulations—notice and comment rulemaking.[58] This distinction matters because *Chevron* deference is available only for legally binding agency determinations.[59] For rules, this translates to those

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55. 5 U.S.C. § 551(5).

56. *Id.* § 551(4).

57. Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 266 (2018) (describing the distinction between regulations (legislative rules) and guidance documents (nonlegislative rules)).

58. Notice and comment rulemaking is not the only method of rulemaking possible—formal rulemaking is also an option. However, due to the significantly increased time commitment required for formal rulemaking compared to informal rulemaking, other than the few instances where it is explicitly required by a statute, it is not voluntarily used for rulemaking. Gwendolyn McKee Savitz, *Public Comments Run Amok: Reforming the Notice and Comment Process to Help Reduce the Negative Effects of Mass and Fake Comments*, 69 BUFF. L. REV. 759, 762–63 (2021) ("Informal rulemaking is informal in the same way that black tie is informal. It's not, unless one compares it to white tie. White tie here is equivalent to formal rulemaking both in its increased level of formality and its rarity in modern society.").

59. Christensen v. Harris County, 529 U.S. 576, 587 (2000) ("Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, . . . notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.").

rules issued after notice and comment.[60] Rules issued through other means, like guidance documents, do not qualify for *Chevron* deference and instead are analyzed under *Skidmore*.[61]

Notice and comment rulemaking starts when an agency makes a determination that a rule is needed in a particular area. This determination may be made because a statute has commanded the agency to undertake rulemaking over a certain issue, or because the agency has determined that further regulation in an area is needed.[62]

If the rule the agency is considering is determined to be significant, most frequently because it is expected to have an annual impact on the economy of more than $100 million, the proposed rule must receive the approval of the Office of Management and Budget ("OMB").[63] As described in section II.A.1, OMB is the means by which the President exercises greater oversight of agency action.[64]

OMB requires that economically significant rules be submitted with a regulatory impact statement.[65] This statement must describe the approach chosen as well as alternatives considered and the costs of each approach.[66] It must also demonstrate why the approach chosen is justified.[67]

Once the agency has OMB approval, the agency is then able to publish the proposed rule in the Federal Register, the

60. *Id.*

61. *See* discussion *supra* section I.C.

62. MAEVE P. CAREY, CONG. RSCH. SERV., RL 32240, THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW 2 (2013), https://sgp.fas.org/crs/misc/RL32240.pdf [https://perma.cc/V6JR-NBSE] ("An initiating event (e.g., a recommendation from an outside body or a catastrophic accident) can prompt either legislation or regulation (where regulatory action has already been authorized).").

63. While the $100 million trigger is the most common, there are other ways an action can be significant. It could also "adversely affect in a material way the economy," "[c]reate a serious inconsistency or otherwise interfere with an action taken or planned by another agency," "[m]aterially alter the budgetary impact of entitlements . . . or the rights and obligations of recipients thereof," or "[r]aise novel legal or policy issues." Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,738 (Oct. 4, 1993).

64. *See infra* note 78 and accompanying text.

65. The requirements are set out in a guidance document created by OMB. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR A-4, REGULATORY ANALYSIS 1–3 (2003), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf [https://perma.cc/RXV5-6T8J].

66. OFF. MGMT & BUDGET, AGENCY CHECKLIST: REGULATORY IMPACT ANALYSIS 1 (2010), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/inforeg/inforeg/regpol/RIA_Checklist.pdf [https://perma.cc/T4ZJ-625Q].

67. *Id.* at 1, 3 n.10.

government's official method of public notification.[68] The published document includes the text of the rule as well as a preamble that explains the reasoning behind the agency's choice.[69] If applicable, this reasoning also includes other options that were considered and why the agency made the choice it did.[70]

Publication of the rule marks the beginning of what is generally a thirty- or sixty-day comment period during which anyone in the world is able to comment on the agency's approach.[71] While many rules receive no comment, rules on particularly hot button issues can receive millions of comments.[72]

The comments received are then reviewed by the agency, often after outside contractors have sorted and compiled them if a large number are submitted.[73] The comments do not function as votes, and the agency is not required to follow the will of the comments,[74] but the agency must consider all significant points raised in the comments.[75] This is the opportunity for the public to point out potential problems with a rule that the agency has not yet considered and to do so before legally binding rules are issued.

The agency then makes any changes the agency feels are necessary after reviewing the comments.[76] As long as the final version is considered a logical outgrowth[77] of the proposed rule, the agency

68. Amy Bunk, *Federal Register 101*, 67 PROCEEDINGS 55, 55 (2010).

69. *Id.* at 56.

70. *Id.* at 56–57.

71. OFF. OF THE FED. REG., A GUIDE TO THE RULEMAKING PROCESS (2011), https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf [https://perma.cc/T6C2-4HL7] (stating that the time can extend to 180 days for particularly complex rulemakings).

72. *See, e.g.*, Savitz, *supra* note 58, at 766 (pointing out the large number of comments submitted to the second net neutrality rulemaking that were later determined to be fake).

73. Jennifer Nou, *The FCC Just Received a Million Net-Neutrality Comments. Here's What It's Like to Sort Through Them All*, WASH. POST. (July 18, 2014), https://www.washingtonpost.com/posteverything/wp/2014/07/18/the-fcc-just-received-a-million-net-neutrality-comments-heres-what-its-like-to-sort-through-them-all/ [https://perma.cc/4M3C-KXGX] ("Practices among agencies vary, but in general, each comment is read and coded by teams of agency staff members or contractors.").

74. *Id.* ("[A]gencies can't promulgate regulations by reference to how loudly the crowd applauds.").

75. *Id.* (referring to the process of sorting through the comments for the few significant ones as "sifting for gold").

76. *See* Michael Tingey Roberts, *United States Food Law Update*, 2 J. FOOD L. & POL'Y, 137, 145–46 (2006) (detailing changes made to an interim final rule issued by the Food and Drug Administration.).

77. The logical outgrowth requirement mandates that the final rule be similar enough to the proposed rule that the public could have determined whether there was something they needed to respond to. *See* Phillip M. Kannan, *The Logical Outgrowth Doctrine in*

can send the revised version and required analyses back to OMB for a second review.[78]

After this version is approved by OMB the final rule is published in the Federal Register. As before, the publication includes a preamble discussing the reasoning behind the rule, but, for the final rule. this preamble must also discuss the significant comments received and the agency's response to those comments.[79]

The significant qualifier is important, as many comments received are mass comments that are often devoid of true substance.[80] Not only are these generally screened out before even reaching the agency, they fail to raise the types of issues that an agency would be required to respond to in the preamble.[81]

When the final rule (regulation) is published it also generally includes an effective date.[82] This date, by statute, may not be less than thirty days away.[83] An exception to this thirty-day requirement is available for the types of rules that are not required to undergo notice and comment rulemaking (and that consequently fail to have the force of law)—interpretive rules and guidance documents.[84]

Some rules can be challenged immediately after publication,[85] but often rules are not challenged until the agency has taken action

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Rulemaking, 48 ADMIN. L. REV. 213, 216–17 (1996) (describing the origin of the requirement).

78. *OMB Approval Process*, DOD OPEN GOV'T, https://open.defense.gov/Regulatory-Program/Process/OMBApproval [https://perma.cc/Y93F-SFSV]; OFF. OF THE FED. REG., *supra* note 71 ("In the same way that the President and the Office of Information & Regulatory Affairs (OIRA) review draft proposed rules prior to publication, the President and OIRA analyze draft final rules when they are 'significant' due to economic effects or because they raise important policy issues.").

79. OFF. OF THE FED. REG., *supra* note 71; Grand Canyon Air Tour Coal. v. FAA, 154 F.3d 455, 468 (D.C. Cir. 1998) ("An agency must also demonstrate the rationality of its decision-making process by responding to those comments that are relevant and significant.").

80. Savitz, *supra* note 58, at 769 ("Mass comments are generally not substantive because the arguments in mass comments are primarily policy-based, the least useful type of comment from the agency perspective.").

81. *See id.* at 769–70.

82. 5 U.S.C. § 553(d).

83. *Id.*

84. § 553(d)(2).

85. The biggest hurdle faced by those attempting to challenge regulations immediately after they have been enacted is ripeness. "The problem [of determining whether administrative action is ripe for judicial review] is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967), *abrogated by* Califano v. Sanders, 430 U.S. 99, 105 (1977). The fitness of the issue looks primarily at the degree to which specific facts will be necessary to make a determination as

against an individual or organization.[86] A challenge can be procedural, like an argument that the agency did not properly consider the comments received or the challenge can focus on the substance of the agency's rule.[87] *Chevron* comes into play only when what is at issue is the agency's interpretation of the statute (a substantive challenge), not whether the agency completed the required procedures.[88] The following section details court review of agency action analyzed using *Chevron*.

2. Examples of Rulemaking Review with *Chevron*

This section provides two examples of rulemaking review using *Chevron*, starting with an older case at the Supreme Court and then a more recent case from the Tenth Circuit.

a. *Chevron* Review of Rulemaking in the Supreme Court

The 2011 case of *Mayo Foundation for Medical Education and Research v. United States*[89] demonstrates how ambiguity can exist in seemingly clear statutory text. *Mayo* dealt with whether the Mayo Foundation (the employer) needed to pay taxes on money paid to medical residents who were working fifty to eighty hour weeks.[90] The relevant statute required that employers pay taxes "on the wages employees earn," which defined "wages" to include "all renumeration for employment" but excluded from taxation any "service performed in the employ of . . . a school, college, or university . . . if such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university."[91] The Treasury Department, the agency in question, had long interpreted the student exception to apply only to "students who

opposed to the degree to which the issue is purely legal. In the second factor the court looks at whether "the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Id.* at 149, 152.

86. In many instances the individual would learn about the relevant regulation for the first time after an enforcement action was brought, so this option also enables those who were not previously aware of the regulation a chance to challenge it. *See* Stephen Hylas, *Final Agency Action in the Administrative Procedure Act*, 92 N.Y.U. L. REV. 1644, 1650 (2017).

87. *See* NRDC. v. EPA, 961 F.3d 160, 170–71 (2d Cir. 2020) ("[W]e evaluate their substantive challenge . . . under *Chevron* and their procedural challenge . . . under [Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)].").

88. *Id.* at 170.

89. 562 U.S. 44 (2011).

90. *Id.* at 47–48.

91. *Id.* at 48–49 (quoting 26 U.S.C. §§ 3121).

work for their schools 'as an incident to and for the purpose of pursuing a course of study.'"[92]

In an attempt at greater clarity, the Treasury Department finalized regulations regarding the restriction in 2004. These regulations stated "'The services of a full-time employee'--as defined by the employer's policies, but in any event including any employee normally scheduled to work forty hours or more per week--'are not incident to and for the purpose of pursuing a course of study.'"[93] The regulations also provided a number of examples of situations that did and did not qualify, one of which was particularly relevant.

In Example 4, the regulations specifically address a medical resident, called E, stating that the medical resident's "normal work schedule, which includes services having an educational, instructional, or training aspect, is 40 hours or more per week."[94] Because the forty hour requirement automatically made the resident a full-time employee, the example stated that the conclusion was unaffected by "the fact that some of E's services have an educational, instructional, or training aspect"; and there is similarly no need to consider "other relevant factors, such as whether E is a professional employee or whether E is eligible for employment benefits."[95]

Mayo first attempted a *Chevron* step one claim, that the statute unambiguously granted an exception for anyone substantially engaged in education and that the only restriction was the one in the statute, that the students be regularly attending classes.[96] However, Mayo was forced to concede that a professor who routinely took an evening class each term would not predominately be a student.[97] This concession meant that the statute could not simply be interpreted as written and was ambiguous.[98]

The second step of the Chevon analysis was straightforward once the Court determined that tax regulations were indeed entitled to *Chevron* deference rather than a less deferential tax-specific standard.[99] Mayo argued that it was inappropriate for the agency

92. *Id.* at 49 (quoting 16 Fed. Reg. 12474 (adopting Treas. Regs. 127, § 408.219(c))).

93. *Id.* at 50 (quoting 26 C.F.R § 31.3121(b)(10)-2(d)(3)(iii) (2005)).

94. 26 C.F.R. § 31.3121(b)(10)-2(e)(ii) (2022).

95. *Id.*

96. *Mayo*, 562 U.S. at 52.

97. *Id.*

98. *Id.*

99. *Id.* at 55–56 (determining whether to follow *Chevron* or the test from Nat'l Muffler

to categorically prohibit medical residents from ever qualifying for the exception, but the Court said that:

> Regulation, like legislation, often requires drawing lines. Mayo does not dispute that the Treasury Department reasonably sought a way to distinguish between workers who study and students who work. . . . Focusing on the hours an individual works and the hours he spends in studies is a perfectly sensible way of accomplishing that goal. The Department explained that an individual's service and his "course of study are separate and distinct activities" in "the vast majority of cases," and reasoned that "employees who are working enough hours to be considered full-time employees . . . have filled the conventional measure of available time with work, and not study."[100]

And it was not simply that this interpretation was reasonable; the Court further explained that the agency's conclusion was also in line with Supreme Court precedent that tax exemptions be construed narrowly and the "rule takes into account the [Social Security Administration's] concern that exempting residents from [the Federal Insurance Contributions Act] would deprive residents and their families of vital disability and survivorship benefits that Social Security provides."[101]

Since the statute was ambiguous and the agency's interpretation was reasonable, the rule was upheld.[102]

b. *Chevron* Review of Rulemaking in the Circuit Courts

The second case, *Big Horn Coal Co. v. Sadler*, shows a more recent application of *Chevron* at the circuit court level.[103] *Big Horn Coal* dealt with a Department of Labor regulation interpreting a section of the Black Lung Benefits Act ("BLBA").[104] As relevant, the BLBA stated "Any claim for benefits by a miner under this section shall be filed within three years after . . . a medical determination of total disability due to pneumoconiosis."[105] In the relevant regulation, the Department of Labor had added an exception to this three-year time limit for "extraordinary circumstances."[106]

Dealers Ass'n v. United States, 440 U.S. 472 (1979)).

100. *Id.* at 59 (citations omitted).

101. *Id.* at 59–60.

102. *Id.* at 60.

103. 924 F.3d 1317 (10th Cir. 2019).

104. *Id.* at 1318–19.

105. *Id.* at 1318 (quoting 30 U.S.C. § 932(f)).

106. "[T]he time limits in section 932(f) 'are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.'" *Id.*

Edgar Sadler, a former miner, had received his official diagnosis of total disability due to pneumoconiosis while in the middle of a lengthy appeal of a prior denial of partial disability.[107] Two years and nine months after the diagnosis and under the advice of counsel, the miner withdrew his partial disability claim to file a total disability claim.[108] When the claim was withdrawn, the hearing judge told the miner that the judge "believe[d] that [the miner] understands that he has now time to gather additional medical evidence—more current, more recent medical evidence—and that he knows that he has the opportunity to file another, subsequent claim."[109] Based on this understanding, the judge allowed the miner to withdraw his initial claim.[110]

The miner's second claim, however, was not filed until two years after the withdrawal hearing, making it nearly five years after the initial determination of total disability.[111] This claim was filed without the assistance of counsel.[112]

The new claim was granted and appealed to the same administrative law judge who had heard the previous case.[113] While the judge noted that the time had indeed run, the judge also said that the combination of the apparently poor assistance provided by the miner's attorney and the judge's own statement that the miner would have additional time to file constituted sufficiently exceptional circumstances to toll the filing deadline.[114]

Under the arguments validly before the appellate court,[115] the case turned on whether the regulation allowing the option of tolling the time was valid.[116] This, in turn, depended for the first part of the *Chevron* analysis on whether the statutory language, which made no mention of an exception to the time requirement, could still be considered ambiguous.[117] After determining that there was

107. *Id.* at 1320.
108. *Id.* at 1320–21.
109. *Id.*
110. *Id.*
111. *Id.* at 1321.
112. *Id.*
113. *Id.*
114. *Id.*
115. The mining company had also argued that the advice the judge had given to Sadler should not be sufficient to count as extraordinary circumstances, but the court did not consider this argument since the company had not exhausted it before the Benefits Review Board. *Id.* at 1325.
116. *See id.* at 1322.
117. *Id.* at 1322–23.

nothing in the text of the statute itself or the legislative history answering the question one way or the other, the court declared the statute ambiguous.[118]

When determining whether the agency's interpretation was reasonable, as required in *Chevron*'s second step, the court relied on the implicit presumption[119] in favor of equitable tolling to find that the agency's determination to retain such a presumption was reasonable.[120]

Since the statute was ambiguous and the agency's interpretation was reasonable, the rule was upheld.[121]

B. *Reviewing Adjudications with* Chevron

This section begins by describing what adjudication is before providing two examples of judicial review of adjudication using *Chevron*.

118. *Id.*

119. How to treat presumptions within the *Chevron* analysis is not entirely clear. Particularly since many presumptions would normally be used by a court in interpreting a statute, but might not qualify as the "cannons of statutory construction" that courts are to use in *Chevron* step one. *See* Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 571–72 (2003) ("The assertion that judges should consider substantive canons in the *Chevron* analysis raises the question of how they should be considered. The most sensible approach would be to integrate substantive canons into the *Chevron* framework as consistently with their normal usage as possible. Clear statement rules should therefore displace *Chevron* deference, non-clear statement presumptions should be utilized in Step One, and tiebreakers should be utilized in Step Two."). It does, however, seem somewhat incongruous to find that it was merely reasonable for an agency to retain a presumption when no such argument was presented against doing it.

Finding that a presumption operates at *Chevron* step one versus *Chevron* step two can have significant consequences later, since when a court has decided an issue at step two, an agency may later come back and revise its view on the subject. If, however, the decision occurred at step one that is the court saying what the law should permanently mean and prevents the agency from making changes past that point.

In both this case and the prior case, the applicable court appeared to agree with the agency action, but nevertheless proceeded to step two before declaring the result, which would allow the agency to later go against the court's preferred interpretation.

120. Big Horn Coal Co. v. Sadler, 924 F.3d 1317, 1324 (10th Cir. 2019) ("Second, it was reasonable for the Secretary to interpret the BLBA to allow the limitations period to be tolled in extraordinary circumstances because the Supreme Court has stated that nonjurisdictional federal statutes of limitations are 'normally subject to a "rebuttable presumption" in favor "of equitable tolling."'") (quoting Holland v. Fla., 560 U.S. 631, 645–46 (2010)).

121. *See id.* at 1324–25.

1. An Overview of Adjudication

An adjudication is the "agency process for the formulation of an order."[122] An order, in turn, "means 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 rule making but including licensing."[123] Since the term order is defined in opposition to a rule, an adjudication is the opposite of a rulemaking. More specifically, an adjudication is generally focused on the specific actions of a single individual or entity as opposed to rulemaking, which is generally addressing broadly applicable issues.[124]

Also not clear from the definition is that adjudication differs from rulemaking in that it generally addresses issues or actions that have already occurred, even if there will still be a potential future effect of those actions.[125] The order resulting from an adjudication therefore generally analyzes the past actions of a specific individual.

However, this does not mean that adjudications do not have a future effect, even a broadly applicable future effect. In many instances agencies follow a common law approach to legal issues arising in an adjudication, where the administrative judge will reference a prior adjudicatory decision when determining the legal outcome in another case.[126]

Just as the broad category of rulemaking ranges from regulations to unilaterally issued agency guidance documents,[127] adjudication covers everything from a trial-like process to regulatory

122. 5 U.S.C. § 551(7).

123. *Id.* § 551(6).

124. Neustar, Inc. v. Fed. Commc'ns Comm'n, 857 F.3d 886, 896 (D.C. Cir. 2017) ("We reiterate that adjudications by nature are likely to be specific to individuals or entities, while rules tend to be matters of more general application.").

125. Safari Club Int'l v. Zinke, 878 F.3d 316, 333 (D.C. Cir. 2017) ("[R]ules generally have only 'future effect' while adjudications immediately bind parties by retroactively applying law to their past actions.").

126. While the common law foundation of our legal system makes this seem nearly inevitable—of course cases will come up where legal issues were not worked out ahead of time—that creates a false analogy between courts and agency adjudications. Courts have only one method of action—they can decide cases. Agencies are not similarly constrained since they generally have access to both rulemaking and adjudication options. The inevitability with which such actions are viewed in a courtroom therefore need not translate to the agency context.

127. *See* rulemaking discussion *supra* section II.A.1.

letters issued to an individual alleging the violation of a particular statute or regulation.[128]

The terminology is different, however. The rulemaking spectrum goes from formal rulemaking on one end, through informational (notice and comment) rulemaking and continues on to the issuance of documents that would be categorized as rules rather than orders but that are not otherwise referred to as the product of a rulemaking, like guidance documents.[129]

In adjudication, the spectrum only goes from formal to informal adjudication, with a very large percentage of the spectrum considered informal. This is because formal adjudication must follow a number of specific requirements[130] and many adjudications have some, but not all, of the formal protections.[131] While an informal (notice and comment) rulemaking should always qualify for a *Chevron* analysis, even if it does not eventually earn *Chevron* deference,[132] only a formal adjudication or an informal adjudication that still allows the opposing side an opportunity to make its case sufficiently high up in the agency will potentially qualify for *Chevron* deference.[133]

128. *See* CONG. RSCH. SERV., R46930, INFORMAL ADMINISTRATIVE ADJUDICATION: AN OVERVIEW 8 (2021), https://crsreports.congress.gov/product/pdf/R/R46930 [https://perma.cc/M85R-9KNX].

129. For a discussion of the treatment of different types of rules on review, see *supra* sections I.B and C.

130. Hicks v. Comm'r of Soc. Sec., 909 F.3d 786, 804 (6th Cir. 2018) ("The APA distinguishes between formal adjudications, which must follow a set of 'trialtype procedures,' including 'notice of "the matters of fact and law asserted," an opportunity for "the submission and consideration of facts [and] arguments," and an opportunity to submit "proposed findings and conclusions" or "exceptions,"' and informal adjudications, which 'do not include such elements.'").

131. The significance of this type of intermediate level adjudication can be seen in the adoption by the Administrative Conference of the United States of three categories of adjudications, labeled types A, B, and C. Type A adjudications are formal adjudications (some would including highly formal yet still technically informal), Type C are highly informal, and these common intermediate level adjudications are referred to as Type B. Administrative Conference of the United States, Adoption of Recommendations, 81 Fed. Reg. 94,312, 94,314–15 (Dec. 23, 2016).

132. An agency can still be out of luck, however, if the court decides at the step zero phase that the agency did not have delegated authority, such as occurred in FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

133. In a pre-*Mead* case the Court deferred to a letter issued by the Comptroller of the Currency. Interestingly, this is exactly the type of situation where the "adverse party" in the adjudication would not have contested it since the Comptroller was approving a license to sell annuities for a bank (and in the process concluding more broadly "that national banks have authority to broker annuities within 'the business of banking.'"). *See* NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 255 (1995).

The following section describes *Chevron* review of adjudication at the Supreme Court and circuit court levels.

2. Examples of *Chevron* in Adjudication

Many of the *Chevron* related adjudication cases involve the Board of Immigration Appeals ("BIA"). This is not merely because the BIA has such a heavy caseload, but because the BIA must frequently interpret ambiguous phrases in immigration statutes and, as described in the first example below, has been given nearly a carte blanche to do it by the Supreme Court. Both example cases in this section involve the BIA, but they involve different immigration statutes.

In the first one, Aguirre, the immigrant was on track for deportation and petitioned for a withholding of deportation (so he would not be deported).[134] The relevant statute prohibited the attorney general from deporting an alien "if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."[135] However, this exception did not apply if the Attorney General determined that "there are serious reasons for considering that an alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States."[136] The case is thus discussing whether an exception applies to the otherwise mandatory relief from deportation.

In the second case, updated terminology meant that the alien was now facing removal but the exception sought was not mandatory, as in the prior case, but a discretionary cancellation of removal.[137] To even be eligible for this potential discretionary relief the alien needed to, among other things, not have been convicted of a crime involving moral turpitude with a potential punishment of at least a year.[138] This case is therefore discussing whether the alien was even potentially eligible for this discretionary relief.

134. INS v. Aguirre-Aguirre, 526 U.S. 415, 418 (1999).
135. 8 U.S.C. § 1253(h)(1) (1995) (amended 1996).
136. *Id.* § 1253(h)(2)(C) (1995).
137. *See* Ortega-Lopez v. Barr, 978 F.3d 680 (9th Cir. 2020).
138. *Id.* at 682–83.

a. *Chevron* Review of Adjudication in the Supreme Court

I.N.S. v. Aguirre-Aguirre was a 1999 Supreme Court case that dealt with whether Aguirre, a noncitizen,[139] was entitled to withholding of deportation that would otherwise return him to Guatemala.[140] While Aguirre claimed that he feared political persecution if he returned, this would be irrelevant if he had "'committed a serious nonpolitical crime' before his entry into the United States" since the judge would have no discretion to withhold removal.[141]

Aguirre was alleged to have "burned buses, assaulted passengers, and vandalized and destroyed property in private shops, after forcing customers out" to protest Guatemalan governmental policies.[142] The Board therefore needed to determine whether these actions were enough to qualify as a prohibited "serious nonpolitical crime."[143] It relied on a previous board opinion it had deemed precedential to determine that the "the criminal nature of the respondent's acts outweigh their political nature" and therefore refused to grant the withholding.[144]

When the case went to the Ninth Circuit on review, all parties agreed that the term serious nonpolitical crime should be analyzed by "weighing 'the political nature' of an act against its 'common-law' or 'criminal' character."[145] The question was whether the analysis should also consider other factors. The Ninth Circuit determined that the agency had erroneously failed to expand its analysis to include "'the political necessity and success of Aguirre's

139. Aguirre is referred to here by a single name since that is how it was done in the case itself. He is also referred to as a noncitizen to state his status in as neutral a way as possible. *See Glossary of Immigration Terms*, FREEDOM FOR IMMIGRANTS, https://www.freedomforimmigrants.org/terminology [https://perma.cc/UWB8-Q4T8] ("Although 'undocumented immigrant' is not ideal nomenclature, we use it, 'non-citizen' or 'non-status immigrant' for lack of better terms.").

140. 526 U.S. 415, 418 (1999). There is evidence that the Court is moving away from such aggressive deference to the BIA, but that does not appear to be followed in the lower courts, which makes sense after reviewing the language from this opinion.

141. *Id.* The statutory section at issue in this case is 8 U.S.C. § 1253(h)(2).

142. *Id.*

143. *Id.*

144. *Id.* at 422.

145. *Id.* at 423. This drew, in part, from a prior BIA decision where the BIA had said "In evaluating the political nature of a crime, we consider it important that the political aspect of the offense outweigh its common-law character. This would not be the case if the crime is grossly out of proportion to the political objective or if it involves acts of an atrocious nature." *Id.* at 422 (quoting Matter of McMullen, 19 I. & N. Dec. 90, at 97–98 (B.I.A. 1984)). The BIA, using that standard, had found that "the criminal nature of the respondent's acts outweigh their political nature." *Id.*

methods'; whether his acts were grossly out of proportion to their objective or were atrocious; and the persecution respondent might suffer upon return to Guatemala"[146]

In contrast, the BIA relied on language from a previous adjudication in a different case and said that it "rejected any interpretation of the phrase . . . 'serious nonpolitical crime' . . . which would vary with the nature of evidence of persecution" the immigrant would face when returned to their country of origin.[147]

The Supreme Court ruled that the Ninth Circuit's interpretation was not proper, as it "confronted questions implicating 'an agency's construction of the statute which it administers.'"[148] This meant the Ninth Circuit should have used *Chevron* deference, as the Attorney General was charged with interpreting immigration law and the Attorney General had delegated that authority to the BIA.[149] This was particularly true, the Court said, because "judicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'"[150]

Despite saying that the BIA's determination was closer to the language of the statute, the Court still proceeded through the full *Chevron* analysis. Because the requirement that the immigrant prove a risk of persecution was required to even be eligible for a withholding of removal, the Court stated, "[i]t is reasonable to decide, as the BIA has done, that this factor can be considered on its own and not also as a factor in determining whether the crime itself is a serious, nonpolitical crime."[151]

Because the statute was ambiguous and the BIA's interpretation was reasonable, the Court deferred to the BIA and the interpretation announced in the adjudication was upheld.[152]

146. *Id.* at 418.

147. *Id.* at 425 (quoting Matter of Rodriguez-Coto, 19 I. & N. Dec. 208, 209 (B.I.A. 1985)). The quoted section specifically references the relevant statutory section.

148. *Id.* at 424.

149. *Id.* at 425.

150. *Id*. (quoting INS v. Abudu, 485 U.S. 94, 110 (1988)). The Court went on to say that a "decision by the Attorney General to deem certain violent offenses committed in another country as political in nature, and to allow the perpetrators to remain in the United States, may affect our relations with that country or its neighbors. The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions." *Id.*

151. *Id.* at 426.

152. *Id.*

b. *Chevron* Review of Adjudication in the Circuit Courts

A recent Ninth Circuit case demonstrates the degree to which courts continue to defer to the BIA under *Chevron*. In *Ortega-Lopez v. Barr*, Ortega-Lopez, a noncitizen, had pleaded guilty to "knowingly aiding and abetting another person who sponsored or exhibited an animal in an animal fighting venture."[153] While the case was pending, removal proceedings were commenced against him.[154] Ortega-Lopez sought cancellation of his removal, an option that was not possible if he had been convicted of a crime involving moral turpitude.[155] "Crime involving moral turpitude" is an ambiguous phrase that the BIA has attempted to clarify through a case-by-case approach, determining in each case whether the conduct in question does or not does qualify as a crime involving moral turpitude.[156]

When the initial decision was appealed to the Board, it issued a precedential option determining "that animal fighting under 7 U.S.C. § 2156(a)(1) is categorically a crime involving moral turpitude under the immigration laws because the commission of this offense requires a culpable mental state and involves reprehensible conduct."[157]

The Ninth Circuit initially remanded the decision to the BIA, asking it to consider the issue further, as "harm to chickens is, at first blush, outside the normal realm of [crimes involving moral turpitude]."[158] On remand the BIA expressed the same conclusion at length in another precedential opinion—analogizing animal fighting to incest and prostitution, conduct that society inherently deems reprehensible.[159]

153. 978 F.3d 680, 683 (9th Cir. 2020) (referencing 7 U.S.C. § 2156(a)(1) and 18 U.S.C. § 2(a)).

154. *Id.*

155. *Id.*

156. *See id.* at 684.

157. Matter of Ortega-Lopez, 26 I. & N. Dec. 99, 101 (B.I.A. 2013).

158. Ortega-Lopez v. Lynch, 834 F.3d 1015, 1018 (9th Cir. 2016).

159. Matter of Ortega-Lopez, 27 I. & N. Dec. 382, 386–87 (B.I.A. 2018) ("[B]ecause the conduct encompassed in a violation of § 2156(a)(1) celebrates animal suffering for one's personal enjoyment, it transgresses the socially accepted rules of morality and breaches the duty owed to society in general.") On this round, the BIA also specifically reiterated that its decision should be deferred to by the Ninth Circuit. *Id.* at 385 ("The Ninth Circuit has deferred to the manner in which we apply this definition through case-by-case adjudications in order to 'assess[] the character, gravity, and moral significance of the conduct' in question. Marmolejo-Campos v. Holder, 558 F.3d 903, 910 (9th Cir. 2009) (en banc). As the court explained, this approach allows the Board to 'draw[] upon its expertise as the single body

When the case returned to the Ninth Circuit, the court upheld the BIA's interpretation, noting that it had "deferred to the BIA's approach of identifying 'examples of the types of offenses that qualify as crimes involving moral turpitude,' when the BIA sets out the example in a published opinion."[160]

Now convinced that the BIA had indeed carefully considered the issue, evidenced by the reasoning and the fact that the BIA chose to publish it and finding the interpretation reasonable for the ambiguous statutory phrase, the BIA decision was upheld.[161] While this case appears to be a relatively straightforward application of *Chevron*, the fact that it was initially returned to the BIA, despite the original opinion also being reasoned and published, indicates the degree to which the court was uncomfortable with the interpretation but still felt bound by *Chevron* to defer.

3. *Chevron* Can Be Thought of as Deference an Agency Earns by Using the Required Procedures

As described in sections II.A.1 and II.B.1, both rulemaking and adjudication exist on a spectrum with different levels of formality. In both instances, the agency will generally need to use a procedure that provides increased protection for the public before the result will be entitled to *Chevron* deference.

For rulemaking, which has specific, required procedures for even informal (notice and comment) rulemaking, those informal procedures are generally the minimum expected of an agency before deference is available.[162] Both case examples used for rulemaking review were reviewing regulations issued after notice and comment.

For adjudication, which does not have a similarly formalized middle ground, the opposing side must generally have an

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charged with adjudicating all federal immigration cases' and 'is precisely the type of agency action the Supreme Court instructs is entitled to . . . deference.' *Id.*; *see also* Mendoza v. Holder, 623 F.3d 1299, 1303 (9th Cir. 2010).").

160. Ortega-Lopez, 978 F.3d at 685 ("We have acknowledged that the phrase 'crime involving moral turpitude' is inherently ambiguous, and neither we nor the BIA have established any clear-cut criteria 'for determining which crimes fall within that classification and which crimes do not.' Because the BIA has authority to interpret the term 'crime involving moral turpitude' as used in the INA, interpretations provided by the BIA in published opinions are entitled to deference under *Chevron*." (citations omitted)).

161. *Id.* at 692–93.

162. Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (citing Reno v. Koray, 515 U.S. 50, 61 (1995) ("[I]nternal agency guideline, which is not 'subject to the rigors of the Administrative Procedure Act, including public notice and comment,' entitled only to 'some deference.'").

opportunity to present its case to a high-level reviewer within the agency. In both examples of adjudication review, the courts reviewed published decisions of the BIA, decisions that had been appealed to the BIA from lower-level administrative determinations.[163]

In either instance, whether an agency has earned *Chevron* deference corresponds very closely to whether the agency has put in the required (generally more time-consuming) process. The agencies choose which rules will become formal regulations and which opinions will become formal published (precedential) opinions.

Rules, like guidance documents, that are quicker to issue require less effort on the part of the agency but, in turn, will not receive *Chevron* deference on review.[164] In contrast, an agency that is willing (or forced by statute) to undertake notice and comment rulemaking will emerge on the other end with a document entitled to greater deference.[165] The difference is not the substance of the rule produced, it is the process by which that rule has been produced.[166]

Similarly, on the adjudication side, *Chevron* is more likely to be earned when the adjudication has been reviewed by those highest in the agency[167] and when the opposing side has been given an opportunity to present its views,[168] both factors that will lengthen the process but that correspondingly entitle the agency to greater discretion upon review.[169]

This effectively allows the agency to choose the level of deference desired when the document is reviewed. In a rulemaking, for

163. *See supra* section II.B.2.

164. *E.g.*, *Christensen*, 529 U.S. at 587.

165. *See id.*

166. That said, a guidance document or other interpretation explicitly intended to avoid the notice and comment process will often contain a disclosure that it is not intended to be legally binding. For instance, the document discussed *infra* note 208 includes the phrase "[p]lease be advised that the contents of this document do not have the force and effect of law and are not meant to bind the public in any way."

167. For example, the BIA is the "highest administrative body for interpreting and applying immigration laws." *Board of Immigration Appeals*, EXEC. OFF. FOR IMMIGR. REV., https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/KKW3-32L3] (Sept. 14, 2021).

168. *Obtaining Asylum in the United States*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states [https://perma.cc/ZKS7-3ZLK] (Sept. 16, 2021) (describing the adversary proceedings in immigration hearings.)

169. For BIA determinations, an additional factor is generally whether the Board has chosen to make the decision a published (precedential) decision. *See* 8 C.F.R. § 1003.1(d)(1) (2022).

instance, if an agency wants to ensure *Chevron* deference for a rule, it should go through notice and comment. Alternatively, if speed is more important than deference, or review seems highly unlikely, a guidance document that will not receive significant deference on review could be the right choice. Either way, the determination of which route to pursue (rulemaking vs. adjudication) is left to the agency, as described in the following section.

4. Whether to Undertake a Rulemaking or an Adjudication Is a Choice Left to the Agency

Just as agencies have a choice on how formal they want a given rulemaking or adjudication to be, as described in the prior section, they also have a choice on whether to proceed initially down a rulemaking or adjudication pathway.

The Supreme Court determined decades ago that the choice on whether to proceed through an adjudication or a rulemaking on a particular issue was a choice that would remain with the agency.[170] This goes with the general understanding that agencies likely know what makes the most sense in their particular situation. And different agencies have adopted different approaches. For instance, while most agencies have engaged in rulemaking through the notice and comment process, the National Labor Relations Board ("NLRB") has instead generally chosen to elucidate the requirements that companies have to their employees through a series of adjudications,[171] a choice that has received scholarly criticism for decades[172] but nevertheless been repeatedly upheld by the courts.[173]

While the decision to allow agencies a choice in how to act was commendable in the autonomy it granted agencies, the Supreme Court unfortunately followed this line of thought and expanded *Chevron*, a doctrine that was defendable on a rulemaking basis, to adjudication,[174] where many of the same safeguards were lacking.

170. SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

171. *See generally* Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. REV. 411 (2010) (describing the continued use of adjudication rather than rulemaking by the NLRB in the face of near unanimous criticism).

172. *E.g.*, Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 EMORY L.J. 1469, 1471 (2015).

173. *E.g.*, Nestle Dreyer's Ice Cream Co. v. NLRB, 821 F.3d 489, 501 (4th Cir. 2016).

174. The extension was acknowledged by the Supreme Court three years after *Chevron* was issued. NLRB v. United Food & Com. Workers Union, Local 23, 484 U.S. 112, 123 (1987)

Agency autonomy is an important goal, but it does not automatically follow that allowing agencies a choice of how to act should automatically entitle agencies to equal deference regardless of the method they choose to act through.

This is in fact the question at the heart of *Mead*, the post-*Chevron* case that established that not all agency action was automatically entitled to *Chevron* deference.[175] Less formal and less authoritative agency determinations do not earn *Chevron* deference but are correspondingly easier for an agency to produce.

This leaves the agency with a choice. An agency that believes clarification is needed on a particular rule can chose to go through the notice and comment process and feel confident that the result of the process will be entitled to deference, or it can move much faster, and with less oversight, to produce a guidance document or something similar, knowing that the end result of that process will not be entitled to *Chevron* deference. Currently an agency can also choose whether to go through a sufficiently formal adjudication or rulemaking and likewise receive *Chevron* deference. That should no longer be the case, as Part III explains.

III. *CHEVRON* SHOULD NOT BE AVAILABLE IN ADJUDICATION

As the previous section described, agencies are able to choose whether to undertake a rulemaking or an adjudication to decide a particular issue. Completing a rulemaking can take years as the process includes public comment and greater agency oversight. If the agency instead decides to undertake an adjudication it can do so quickly, without public input, and without having anyone else question its choice or point out potential problems. This determination can then be immediately applied to the adjudication in the agency, and the result will be upheld on appeal using *Chevron*. This Part argues why this should not be the case. It first goes into greater detail about the problems with the current approach before reiterating the need to restrict *Chevron* deference exclusively to rulemakings.

("[W]here 'the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.' [Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)]. Under this principle, we have traditionally accorded the Board deference with regard to its interpretation of the NLRA as long as its interpretation is rational and consistent with the statute.").

175. United States v. Mead Corp., 533 U.S. 218 (2001).

A. *Problems with the Current System*

The current system suffers from both a lack of public notice and public participation. This section describes why these two factors are so important in the rulemaking process and how problematic their absence from adjudication should be considered. Since the problems are a lack of public notice and comment, the very definition of how most rules are made, that is the order in which they are addressed in this section.

1. Agencies Can Bind the Public Without Public Notice

As described in section I.A, the Supreme Court generally grants *Chevron* deference to agency action where the opposing side was granted some meaningful opportunity to make its case. This in effect equates all the procedural protections of the rulemaking process to the due process considerations due to an individual.[176] In many adjudications not only is the public not aware what action the agency is considering or the reasoning behind it, the individual in the adjudication does not know ahead of time either.

This will undoubtedly result in instances where the individual did not present the same arguments in the adjudication that they would have presented if they had known what direction the agency was planning to go in. In such cases in particular, a lone adverse party cannot be said to effectively stand in for the public as in a rulemaking.

In other instances, even if the individual might not know what action the agency is considering ahead of time, it is possible that the particular individual in the adjudication would not consider it problematic. For instance, if the agency is creating a new multifactor test, but the individual can meet that test, they have little reason to contest it, even if the test would be problematic if applied

176. The due process, if not the Due Process. Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931, 974 (2021) ("Indeed, retroactively announcing policy via adjudication presents two types of overlapping concerns—what we call 'Due Process' and 'due process,' with the former being actual constitutional violations and the latter being the sort of government action that, while perhaps constitutional, nonetheless requires a clear statement from Congress because of its tension with traditional understandings of fairness and the rule of law. Both Due Process and due process matter. For instance, there often is no constitutional prohibition on retroactive rulemaking; Congress *can* authorize it. Yet courts understandably are reluctant to conclude that Congress has done so.").

more broadly.[177] It is never enough for one individual in an adjudication to speak for the public in general.

One individual will never represent every aspect of the broader public that the rule will apply to. A precedential opinion that sets forth a test the adverse party can meet is also highly unlikely to be appealed, even though there may be good reasons that test should not be broadly applied.

Notice to the public requires more than that one lone individual was able to make their own case in an adjudication. In the notice and comment process, the public at large must first be notified of the potential agency action and the reasoning behind that action.[178]

This public notice can be particularly beneficial for those working on behalf of the often marginalized groups that are frequently affected by the agencies that chose to operate in this manner. Many immigrants, for instance, have little access to resources, and the clinics or other voluntary aid programs designed to help are only able to handle a fraction of the workload.[179] These programs must

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177. For instance, in *Matter of S-L-H- & L-B-L-*, the BIA determined that a noncitizen had successfully excused her delayed appearance at a hearing under a totality of the circumstances review. 28 I. & N. Dec. 318, 324 (B.I.A. 2021). Previously, the Board had held that traffic delays were insufficient. *In re* S-A-, Applicant, 21 I. & N. Dec. 1050, 1051 (B.I.A. 1997). In this case, however, the noncitizen was able to demonstrate that she had hired a driver to take her but that traffic was exceptionally bad due to unusual snowfall in the area. *S-L-H- & L-B-L-*, 28 I. & N. Dec. at 319–20 (B.I.A. 2021). The Board held that it was possible for a petitioner to make such a showing but also took into account that she had been on time at a number of prior appearances. *Id.* at 321 ("Other factors, such as prior attendance at hearings, eligibility for relief from removal, and promptness in filing the motion to reopen may shed light on whether the alien intended to appear on time or otherwise had an incentive to do so.") Since she successfully met these requirements, she had little reason to argue that similar circumstances could still impact someone coming for their first hearing, but this is now a precedential opinion of the BIA. And it is not merely that she had little reason to contest such factors, as she was trying to make a wholistic case, she recited them as factors in her favor. *Id.* at 320 ("[R]espondent contends that her situation is exceptional because she appeared at all prior hearings during a period of 9 months, the respondents previously filed asylum applications with the Immigration Court, and she promptly filed a motion to reopen."). This is an entirely understandable position for someone to take in an adjudication and further demonstrates the degree to which the arguments made in an adjudication by a lone individual do not function as an effective summary of what all other individuals would say.

178. 5 U.S.C. § 553(b).

179. Counsel in immigration hearings is the responsibility of the noncitizen, and many are unable to obtain counsel at all. This can make a major difference to the outcome. A recent report illustrated the difference counsel can make. "Detained immigrants with counsel were nearly 11 times more likely to seek relief such as asylum than those without representation (32 percent with counsel versus 3 percent without)." INGRID EAGLY & STEVEN SHAFER, AM. IMMIGR. COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 2 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel

work on an individual basis assisting each of their clients, but an organization already stretched thin will not necessarily know which cases it can be most effective on, or which cases will be determined to have precedential value, so the group cannot advocate in a more effective manner.

Courts, including those within an agency, are also not bound by the logical outgrowth rule.[180] This means that courts can decide cases based on arguments that were not made by either side, and certainly were not argued against by the opposing view. In contrast, if an advocacy group is notified of action being considered in a rulemaking it can use the knowledge gained from its broad representation to help explain potential problems with the rule in a far broader manner than in a single adjudication, and the logical outgrowth rule in rulemaking mandates that the public has been on sufficient notice of the potential direction the agency action would take that potential objections can be raised.

It is not just the public that is harmed by this lack of public notice, like those represented by the advocacy groups. The agency is also harmed since it cannot receive the same quality of information, as described in the following section.

2. Agencies Can Bind the Public Without Public Comment

As discussed in the previous section, members of the public will be unable to provide comment on agency action they are unaware of. When this happens, the agency, and thereby the public the agency works on behalf of, also loses out on the expertise that public comments bring to the agency.

Part of the rationale for *Chevron* is that agencies have superior expertise to courts, but, as described in section II.A.1, an important

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_in_immigration_court.pdf [https://perma.cc/MQ9F-N7TM]. Not only were these immigrants more likely to seek relief, out of those who sought relief, they were more likely to obtain it. *Id.* at 3 ("49 percent with counsel versus 23 percent without."). The same effect was seen with immigrants who were not detained as well. *Id.* at 2 ("Immigrants who were never detained were five times more likely to seek relief if they had an attorney (78 percent with counsel versus 15 percent without)."). And, like before, out of those who sought relief they were much more likely to be successful. *Id.* at 3 ("63 percent with counsel versus 13 percent without.").

180. *See supra* note 77 and accompanying text. Allowing a single adjudication to stand for the entire comment process also discounts the fact that the broad issues supposedly being addressed by these agency determinations will not necessarily be adverse to the individual who is the other party to the agency adjudication, and who might therefore not have any reason to defend against the agency action.

part of that expertise includes the information gathered from the public during the comment process. This process allows the agency an opportunity to stop and let the public preemptively check for problems ahead of time.

When agencies act unilaterally, as they do when making binding legal interpretations in an adjudication, they lose the additional information that would otherwise have been contributed by the public—information that can and does end up affecting the final agency action in a rulemaking.

While public comments do not need to be acted on in the rulemaking process, in that the agency does not need to change course based on them, the agency does need to at least respond to those making substantive points.[181] A view of agencies that assumes they are trying to come to the "best" resolution would take it as a given that this best resolution can only be reached with all relevant information, and a component of that relevant information in many instances will be information provided by the public through comments.[182]

Acting through adjudication inherently bypasses this important component of the traditional rulemaking process. While the Supreme Court has made statements indicating a belief that a lone individual arguing their side suffices to provide an alternative point of view,[183] this is nevertheless antithetical to the rulemaking process and should no longer be considered sufficient for *Chevron* deference, as the following section explains.

B. *Only Rules Should Be Eligible for* Chevron *Deference*

Given the problems discussed in the prior sections regarding the comparative public notice and input available in a rulemaking compared to an adjudication, it does not make sense to grant the

181. *See* rulemaking discussion *supra* section II.A.1.

182. Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1373 (1992) ("The accuracy and thoroughness of an agency's actions are enhanced by the requirement that it invite and consider the comments of all the world, including those of directly affected persons who are able, often uniquely, to supply pertinent information and analysis.").

183. *E.g.*, INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) ("[T]he BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication'").

same deference to the results of an adjudication as to a notice and comment rulemaking.[184]

This would not need to mean that an agency that determined during an adjudication that there was an ambiguity in a statute would have no option for deference. The problem could be solved if agencies instead undertook a rulemaking when an ambiguity was identified during an adjudication. That would solve both the lack of public notice and the lack of public input before the agency makes a final determination on its preferred approach.

Restricting *Chevron* deference to rulemakings, rather than rulemakings and adjudications as is currently allowed, would encourage agencies to engage in rulemaking.[185] But merely requiring an agency to undertake a rulemaking to earn *Chevron* deference would not encourage the agency to pause an adjudication to pursue a rulemaking because under current law the results of that rulemaking could not be used in the adjudication that initiated it, due to the retroactivity ban for rulemaking.

Part IV discusses why an exception to this ban should be created to enable an agency to actually use the results of a rulemaking in the adjudication that prompted it, exactly as it would have been able to do with a traditional legal determination in the adjudication that had not been vetted through the public comment process.

IV. ADJUDICATION-INITIATED RULES SHOULD BE APPLICABLE RETROACTIVELY

Allowing *Chevron* deference only for rulemaking rather than for rulemaking and adjudication would increase the incentive for agencies to use rulemaking in many instances. However, it would not provide a sufficient incentive for agencies to use rulemaking to resolve issues that arise in an adjudication. The reason for this is

184. While the fact that *Chevron* has been applied to adjudications in the past would of course mean that this new rule would necessitate a change in the law, changing a procedural rule like *Chevron* review does not implicate the same concerns that other types of changes can. Payne v. Tennessee, 501 U.S. 808, 828 (1991) ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved, the opposite is true in cases . . . involving procedural . . . rules." (citations omitted)).

185. This plea has been made by others as well. *E.g.*, Hickman & Nielson, *supra* note 176 (arguing against the use of *Chevron* in rulemaking generally); Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1201 (2021) (making the same argument specifically in the immigration context).

that the resulting rule, under current law, could not be used in the adjudication where that ambiguity mattered. Since the agency would have no method of obtaining greater deference to the determination in that adjudication, it would be pointless for the agency to pause the adjudication to engage in the rulemaking.

If, however, the results of such a rulemaking could be used in the adjudication, the agency would have an incentive to pause the adjudication to enable the general public to point out unforeseen issues with the agency's chosen approach or suggest possible previously unconsidered alternatives.[186]

This Part expands this argument. It starts by explaining why retroactive rulemaking is generally prohibited before reiterating the need for the limited exception advocated for here. It then discusses guardrails that would ensure the limited exception did indeed remain limited, and the safeguards that already exist to protect individuals in an adjudication from the unfair application of retroactive rules. Next, it addresses how it would be possible for agencies to handle the limited number of additional rules that would be expected under the system proposed here and how the system would not constrain agency discretion, before finishing with a discussion on how these retroactive rules would still fit within the APA definition of a rule.

A. *The Rulemaking Retroactivity Prohibition*

It would not be accurate to say that there is a complete ban on retroactive rules.[187] It is better described as a very strong

186. Using rulemaking rather than adjudication also makes it more likely that other administrative agencies and the executive branch in general will have the opportunity to point out potential problems with the agency's chosen approach.

187. Even the term retroactive itself can become confusing, confusion that is not helped by the attempted distinction between primary and secondary retroactivity. Primary retroactivity changes the past consequences of past actions (deciding that a prior act was a violation at the time it occurred). Secondary retroactivity only has a legal effect going forward. For example, deciding "that for purposes of assessing future income tax liability, income from certain trusts that has previously been considered nontaxable will be taxable—whether those trusts were established before or after the effective date of the regulation." Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 219 (1988) (Scalia, J., concurring). Secondary retroactively is considered acceptable. It is okay that the individuals wish they had made a different choice in the past, even if they are locked into something longer term. It is not okay, however, to decide that nontaxable trusts should have been taxable in the prior tax year and impose that tax now. Procedural rules as a general category can also be considered secondarily retroactive. Landgraf v. USI Film Prod., 511 U.S. 244, 275 (1994) ("Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make

presumption against retroactivity.[188] This presumption can generally be overcome only by explicit statutory language indicating permissible retroactive application, although even then courts can be hesitant to impose a rule retroactively.[189]

"Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'"[190]

In the vast majority of cases, retroactivity is prohibited in rulemaking and allowed in adjudication, as the definitions in the APA could be interpreted to require.[191] But this distinction is not as clear cut as it is sometimes presented. Agencies can choose to apply a rule retroactively and have it upheld on review[192] as well as announce a new legal interpretation in an adjudication but only apply the new interpretation prospectively (to future adjudications).[193] It

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application of the rule at trial retroactive.").

188. Very strong indeed. *Bowen*, 488 U.S. at 208–09 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant." (citations omitted)).

189. This was the case in *Bowen* itself, where the Court was unwilling to find retroactive rulemaking ability of the type used when the statute specifically said "provide for the making of suitable retroactive corrective adjustments." *Id.* at 209 (quoting 42 U.S.C. § 1395x(v)(1)(a)).

190. *Landgraf*, 511 U.S. at 265 (quoting Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 856 (1990) (Scalia, J., concurring)). This concern is strongest when the past actions were taken in reliance on a different rule. It can therefore make a difference whether the rule changes as opposed to clarifies the law in a particular area.

191. The key stumbling point being the requirement that a rule have "future effect." 5 U.S.C. § 551(4).

192. *E.g.*, Combs v. Comm'r of Soc. Sec., 459 F.3d 640 (6th Cir. 2006) (allowing a retroactive Social Security regulation to take effect).

193. This is, in effect, what was allowed to happen in NLRB v. Wyman-Gordon Co., 394 U.S. 759, 763–65 (1969). The Court started with strong language condemning the actions of the NLRB: The National Labor Relations Board created a new rule in an adjudication which is said it would only apply prospectively. The Court said "The Board asks us to hold that it has discretion to promulgate new rules in adjudicatory proceedings, without complying with the requirements of the Administrative Procedure Act. The rule-making provisions of that Act, which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application. They may not be avoided by the process of making rules in the course of adjudicatory proceedings. There is no warrant in law for the Board to replace

nevertheless serves as one of the primary operating principles in administrative law and would be the single largest barrier to enacting the type of rules proposed in this Article.

The following section describes why it would be so critical to allow these rules to apply retroactively.

B. *Allowing Limited Retroactivity Is Necessary for These Rules to Apply in Adjudications*

As discussed in Part III, the fact that agencies effectively make new law through adjudication without true public input is problematic and should not be entitled to the same level of deference on review as the product of a notice and comment rulemaking. But, as the prior section described, it is not enough to simply urge agencies to undertake more rulemakings because the results of those rulemakings would not be usable in the adjudications that raised the issue to begin with.

This is because when an agency makes a determination in an adjudication, that determination can generally be immediately applied to the case at hand and will often determine what happens

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the statutory scheme with a rule-making procedure of its own invention. Apart from the fact that the device fashioned by the Board does not comply with statutory command, it obviously falls short of the substance of the requirements of the Administrative Procedure Act. The 'rule' created in [Excelsior Underwear Inc., 156 N.L.R.B. 1236 (1966)] was not published in the Federal Register, which is the statutory and accepted means of giving notice of a rule as adopted; only selected organizations were given notice of the 'hearing,' whereas notice in the Federal Register would have been general in character; under the Administrative Procedure Act, the terms or substance of the rule would have to be stated in the notice of hearing, and all interested parties would have an opportunity to participate in the rule making.

The Solicitor General does not deny that the Board ignored the rule-making provisions of the Administrative Procedure Act. But he appears to argue that *Excelsior*'s command is a valid substantive regulation, binding upon this respondent as such, because the Board promulgated it is the *Excelsior* proceeding, in which the requirements for valid adjudication had been met. This argument misses the point. There is no question that, in an adjudicatory hearing, the Board could validly decide the issue whether the employer must furnish a list of employees to the union. But that is not what the Board did in *Excelsior*. The Board did not even apply the rule it made to the parties in the adjudicatory proceeding, the only entities that could properly be subject to the order in that case. Instead, the Board purported to make a rule: *i.e.*, to exercise its quasi-legislative power." *Id.* at 764–65 (citations omitted). However, in the end the Court upheld the rule the NLRB had cited in another adjudication (referencing the one in question) because the Board could have just as easily said it the second time and that would have been valid. *Id.* at 766 ("Even though the direction to furnish the list was followed by citation to [the previous adjudication] it is an order in the present case that the respondent was required to obey."). And that was the state of affairs fifteen years before *Chevron* further elevated the initial results of the first adjudication. While adjudicatory boards do not often want to apply a new interpretation only prospectively, it does still happen occasionally. *E.g.*, Beneli v. NLRB, 873 F.3d 1094, 1102 (9th Cir. 2017) (upholding a decision of the NLRB to only apply a new interpretation prospectively).

based on past behavior. But rules generally cannot become effective until at least thirty days after the final rule has been published, so past behavior cannot be considered under a new rule.[194] This is despite the fact that the notice and comment process would include greater protection for the adverse party than the current system.

That is why it is necessary to create a limited exception to allow the rules created in these situations to apply to the adjudications that gave rise to them. Given the limited nature of the rules that would be promulgated based on the guardrails and safeguards discussed in the following sections, the resulting rule would not be functionally different from simply allowing the agency to make the determination in the adjudication, except that the rule would be better informed since the public would have been able to provide the agency with additional oversight on the implications of the rule.

Without this retroactive ability, even if the agency is required to conduct a rulemaking to receive *Chevron* deference, there would be no way and no incentive to begin that process based on an issue identified in an adjudication. Agencies would therefore continue making what are effectively rules without the public input that is so central to the rulemaking process.

But this would not be a free-for-all. As described in the following two sections there would be guardrails and safeguards to make sure the retroactive rulemaking ability could not be abused.

C. *Guardrails Would Ensure that the Exception Remained Limited*

This Article argues that an exception should be made to allow some rules to apply retroactively. However, this is not intended to obliterate the generally prospective nature of rulemaking.

Instead, there would be constraints in place to make sure that the exception remained limited. This exception has been designed specifically to allow the decisions that are currently being made in adjudications (without any public input) the opportunity to instead be finalized after the public has had an opportunity to weigh in. This section discusses these constraints, referred to as guardrails

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194. *See* 5 U.S.C. § 553(d).

here. These guardrails would be specific legal requirements for a new rule to apply retroactively.

The newly created guardrails are intended to make clear that this exception should apply only to new rules that are similar to what agencies are already determining on their own in adjudication. Specifically, the agency would need to demonstrate two things. First, the agency would have to be able to identify the adjudication where the issue was first raised. Second, the exception would be limited to rulemakings focused exclusively on clarifying a single issue in a statute.

Since the entire point of this exception is to allow an agency to do in rulemaking what it was previously doing (or would otherwise be doing) in an adjudication, a requirement that the issue originate with an adjudication ensures that the exception applies only to instances that would otherwise have been determined in an adjudication itself, rather than issues the agency later identified on its own as in need of clarification.

The agency would not be required to demonstrate that it first became aware of the potential ambiguity during an adjudication. This is because doing so would prevent agencies that had identified something as a potential issue, but not necessarily one in need of immediate clarification, from ever acting through rulemaking once it became clear that clarification was needed. An agency would, however, need to be able to show the issue had come up in an adjudication.

Second, the issue must involve interpretation of specific, limited phrases from the statute. In many instances this would be expected to be a single word or phrase that was in need of clarification. But, because the previously unforeseen issue may instead involve the interplay of different provisions of a statute, it would be overly limiting to require that a single word or phrase be identified. Instead, this exception would be better thought of as a single issue in a statute that the rulemaking was designed to clarify.[195]

These two new requirements would prevent an agency from using this opportunity to lay out an entire regulatory plan, but the requirements would not prevent an agency from determining that clarification of the issue requires a multi-factor test. In contrast to the guardrails, which would be new requirements, the following

195. Put another way, it is asking whether this is the kind of determination that could have been made in an adjudication.

section discusses already existing legal safeguards that would add protection on a systemic as well as individual level.

D. *Additional Existing Safeguards that Would Further Protect Individuals in Adjudications from a Retroactive Rule*

The guardrails discussed in the prior section would be specific requirements that a rulemaking would need to meet for the resulting rule to be eligible for retroactive application. But those guardrails would not be the only factors preventing unfair retroactive application of a rule. There are already a number of safeguards built into the legal system on both a systemic and individual level that would offer additional protection.

Systemically, retroactive application of a rule would still be tied directly to the statute the rule originated from, and the effective date of the statute would be the earliest possible application of the retroactive rule (barring a separate retroactivity analysis for the statute itself).[196] An agency would not be able to go beyond its statutory authority when promulgating the rule. Just as it cannot now create liability before the applicable date of a statute in an adjudication,[197] it would not be able to do so under this proposal as well. In other words, this limited exception does not open a magic door to unlimited retroactivity for the agency.

Again, this comports with what agencies are currently permitted to do under the law in an adjudication; the only difference would be the requirement of the additional rulemaking. This leads to the individual protections. First, the process as a whole would provide better safeguards for the individuals affected by the rule. Second, retroactivity would not be possible without an individual analysis in that particular adjudication, granting further due process protection to the individual.

196. Landgraf v. USI Film Prod., 511 U.S. 244, 280 (1994) ("When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.").

197. *E.g.*, Reyes-Hernandez v. I.N.S., 89 F.3d 490, 492 (7th Cir. 1996) (applying *Landgraf* to an adjudication).

One critical component of the rulemaking process is that the broader public is given the opportunity to weigh in. In the type of rule proposed here the public would include the individual in the adjudication potentially affected by the rule, who would be able to comment on the proposed rule along with other members of the public. It would be an additional opportunity for the affected party to make its case to the agency as to why an unfavorable interpretation should not be adopted and an opportunity for other members of the community who could be similarly affected to make clear to the agency the impact of the rule.

The individual would also likely be able to make a better case in the rulemaking than in the adjudication, since the logical outgrowth rule means they would be required to know what the potential rule was.[198]

In an adjudication, the agency's new legal interpretation will not necessarily be known by the individual until after the completion of the adjudication. By this point, if the individual seeks judicial review of the decision, the agency's determination could already be entitled to *Chevron* deference.[199] This deprives the individual of an opportunity to explain to the agency why the agency's proposed interpretation is incorrect. In a rulemaking, the logical outgrowth rule requires that those affected have prior knowledge of the agency's proposed actions, enabling a more effective response.[200]

Building from this, in the continuation of an adjudication following a rulemaking of the type argued for here, the individual would now know exactly what they needed to demonstrate and could put their effort into arguing based on the new rule, rather than making vague arguments based on past rules that the agency no longer intended to stick to. While this might mean that the other party knows they would have a more difficult time making the case if the rule had changed in an adverse manner, they would still know what they needed to prove, which would put them in a better position than they are currently in now in many instances.

Second, before a rule could be applied retroactively to an individual in an adjudication, an analysis would still need to be done to see whether there would be an individual violation in that particular instance for the rule to apply retroactively. This analysis is

198. *See supra* section II.A.1.

199. This is true even if no one has had an opportunity to argue why that particular interpretation is problematic.

200. *See supra* notes 77–78 and accompanying text.

already done in adjudications when determining whether to apply the newly created legal interpretation.[201] If, for instance, the individual had received contrary advice from someone at the agency that they had acted on, it might well be determined that applying the rule retroactively in that particular circumstance would not be appropriate.[202] Since such an analysis is not always done in adjudications, applying the new rule as an actual rule rather than an agency interpretation in an adjudication would again provide the individual with greater protection.

Not only would the type of rulemaking discussed here be better for an individual participating in an adjudication, it is a realistic option for the agency as well, as described in the following section.

E. *Agencies Would Be Able to Effectively Promulgate These Rules*

Requiring agencies to undertake an additional process to obtain deference would unquestionably create concern about the increased level of work. However, this section explains why the proposal in this Article is in fact feasible because it would apply to relatively few rules, and the rules it would apply to would be expected to qualify for an expedited process.

1. Relatively Few Rules Would Be Affected by the Change

This Article proposes creating a limited exception to the general prohibition against retroactive rulemaking.[203] That does not mean, however, that any rule would suddenly be applicable retroactively.

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201. In *De Niz Robles v. Lynch*, the Tenth Circuit held that the BIA's method of announcing new interpretations in an adjudication was in fact so similar to rulemaking, if upheld using *Chevron* and *Brand X*, that it should be subject to the same retroactivity constraint. De Niz Robles v. Lynch, 803 F.3d 1165, 1173 (10th Cir. 2015) ("While the Court has granted agencies a fair amount of flexibility in choosing between rulemaking and adjudication, it has long encouraged the former route because rulemaking offers more notice (due process) and better protects against invidious discrimination (equal protection). Allowing agencies the benefit of retroactivity always and automatically whenever they choose adjudication over rulemaking would create a strange incentive for them to eschew the Court's stated preference for rulemaking—and render *Bowen* easily evaded." (citations omitted)). The Tenth Circuit even held that this prohibition would apply to a petitioner who had applied before it was confirmed that the new interpretation was good law. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1144 (10th Cir. 2016) (referring to the adjudication announcing a new interpretation as an "exercise of delegated legislative policymaking authority").

202. *See* Gen. Elec. Co. v. U.S. EPA, 53 F.3d 1324, 1332 (D.C. Cir. 1995) (finding one reason to side against implementing the agency's preferred interpretation was that conflicting advice was being provided by regional offices).

203. This would apply in situations where the statute itself does not already explicitly authorize retroactive rules.

Instead, as discussed in the section on guardrails, section IV.C., there would be additional provisions in place that a rule would need to meet before it could be applied retroactively. Not only would the rule need to be traceable to an adjudication, it would also need to be limited, as it could only address a single issue involving a statute.

These requirements would inherently limit the scope of the potential rule. Since most rules do not arise from adjudications, and very few are so specifically targeted, it would also mean that only a small percentage of the total rules promulgated each year would even potentially be eligible for retroactivity.

Therefore, not only would this exception therefore apply to a small minority of the rules produced each year, the rules that it did apply to would not be terribly burdensome for the agency to promulgate, as discussed in the following section.

2. These Rules Would Generally Be Subject to a Streamlined Rulemaking Process

The rulemaking process that major rules must go through is lengthy and complex, so much so that it has been decried for decades now as ossified.[204] This has contributed to a larger fear of rulemaking among many, a fear that could similarly lead to an instinctive negative reaction to this proposal. But the rulemaking process for the types of rules at issue here, the ones that the retroactivity exception would apply to, would generally not require the full burdensome rulemaking process.

As described in section II.A.1., the most onerous rulemaking requirements, including the repeated review by the OMB, apply to economically significant or other major rules. Not only do these economically significant rules required additional lengthy steps in OMB review, they require significantly more complicated documentation, since the agency must list alternative options and the costs and benefits of each alternative option as well as justify the option chosen.[205] These big, economic rules are not specifically targeted rules that simply happen to have a large economic impact;

204. Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to* Testing the Ossification Thesis, 80 GEO. WASH. L. REV. 1493, 1493, 1498 (2012) ("*Every* study of economically significant rulemakings has found strong evidence of ossification—a decisionmaking process that takes many years to complete and that requires an agency to commit a high proportion of its scarce resources to a single task.").

205. *See supra* section II.A.1 (providing an overview of rulemaking).

they are generally attempts to implement large sections of code, such as the type of rulemaking required when a new statutory directive is passed.[206] The agency must also not only draft the longer rule but explain the reasoning for all parts of it in the preamble.[207]

The type of rules discussed in this Article, in contrast, would not be implementing entirely new statutory provisions but, rather, interpreting single words or brief phrases within a statute.

As such, the rule itself would be faster to draft, since there would only be one issue to determine as well as a similarly limited amount of reasoning in the preamble. Additionally, it would be far less likely to qualify as an economically significant rule, and therefore unlikely to need the analyses required for OMB review or full OMB review itself, saving significant effort and time for the agency and dramatically reducing the regulatory burden of the rule.

These rules are something agencies could do. But, as discussed in the following section, they would not be made a procedural requirement, so agencies would still retain discretion.

F. *Allowing These Retroactive Rules Would Not Constrain Agency Discretion*

Some might worry that requiring an agency to undertake a rulemaking to receive *Chevron* deference would inhibit agency discretion. After all, as described in section II.B.4, it has been established for decades that the choice of whether to proceed with rulemaking or with adjudication is a choice best left to the agency. Concern would therefore be natural that changing the incentive structure would take away the agency's discretion.

But this confuses the agency's right to decide what method to use from the agency's right to determine how the resulting action will be viewed by a court, a right it does not possess.

Instead, when choosing to undertake a rulemaking or an adjudication it is also up to the agency to determine how much official procedure to include in the process. In making the choice the agency must balance a desire to act quickly and expeditiously with

206. *E.g.*, Patient Protection and Affordable Care Act; Exchange and Insurance Market Standards for 2015 and Beyond, 79 Fed. Reg. 15808 (proposed Mar. 21, 2014) (proposing a number of new regulatory sections in response to requirements under the Affordable Care Act).

207. *See* Bunk, *supra* note 68, at 55, 57.

the understanding that greater procedures will likely lend the final result greater deference. Agencies can move very quickly when issuing a guidance document, as the United States Department of Agriculture ("USDA") did when issuing guidance on how states could apply for Pandemic Electronic Benefit Transfer funds ("P-EBT"), i.e., supplemental food assistance for children who were unable to access free and reduced-price lunches at school due to COVID-19 related closures.[208] The information was distributed in the form of a guidance document, an ostensibly non-legally-binding rule,[209] and one that would not receive *Chevron* deference on review.

The Families First Coronavirus Response Act of 2020 was enacted on March 18, 2020.[210] Two days later, on March 20, 2020, the USDA sent out the corresponding guidance.[211]

This incredible speed would not have been possible through the traditional rulemaking process.[212] Getting information out to states as quickly as possible was more important than making sure that the agency would receive the highest level of deference on review.[213]

The fact that the level of deference on review would change depending on the method chosen does not affect the fact that the choice on how to proceed is still left to the agency.

The impact on agency discretion would be different if the proposal in this Article was a call to invalidate any legal determinations made in an adjudication, but that is not what this Article proposes.

On the contrary, under this proposal an agency would still be able to determine that it would not be worth the additional burden to do a rulemaking in order to determine the meaning of an

208. U.S. DEP'T OF AGRIC., STATE PLAN OF PANDEMIC EBT (P-EBT) (Mar. 20, 2020) (outlining how the appropriate state agencies can apply for aid).

209. *Id.* at 1 ("[T]he contents of this document do not have the force and effect of law and are not meant to bind the public in any way."). That does not mean that guidance documents cannot in many senses still be coercive.

210. Families First Coronavirus Response Act, Pub. L. No. 116–127, 134 Stat. 178 (2020).

211. U.S. DEP'T OF AGRIC., *supra* note 208.

212. Even using the faster version of rulemaking likely to be applicable for many of the retroactive rules. *See supra* section IV.E.2.

213. Certainly it also helped that there was no particularly adverse party here who would be likely to bring such a claim. The way the law was set up the states were not competing with each other but simply being told what they needed to do to get money to which all states were equally entitled.

ambiguous phrase in an adjudication and instead simply state the new interpretation directly in the adjudication.[214]

If such a result were appealed, the agency simply would not receive *Chevron* deference. The order would not be sent back to the agency as inherently procedurally invalid simply because the agency had not undertaken a rulemaking.[215] The only result would be a reduced level of deference on review.

The discretion would remain with the agency, and the agency would be able to act through any manner it is currently able to use. The only change would be a change in the level of deference that some adjudications would receive. This would affect the incentives for the agency but not the right of the agency to determine the appropriate method.

Allowing the types of retroactive rules argued for here would also not go against the definition of rule under the APA, as described in the following section.

G. *These Rules Could Still Fit Within the Definition of a Rule*

As discussed in section II.A.1., a rule is defined as "the whole or a part of an agency statement of general or particular applicability and *future effect*." How would enabling retroactive rulemaking fit with such a definition? Can there really even be such a thing as a retroactive rule if a rule must have "future effect"?

Yes. While statutory clarification would undoubtedly solve this issue, there are already instances where a retroactive rule has been upheld.[216] In addition, there is some support for the type of extremely limited retroactivity exception envisioned in this Article. In "the Government's own most authoritative interpretation of the APA,"[217] the 1947 Attorney General's Manual on the Administrative Procedure Act,[218] it was noted that "[n]othing in the Act

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214. This is just like how agencies will at times chose to do a guidance document, even though less deference will be due, because the time commitment required for a notice and comment rulemaking cannot be rationalized.

215. In other words, it would not become a procedural requirement. *See* Nat. Res. Def. Council, Inc. v. U.S. EPA, 961 F.3d 160 (2d Cir. 2020) (enabling a procedural challenge when rulemaking occurred).

216. *See* 5 U.S.C. § 551(4).

217. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 218 (1988) (Scalia, J., concurring).

218. U.S. DEP'T OF JUST., ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947).

precludes the issuance of retroactive rules when otherwise legal and accompanied by the finding required by [5 U.S.C. § 553(d)]."[219]

It would therefore still be possible to create such an exception now. First, the statute does not say that rules must exclusively have a future effect, and the types of rules proposed in this Article would all be intended to be the rule of the agency going forward. Even if the word exclusive is implicitly read into the statute, exceptions already exist such as with interpretive rules,[220] indicating that rulemaking, at least as a broad class, can have exceptions. And the excerpt from the Attorney General's Manual indicates that in this type of rulemaking the agency would need to include a statement on the adjudicative origin of the rule and the consequent need for the rule to have a retroactive effect. This would explain that such a rule was required to have a retroactive effect to enable public participation in a process that otherwise unfairly excludes critical public input and thereby to better harmonize the process in adjudications with the agency's role in rulemaking.[221]

The exception proposed in this Article is also a harmless exception in that it would only provide greater protection to the other party than is currently available. The entire process laid out in this paper is intended to provide greater due process protection to an individual in an adjudication if the agency also undertakes a rulemaking than the individual would have received merely going through the adjudication itself.

The guardrails described in section IV.C. ensure that a rule applied to an individual in an adjudication could not be broader than what the agency could have otherwise done directly in the adjudication itself. The safeguards described in section IV.D. further ensure that there would be an individual determination in each

219. *Id.* at 37 ("The required publication or service of any substantive rule. . . shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule."). This was, however, a logical leap that Justice Scalia was unwilling to make. *Bowen*, 488 U.S. at 219 (Scalia, J., concurring) ("[A]part from the inexplicable reference to . . . 5 U.S.C. § 553(d), which would appear to have no application."). Even if he had made the connection, he appeared unwilling to accept it. *Bowen*, 488 U.S. at 219 (Scalia, J., concurring) ("Moreover, the clarity of [statements indicating exclusively future effect] cannot be disregarded on the basis of the single sentence.").

220. § 553(d)(2) (exempting interpretive rules from the 30 day notice requirement).

221. One that is designed to provide greater due process to individuals affected by administrative adjudicatory determinations while ensuring that the results reached were the most informed possible.

adjudication before a rule could be applied retroactively even if the rule in question met the requirements of the guardrails.

Since these extra protections would ensure that the individual would therefore not have been harmed by application of the rule retroactively, the individual would have difficulty demonstrating an injury regarding the application.

The exception does not harm the individual and would simply be to allow the agency greater deference on those rules it chooses to go through rulemaking with, deference earned given the increased procedural protections present in the rulemaking process. The exception would not enable the agency to gain new adjudicatory powers.

CONCLUSION

By granting *Chevron* deference to administrative adjudications, the judiciary has made adjudications more powerful than rulemaking, despite the inferior public participation and oversight that occurs in adjudications. To better enable true public participation and the benefits that brings, agencies should be encouraged to commence a rulemaking when ambiguities are raised in an adjudication. But this option will only really be considered by agencies if the resulting rule can be used immediately in adjudications, a result that will only be possible if the rule can be applied retroactively. Enacting the proposal in this Article would help bring the participatory benefits of rulemaking into more situations, granting the public increased access to agencies and agencies access to the broader knowledgebase of the general public.