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REVIEWING MIXED QUESTIONS OF FACT AND LAW IN ADMINISTRATIVE ADJUDICATIONS: WHY COURTS SHOULD MOVE TO "SUBSTANTIALLY ESTABLISHED FACTS"

GWENDOLYN SAVITZ*

ABSTRACT

Courts are inconsistent in how they review mixed questions of fact and law in administrative adjudications. Many courts simply and unquestioningly review the entire mixed issue using only substantial evidence review. This grants extreme and unquestioning deference to any legal interpretation used by the agency, far more than would be available to it under the increasingly besieged *Chevron* doctrine, despite the fact that the adjudications being reviewed in this manner generally would not even be entitled to *Chevron* deference if the legal component of the mixed question were analyzed separately. Courts should therefore analyze the different components of a mixed question separately. Reviewing administrative action in this way is actually even easier than it would be when reviewing a traditional trial because the reviewing court can always remand to the agency if factual findings are not sufficient to allow review.

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INTRODUCTION

MANY administrative adjudications involve mixed questions of fact and law in which the facts of the individual situation are being applied to the relevant legal standard. However, courts are inconsistent in how they review these cases. Conflict has sprung up not only between circuits but within circuits as well. And the problem is not merely that not all circuits agree. Many circuits functionally review such questions using only substantial evidence. This grants extreme deference to the legal component of the mixed question, even though in virtually every adjudication reviewed the interpretation would not qualify for any deference if it were reviewed separately.

This Article explains how and why a court should instead break apart a mixed question into its component parts for analysis; something that some but not all courts are currently doing.

I. THE FACT/LAW/DISCRETION TRIANGLE IN ADMINISTRATIVE LAW

The type of question at issue determines the standard of review.[1] Courts must therefore differentiate between questions of fact, law, and discretion. This Part begins by describing the difference between questions of fact and questions of law. While they are distinct, they are also dealt with together because they form a spectrum as questions can also lie in the middle.[2]

It then separately deals with questions of discretion because they are not involved at all in the mixed questions the Article addresses, and it is therefore important to know what the analysis does not apply to.

A. *The Question of Fact/Question of Law Spectrum*

In order to determine the proper standard of review for a case, the court must first determine what exactly it is being asked to review. This is true for all cases, although this Article is focused particularly on judicial review of administrative adjudications.

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1. Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. REV. 469, 470–71 (1988).

2. At least in the middle between fact and law. The term "mixed question" generally is not used to refer to combinations of discretion with fact and law. *C.f.*, Kevin Casey, Jade Camara & Nancy Wright, *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 321 (2002) (referring to the approach of the Federal Circuit to "mixed questions of fact and discretion"). Casey, Camara, and Wright say that when the Federal Circuit deals with such mixed questions "it breaks the mixed questions down into unmixed halves of fact and discretion." *Id.* More generally, to the extent mixed questions arise involving fact and discretion, they are generally dealt with separately, as this Article advocates for traditional mixed questions in Section III.C.2.

A question of fact addresses the particular circumstances of the individual involved in the adjudication. It involves analyzing things like whether an applicant for social security can lift a certain amount of weight and will be granted highly deferential review.

A question of law, in contrast, does not directly involve the facts of the particular individual. Instead, a question of law relates directly to the governing statute or regulation (or other law) the court is applying, such as whether a statute that says someone must be under eighteen when an event occurs applies if the event occurred on their eighteenth birthday.[3]

While such a question (whether someone should count as being under eighteen if the relevant event occurred on their eighteenth birthday) is only ever going to be applicable in cases where the event in question occurred on that individual's birthday, what the court is trying to determine is not the specifics of the facts but rather the meaning of the statute.

It is not always immediately clear whether something should be considered a question of law or a question of fact. Some of these choices are historical and would possibly not be made today.[4]

While this fact/law distinction is often taught as a dichotomy, it is closer to the two ends of a gradient. Many issues fall along the spectrum and involve both legal and factual issues, such as whether a particular noncitizen's children will suffer "exceptional and extremely unusual hardship" if the parent is removed from the country.[5] This is a factual question, since it must be determined what hardship, exactly, the children will face, and it is a legal question because it must be determined if the particular hardship the children will face meets the legal requirement of "exceptional and extremely unusual hardship."[6]

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3. This was the question in Coniglio v. Garland, 556 F. Supp. 3d 187, 192 (E.D.N.Y. 2021). The question was whether Minxuan Qiu could count as the stepchild of Peter Coniglio for immigration purposes. Coniglio had married Qui's mother on Qui's eighteenth birthday. *Id.* To be able to petition for Qui to get permanent residency, Qui needed to be considered Coniglio's child. Child was defined as "an unmarried person under twenty-one years of age who is . . . a stepchild . . . provided the child had not reached the age of [eighteen] years at the time the marriage creating the status of stepchild occurred." *Id.* at 191 (first alteration in original) (quoting 8 U.S.C. § 1101(b)(1)(B) (2018)). The court analogized to other similar phrasing in other statutes and the rule of lenity to conclude that Qui could still be considered a child. *Id.* at 207.

4. *See infra* Section III.A.1.

5. Cuauhtenango-Alvarado v. U.S. Att'y Gen., 855 F. App'x 559, 559 (11th Cir. 2021) (citing 8 U.S.C. § 1229b(b)(1) (2018)). While the statute applies to both hardship to U.S. citizens and hardship to lawful permanent residents, the children at issue here were U.S. citizens. *Id. See* 8 U.S.C. § 1229b(b)(1)(D) (2018) (allowing the cancellation of removal if the noncitizen "establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence").

6. *Cuauhtenango-Alvarado*, 855 F. App'x at 559.

In Part II, this Article addresses the standard of review for the ends of the spectrum—questions considered as only questions of law or questions of fact. In Part III, it addresses the standard of review for the middle section of this spectrum—the mixed questions. The following section deals with a separate issue that arises in administrative review—questions of discretion.

B. *Questions of Discretion Are Off the Fact/Law Spectrum*

Questions of fact can be confused with questions of discretion as well as questions of law. Questions of discretion are properly thought of as lying outside the traditional law/fact gradient. But because questions of fact generally require deference to the initial decisionmaker, as do questions of discretion, the two can be conflated.

However, a question of discretion is distinct and does not fall into the fact/law spectrum described in the prior section. Questions of fact deal with what exactly happened in the past. Questions of law deal with the legal consequences of things that happened in the past. But questions of discretion deal with the specific choice made by the agency[7] with future repercussions or choices that relate directly to the proceeding and that involve a decision the agency is allowed to make. It is the discretion used to make this choice that is under review in a question of discretion.

If a statute requires that all individuals proving something be granted relief, then the agency has no choice and so no discretion is involved. In such a case, facts are determined and compared to the legal standard, and the result of that process dictates exactly what will happen next.

However, if a statute says that the agency has discretion to grant relief to individuals proving something, review is very different since this then becomes a question of discretion. What is being reviewed in this case is the choice made by the agency once it is determined the individual potentially qualifies for relief.[8]

Questions of discretion are reviewed using the abuse of discretion standard, an extremely lenient standard making it highly likely the agency action will be upheld, since it allows for the existence of a range of acceptable choices.[9] Similarly, questions of fact are generally reviewed for sub-

7. Or lower court when it is a court determination under review.

8. A determination that the individual did not possibly qualify for relief is not reviewed as a question of discretion because the agency is not granted any discretion until the determination has been made that the individual qualifies.

9. Apple Inc. v. VoIP-Pal.com, Inc., 976 F.3d 1316, 1324 (Fed. Cir. 2020) ("[D]iscretion implies a range of permissible choices. As long as the tribunal's choice falls within a reasonable range, it cannot constitute an abuse of discretion." (quoting Abrutyn v. Giovanniello, 15 F.3d 1048, 1053 (Fed. Cir. 1994))). This does not mean review is impossible. If the agency has not given any reason for a choice or made the choice for something that should not have been considered, it may still be an abuse of discretion. If an agency denies relief saying that the individual does not even qualify, that instead becomes a question of law—whether the individual could qualify for the discretionary relief.

stantial evidence. Substantial evidence also requires a court to affirm in many instances where the reviewing court may not fully agree with the choice made below.[10] There can therefore similarly be a range of acceptable responses. The difference is what is being reviewed.[11]

Whether to cancel a removal of an immigrant, for instance, is in certain circumstances within the discretion of the head of the agency.[12] The determination will generally be based on facts that happened before the proceeding, but the act of deporting cannot occur outside of the administrative process.

In contrast, whether the individual had engaged in an act that determined whether they could even qualify for the discretionary review would be an underlying question of fact and correspondingly be reviewed separately.[13] With a question of discretion, the law operates under the assumption that there is not necessarily one right answer, hence the discretion that has been explicitly handed to the agency for the particular issue.[14]

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10. Freeman v. Halter, 15 F. App'x 87, 88 (4th Cir. 2001) ("We must uphold the Commissioner's finding of no disability, even if we disagree, as long as it is supported by substantial evidence.").

11. The two are sometimes conflated too, where a court will say the agency abused its discretion because there was not substantial evidence. *E.g.*, Tartaglia v. Dep't of Veterans Affs., 858 F.3d 1405, 1409 (Fed. Cir. 2017) ("As a result, the MSPB abused its discretion because it used facts unsupported by substantial evidence in its analysis."); Langford v. Huerta, No. 16-CV-00006, 2016 WL 8674388, at *13 (W.D. Tex. Aug. 9, 2016) ("[T]he NTSB . . . abused its discretion by relying on uncharged conduct and allegations unsupported by substantial evidence in affirming the ALJ's order on remand and departing from its precedent without reasoned explanation . . . ."). But abuse of discretion encompasses more than substantial evidence.

12. Pereida v. Wilkinson, 141 S. Ct. 754, 759 (2021). Reviewing the law, the Court said:

> A person faced with a lawful removal order may still ask the Attorney General to "cancel" that order. To be eligible for this form of relief, a nonpermanent resident alien like Mr. Pereida must prove four things: (1) he has been present in the United States for at least 10 years; (2) he has been a person of good moral character; (3) he has not been convicted of certain criminal offenses; and (4) his removal would impose an "exceptional and extremely unusual" hardship on a close relative who is either a citizen or permanent resident of this country. Establishing all this still yields no guarantees; it only renders an alien eligible to have his removal order cancelled. The Attorney General may choose to grant or withhold that relief in his discretion . . . .

Id. (emphasis omitted) (citations omitted).

13. This is potentially what the court was attempting to get at in United Space All., LLC v. Solis, 824 F. Supp. 2d 68 (D.D.C. 2011). For further discussion, see *infra* note 81.

14. Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359, 368 (1975). Greenawalt said:

> [I]n ordinary discourse the existence of discretion turns on the range of performance that will be deemed proper by those people to whom the person making decisions is responsible. It does not turn on the duty of the decision-maker conscientiously to reach the best decision he can under a standard that may theoretically provide an objectively "right" an-

With questions of fact and law, in contrast, there is assumed to be a right answer, although a court will require various levels of proof that the wrong choice was made before disturbing it.[15]

This does not mean that questions of discretion are never disturbed on appeal,[16] but the standard for disturbing something that has been committed to the agency's discretion is that it be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[17]

Abuse of discretion is often defined by turning to the other words in that section. It can therefore be considered synonymous with "arbitrary or capricious" or "otherwise not in accordance with law."[18] If the agency acts arbitrarily or capriciously, it has abused its discretion.[19] Violations can also be found if the result is contrary to law, although this means that a legal error has occurred and some aspect of the agency's determination regarding whether it could act or how it could act was legally incorrect.[20] These reviews of discretion are therefore evaluating the choice made from

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> swer. . . . In ordinary discourse discretion exists if there is more than one decision that will be considered proper by those to whom the decision-maker is responsible, and whatever external standards may be applicable either cannot be discovered by the decision-maker or do not yield clear answers to the questions that must be decided.

Id.

15. *See generally* Part II.

16. Omni Packaging, Inc. v. U.S. I.N.S., 733 F. Supp. 500, 504 (D.P.R. 1990). *Omni* said:

> Because the L-1 visa was granted and extended on precisely the same standard that the INS now chooses to deny the Class A, Schedule IV certification and consequently, the third preference classification, the INS must specifically elucidate why the previous granting and extensions of Mr. Avila's L-1 visa were erroneous. The failure to do so results in a decision which is inconsistent with its previous treatment of the L-1 visa and is an abuse of discretion.

Id.

17. 5 U.S.C. § 706(2)(A) (2018).

18. Affum v. United States, 566 F.3d 1150, 1161 (D.C. Cir. 2009) ("[T]he Secretary abuses his discretion in his choice of a penalty if his decision is either 'unwarranted in law' or 'without justification in fact' or is 'arbitrary' or 'capricious.'" (first quoting Coosemans Specialties, Inc. v. USDA, 482 F.3d 560, 566 (D.C. Cir. 2007); then citing Norinsberg Corp. v. USDA, 47 F.3d 1224, 1228 (D.C. Cir. 1995))).

19. Hosp. Bus. Servs., Inc. v. Jaddou, No. 19-0198, 2021 WL 4262653, at *9 (D.D.C. Sept. 20, 2021) ("USCIS was arbitrary, capricious, and abused its discretion in its decisions regarding this criterion."); Coca-Cola Co. & Subsidiaries v. Comm'r of Internal Revenue, 155 T.C. 145, 201 (2020) ("In order to set aside such discretionary action by the Commissioner, 'a taxpayer must establish that the Commissioner abused his discretion by making allocations that are arbitrary, capricious, and unreasonable.'" (quoting Guidant LLC v. Comm'r, 146 T.C. 60, 73 (2016))).

20. Colin-Carmolinga v. Barr, 796 F. App'x 551, 553 (10th Cir. 2020) ("Committing a legal error . . . is necessarily an abuse of discretion." (alteration in original) (quoting Elzour v. Ashcroft, 378 F.3d 1143, 1150 n.9 (10th Cir. 2004))). *But see* Conn. Gen. Life Ins. Co. v. Humble Surgical Hosp., L.L.C., 878 F.3d 478, 484 (5th Cir. 2017) ("Other courts have held that, where an administrator's interpreta-

different angles. These two together mean that a court reviewing something under the abuse of discretion standard can see whether the agency was wrong on some legal aspect of the issue, as well as whether the agency gave no reasons for its actions or gave reasons having nothing to do with the issue at hand.

Notice the requirements here: the agency did something that was contrary to law, or the agency did something without legitimate reasons or reasoning.[21] There are essentially extreme bars the agency is not allowed to cross, but everything aside from that is fair game.

Review is somewhat stricter for review of facts[22] and significantly stricter for review of law, as explained in Part II.

II. HOW TO REVIEW QUESTIONS OF FACT AND LAW IS RELATIVELY SETTLED

Because mixed questions are questions with both a legal and factual component, it is necessary to examine how each of these is handled individually. This Part lays the groundwork for understanding mixed questions by covering how courts review straight factual questions and straight legal questions.

A. *Reviewing Questions of Fact in Administrative Adjudications*

This section begins by reviewing the substantial evidence standard under which most agency questions of fact are reviewed. It then provides examples in two commonly encountered areas of judicial review of agency action involving questions of fact. Finally, it takes a step back to talk about how courts categorize the process of substantial evidence review itself: while substantial evidence review is the standard for review of facts, the determination of whether substantial evidence exists is a legal question. This has caused confusion for some courts that mistakenly believe calling this review a legal question allows determinations at the motion to dismiss stage.

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tion is supported by prior case law, it cannot be an abuse of discretion—even if the interpretation is legally incorrect.").

21. *In re* NTE Conn. LLC, 26 F.4th 980, 990 (D.C. Cir. 2022) ("Indeed, FERC concedes that it provided an 'admittedly limited explanation in the Termination Order.' Without further explanation, we had no reason to believe that FERC reasonably exercised its discretion.").

22. Substantial evidence review, as discussed in Section II.A.1, is a less lenient standard than abuse of discretion. United Steel Workers of Am. AFL-CIO-CLC v. NLRB, 482 F.3d 1112, 1117 (9th Cir. 2007) ("[W]hen the Board disagrees with an ALJ's findings or conclusions, we conduct a more searching review. That is because this court reviews the Board's findings for substantial evidence—not a clear abuse of discretion." (citations omitted)).

1. *Questions of Fact are Generally Reviewed Using Substantial Evidence*

In general, findings of fact in agency adjudications are reviewed using the substantial evidence standard. The substantial evidence standard is very deferential, requiring that the agency's "findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."[23]

The term substantial evidence is used directly in the Administrative Procedure Act,[24] as well as the Social Security Act.[25] Immigration law, in contrast, approaches it from the other direction. The Immigration and Nationality Act effectively provides for the same standard of review but fails to name it specifically as substantial evidence, instead using the quoted language from above.[26] If there were any doubt, the Supreme Court has made the connection clear.[27] The immigration language has also been copied back into social security determinations as well.[28]

Substantial evidence is an extraordinarily lenient standard of review. A court is not merely supposed to uphold agency factual findings if it agrees with the agency or even if it thinks it is a close call, but is willing to give the agency the benefit of the doubt. Instead, a court must be convinced that no reasonable person could have made that factual determination before disturbing it. Perhaps not surprisingly, this is the same standard often used when reviewing factual findings made by a jury.[29] To help further clarify the standard, the following section provides two examples.

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23. Nasrallah v. Barr, 140 S. Ct. 1683, 1692 (2020) (quoting 8 U.S.C. § 1252(b)(4)(B) (2018)).

24. 5 U.S.C. § 706(2)(E) (2018) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute.").

25. 42 U.S.C. § 405(g) (2018) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive . . . .").

26. 8 U.S.C. § 1252(b)(4)(B) (2018) ("[T]he administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.").

27. The two were explicitly linked by the Supreme Court in *Nasrallah*, 140 S. Ct. at 1692 ("The standard of review is the substantial-evidence standard: The agency's 'findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.'" (quoting 8 U.S.C. § 1252(b)(4)(B))).

28. *E.g.*, Sisco v. Comm'r Soc. Sec., 840 F. App'x 685, 688 (3d Cir. 2020) (quoting *Nasrallah*, 140 S. Ct. at 1692 to explain substantial evidence in a social security case); Goodwin v. Kijakazi, No. 21-60225, 2021 WL 5176645, at *1 (5th Cir. Nov. 5, 2021) (linking *Nasrallah* to the Social Security Act requirements as well). *But see* Ahearn v. Saul, 988 F.3d 1111, 1115 (9th Cir. 2021) (finding that the differing language between the immigration and social security statutes implies that they should mean different things).

29. Amin v. Mayorkas, 24 F.4th 383, 393 (5th Cir. 2022) ("When the arbitrary and capricious standard is invoked to question the factual basis for an agency's conclusions, our review is functionally the same as the 'substantial evidence' test used to evaluate formal agency action under 5 U.S.C. § 706(2)(E).").

2. *Sample Cases Involving Questions of Fact in Administrative Adjudications*

This section briefly provides two examples of traditional court analysis of agency factual questions in the two most commonly reviewed areas of administrative adjudication—first in social security disability review and then in immigration.

a. Facts in Social Security

Social Security appeals generally deal with disability payments. To apply for disability payments, a potentially eligible individual first files an application.[30] Most claimants are rejected after this initial application.[31] The applicant can then generally request a reconsideration.[32] Again, rejections are common.[33] The applicant can then request a hearing in front of an Administrative Law Judge (ALJ).[34] The ALJ reviews the material provided by the applicant as well as any medical reports requested by the agency and works through a multistep process.[35]

The ALJ must first determine whether the applicant is currently working.[36] If the applicant is engaged in "substantial gainful activity"[37] then no further consideration is required and the applicant is not considered disabled for purposes of social security disability payments.[38]

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30. *Disability Benefits*, SOC. SEC. ADMIN. 4–5 (Aug. 2022), https://www.ssa.gov/pubs/EN-05-10029.pdf [https://perma.cc/J3LV-DPLM] (detailing the suggested materials to be included).

31. *Annual Statistical Report on the Social Security Disability Insurance Program, 2020*, SOC. SEC. ADMIN. 164 tbl.61 (Nov. 2021), https://www.ssa.gov/policy/docs/statcomps/di_asr/2020/di_asr20.pdf [https://perma.cc/SJP8-XXFM] (showing that in 2019 (the most recent date) nearly two-thirds (63.1%) of applicants were denied at the initial decision stage).

32. *Your Right to Question the Decision Made on Your Claim*, SOC. SEC. ADMIN. 1 (May 2022), https://www.ssa.gov/pubs/EN-05-10058.pdf [https://perma.cc/PS5P-8N7U].

33. *Annual Statistical Report on the Social Security Disability Insurance Program*, *supra* note 31, at 168 tbl.62 (showing that in 2019 only 12.9% of applicants were awarded disability upon reconsideration).

34. *Your Right to Question the Decision Made on Your Claim*, *supra* note 32, at 2.

35. 20 C.F.R. § 404.1520(a)(4) (2023). The process is also explained in a more client friendly manner in *Disability Benefits*, *supra* note 30, at 68.

36. *Disability Benefits*, *supra* note 30, at 6.

37. 20 C.F.R. § 404.1520(a)(4)(i).

38. This determination does not impact (and is not impacted by) other related disability determinations. *E.g.*, Matthew L. v. Comm'r of Soc. Sec., No. C18-5697, 2019 WL 2183611, at *3 (W.D. Wash. May 21, 2019). In *Matthew*, the court said:

> The ALJ noted the VA had rated Plaintiff as 100% disabled due to service-connected impairments. The ALJ discounted this disability rating because the VA uses different standards for rating claimants and addresses whether claimants can perform military work, which is not relevant to determining whether claimants are disabled under the Social Security Act. An ALJ must ordinarily give "great weight" to a VA determination of disability. However, a VA rating is not conclusive.

It is only if the applicant is not working that any consideration will be given to the particular disability claimed by the applicant. The disability must be expected to result in death or to last at least a year,[39] and it must be severe. A severe impairment "significantly limits [the person's] physical or mental ability to do basic work activities."[40]

The third step of the analysis then goes deeper into the exact disability to determine whether it is severe enough that the applicant can automatically qualify as disabled without having to do a more specific analysis of individual abilities of the applicant.[41]

If the applicant does not automatically qualify under the analysis in step three, the fourth step looks at what they are still able to do despite the disability, and specifically whether they are still able to do a former job.[42]

Finally, if the applicant cannot do a former job, in step five their "residual functional capacity and . . . age, education, and work experience" are taken into account to determine whether there are other jobs in the national economy that the applicant would be able to do.[43]

For applicants who did not qualify at step three, it is only once a determination has been made that the applicant cannot do their former jobs and cannot do any other job that they are considered disabled.

This analysis involves a number of factual determinations, particularly because much of it involves the specifics of the disability the applicant is dealing with. The ALJ must determine in many cases exactly what the disability prevents the applicant from doing, and therefore conversely exactly what the applicant is still able to do. This residual functional capacity determination affects both whether the applicant can do their prior jobs as well as other jobs.

In *Pupo v. Commissioner, Social Security Administration*,[44] the ALJ determined that Pupo, the applicant, suffered from diabetes, obesity, and depression.[45] The ALJ did not mention incontinence among Pupo's ailments, but did say that all relevant evidence had been considered.

However, the ALJ stated:

Id. (citations omitted) (quoting McCartey v. Massanari, 298 F.3d 1072, 1076 (9th Cir. 2002)); *see also* Benaderet v. Comm'r of the Soc. Sec. Admin., No. 19-cv-1141-pp, 2021 WL 3913606, at *14 (E.D. Wis. Sept. 1, 2021) ("The plaintiff and his family are not the first ones to be stymied by the Social Security standards. This court has decided appeals in which plaintiffs have received Worker's Compensation, or a disability pension from the military or their former employer, yet did not qualify as disabled for the purposes of Social Security benefits.").

39. 20 C.F.R. § 404.1520(a)(4)(ii) (referencing 20 C.F.R. § 404.1509 (2023)).

40. *Id.* § (c).

41. *Id.* §§ (a)(4)(iii), (d).

42. *Id.* § (a)(4)(iv).

43. *Id.* § (a)(4)(v).

44. 17 F.4th 1054 (11th Cir. 2021).

45. *Id.* at 1058.

> [T]he record show[ed] that Pupo saw numerous gynecologists and a urologist about her incontinence and uterine prolapse [which contributed to the incontinence]; she complained about incontinence to multiple providers, noting that she had to wear five pads a day; she was referred to have surgery in 2014 but was unable to receive medical clearance; she complained of incontinence when coughing or lifting weight; she had a positive cough test; and treatment through medication had failed.[46]

The ALJ eventually concluded that Pupo could perform medium work.[47] Medium work includes work that involves frequently lifting twenty-five pounds and occasionally lifting fifty pounds.[48]

No mention had been made about whether her incontinence would affect her ability to lift twenty-five to fifty pounds.[49] This was true both with the ALJ and on appeal to the Social Security Appeals Council, to which she had submitted additional material showing that she had undergone surgery in an attempt to address the prolapse, thus further demonstrating the severity of the condition the ALJ had discounted.[50]

The Eleventh Circuit sent the case back to the agency, finding "that substantial evidence does not support the Commissioner's decision because the ALJ did not consider Pupo's incontinence when determining her [residual functional capacity]. Further, the Appeals Council erred in not considering the new evidence submitted by Pupo."[51] The court was careful to note that it was not saying she would definitely be able to establish an inability to lift the required amount, merely that the evidence in the record did not support the ALJ's determination that she could lift that amount.[52]

Remand to the agency like this is common in cases where the agency decision fails substantial evidence review. The reviewing court generally does not determine the outcome but instead remands the case for further consideration.

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46. *Id.* at 1065.

47. *Id.* at 1060.

48. *Id.* (citing 20 C.F.R. § 416.967(d) (2023)).

49. *Id.* at 1059–60 ("Notably, the ALJ did not identify Pupo's stress urinary incontinence as one of her severe impairments at Step Two and did not address the effect of her stress urinary incontinence on her physical abilities at Step Four.").

50. *Id.* at 1063.

51. *Id.* at 1066.

52. *Id.*

b. Facts in Immigration

Noncitizens are removable when they have entered the country without inspection.[53] However, those who can qualify as refugees[54] can petition for a withholding of removal—that is, permission to remain in the United States. This entails two separate but closely related analyses—first to determine whether the individual qualifies as a refugee and then second, assuming they qualify, to determine whether they are entitled to a withholding of removal.[55]

To qualify as a refugee (as relevant to the case here):

> [A]n alien must demonstrate that . . . he is unable or unwilling to return to, and unable or unwilling to avail himself of the protection of, his home country because of past persecution or a well founded fear of future persecution on account of . . . political opinion. Persecution on account of "resistance to a coercive population control program" is statutorily deemed to be "persecut[ion] on account of political opinion." Meanwhile, a well founded fear of future persecution requires a subjective fear that is objectively reasonable.[56]

In *Huo Qiang Chen v. Holder*,[57] both sides agreed that in 1996, at a time when Chen had been earning around 1000 Renminbi (rmb) as a farmer, he had been fined 13,000 rmb and his wife was sterilized after they violated China's strict family planning policy by having three children.[58] Despite selling his belongings and borrowing money from a family member, Chen was only able to pay 5000 rmb.[59] Then, "in September 1996,

53. Among other reasons. 8 U.S.C. § 1227(B) (2018). While the act of being present in the United States without having legally entered is a civil offense, the act of entering the United States without inspection is a criminal offense. *Primer on U.S. Immigration Policy*, CONG. RSCH. SERV. 17 (July 1, 2021), https://sgp.fas.org/crs/homesec/R45020.pdf [https://perma.cc/J6ZP-XUET]; 8 U.S.C. § 1325 (2018) ("Any alien who . . . eludes examination or inspection by immigration officers . . . shall, for the first commission of any such offense, be fined under Title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under Title 18, or imprisoned not more than 2 years, or both.").

54. 8 U.S.C. § 1101(a)(42) (2018).

55. 8 U.S.C. § 1231(b)(3) (2018).

56. Huo Qiang Chen v. Holder, 773 F.3d 396, 404 (2d Cir. 2014) (fourth alteration in original) (citations omitted) (quoting 8 U.S.C. § 1101(a)(42)). An immigrant who is able to demonstrate that they qualify for withholding of removal is entitled to mandatory relief (it is not a question of discretion with the agency) but to do so they must show that the harm in question "is more likely than not." *Id.* (quoting Vanegas–Ramirez v. Holder, 768 F.3d 226, 237 (2d Cir. 2014)).

57. *Id.* at 396.

58. *Id.* at 400–01.

59. *Id.* at 401.

government officials gave him ten days to pay the 8,000 rmb outstanding on the fine as well as an additional 10,000 rmb penalty. Thus, in 1996, Chen was fined a total of 23,000 rmb, with 18,000 rmb still owed."[60]

Chen then fled to a neighboring village, earning some money that was sent home to his family before fleeing the country.[61] After he left, his wife continued to farm the land until their family lease to the farm was terminated for failing to pay the fine.[62]

Because the previous unpaid fine could not be considered prior persecution,[63] the question was whether he would be forced to pay the money if sent back to China.[64] Economic sanctions can result in persecution if they deprive someone of the necessities of life, but that would depend on how, if at all, a loan was to be paid back.[65] What will happen to someone if they are forced to return to a country is a question of fact.[66] The agency[67] determined:

> [T]hat despite an outstanding 18,000 rmb fine and the loss of his farming leasehold, Chen did not have a well founded fear of future economic persecution upon return to China because (a) he had not claimed that Chinese officials made any attempt to collect the fine after 2003; and (b) even if payment were demanded, Chen could (1) make arrangements for installment payments, (2) borrow money from friends and relatives, (3) earn money working in a neighboring village, as he had before fleeing China, and (4) use his savings of $1,716.75.[68]

Based on these facts, the agency determined that Chen would not face future persecution if he returned to China.[69] In order to review the legal conclusion, the Second Circuit first had to review the individual facts under the deferential substantial evidence standard, and the court did not find support for the facts in the record.

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60. *Id.*

61. *Id.*

62. *Id.*

63. The thinking here is that a large fine might never be expected to be paid, and therefore never cause any problems for the individual. *Id.* at 406. "A severe fine may, after all, go unpaid." *Id.*

64. *Id.* at 408.

65. *Id.* at 405–06.

66. Although, at least in this court, whether those facts amount to future persecution is a question of law. *Id.* at 403. This follows how the Article argues it should be done, as discussed in Section III.C.2.

67. Since the Board of Immigration Appeals (BIA) had very closely followed the Immigration Judge (IJ), the court reviewed both decisions together. This summary therefore refers to these opinions as coming from the agency. *Id.*

68. *Id.* at 408.

69. *Id.*

The court said the agency was wrong to determine that the government had not made any effort to collect the money after 2003 since Chen had testified that officials had come to his house to collect after that point.[70]

Second, the agency had been wrong to determine that he would be able to arrange a payment plan.[71] This error appeared to stem from an incorrect date: the officials had come to demand the rest of the fine in 1996, not 1998 as the agency had stated (the agency had reasoned that if the government was willing to wait years to collect the fine, it might well be open to a payment plan).[72] To the contrary, the government had demanded the entire amount from the beginning.[73] When Chen paid everything he could get together, the government not only demanded that he pay the remaining amount immediately but added a substantial fine for failing to pay it.[74]

Finally, the court said the government erred in concluding that he could borrow the remaining money from friends and family.[75] This determination was based on the fact that he was able to borrow $50,000 to travel to the United States, but the court noted that a prior case made clear that people were often far more willing to lend money to pay for travel to the United States when they were confident that they would be paid back[76] (as Chen had done here with the $50,000),[77] than they would be to pay an in-country fine that would be very difficult to repay (and no effort had been made to distinguish the case at all).[78]

Chen did not dispute the remaining two parts of the agency's analysis, but those were not enough for the court to legally conclude he would not face persecution given the sums involved.[79]

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70. *Id.* (noting that the alien's credibility was not at issue).
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 408–09.
76. *Id.*
77. *Id.* at 408.
78. *Id.* at 409.
79. *Id.* The court said:

> [Even if Chen used his entire] savings of $1,716.75 (10,565 rmb) and another 2,000 rmb borrowed from his sister to pay the outstanding 18,000 rmb fine, he would still fall 5,435 rmb short of the full amount due. Whatever employment Chen might be able to find in China, there is no evidence to support a conclusion that a man who never earned more than 1,500 rmb per year in that country and who no longer had a farming leasehold could quickly earn more than three times that amount so as to pay the more than 5,000 rmb due after depleting his savings and borrowing from his sister, much less that he could do so without becoming impoverished or deprived of the necessities of life—*i.e.*, without suffering economic persecution.

Id.

As in *Pupo*, since the factual findings did not survive substantial evidence review, *Chen* was remanded to the agency to engage in further fact-finding.[80]

These examples walked through the way substantial evidence review is performed but did not discuss at what stage of the case this review takes place. That has also generated confusion, as the next section explains.

3. *Categorizing the Substantial Evidence Review Itself*

In addition to the confusing fact/law dichotomy already discussed, additional confusion has arisen about what exactly courts are doing when reviewing questions of fact. The determination made by a court on appeal about whether a lower court or administrative decision is supported by substantial evidence is a question of law.[81] This is logical because if the determination were to be reviewed by a higher court—going from a court of appeals to the Supreme Court for instance—there would be no reason to expect the Supreme Court to defer at all to the decision made by the court of appeals.[82]

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80. *Id.* at 410. On remand the court clarified:

> We neither require nor foreclose the agency on remand from expanding the record on factual matters relevant to the feared future persecution claim, such as whether an 18,000 rmb fine against Chen remains outstanding in China; whether Chinese authorities have a continuing interest in collecting such a fine; and whether Chen has the ability to pay the full fine amount demanded (whether from savings, loans, or earnings) without becoming impoverished or deprived of life's necessities . . . .

Id.

81. United Space All., LLC v. Solis, 824 F. Supp. 2d 68, 78 (D.D.C. 2011) ("When an agency's findings are at issue, the question of law is 'whether [the agency] acted in an arbitrary and capricious manner.' This analysis is conducted under the substantial evidence standard, which requires that a court 'determine only whether the agency could fairly and reasonably find the facts as it did.'" (alteration in original) (first quoting Univ. Med. Ctr. v. Shalala, 173 F.3d 438, 440 n.3 (D.C. Cir. 1999); then quoting Robinson v. Nat'l Transp. Safety Bd., 28 F.3d 210, 215 (D.C. Cir. 1994))); *see also* Himes v. Comm'r of Soc. Sec., 585 F. App'x 758, 761 n.1 (11th Cir. 2014) ("[T]he substantial evidence inquiry, though a factual review of a sort, is a question of law for the court which can be made upon a review of the administrative record." (alteration in original) (quoting Holley v. Seminole Cnty. Sch. Dist., 755 F.2d 1492, 1499 n.5 (11th Cir. 1985))).

82. This same issue is raised when a district court reviews the initial determination before it is appealed to a court of appeals, since the district court also acts to review the agency material. An argument has been made that the substantial evidence analysis done by the district court should be considered a question of fact entitled to deference on review, but this has so far not been widely adopted. Morton Denlow, *Substantial Evidence Review in Social Security Cases as an Issue of Fact*, 2 FED. CTS. L. REV. 99, 117–19 (2007) (describing how the Tenth Circuit alone appeared to rely somewhat on the extensive review of the administrative record performed by the trial court when making its own determinations).

But merely considering this a question of law equivalent to regular statutory interpretation overlooks a major issue. Substantial evidence review can only be accomplished by reviewing the evidence in the record to determine whether there is in fact substantial evidence supporting the determination at issue.

This is a functionally different action than simply reading and analyzing the relevant law to determine the appropriate meaning—the traditional task for a question of law. As such, courts are in error when they review the administrative record at the motion to dismiss stage.[83]

A question of law issue can potentially be determined at the motion to dismiss stage. If the question is whether the complaint makes a legal claim, a determination that it does not can properly end the case.[84] This

83. An example of such error is Rempfer v. Sharfstein, 583 F.3d 860, 865 (D.C. Cir. 2009). *Rempfer* said:

> We will consider both arguments, but first pause to correct the plaintiffs' misperception regarding the nature of the district court's review, and of ours, under the APA. The plaintiffs repeatedly insist that the district court was obliged to deny the government's motion to dismiss because they had raised genuine issues of material fact and hence were entitled to discovery to flesh out their claims. But "when a party seeks review of agency action under the APA [before a district court], the district judge sits as an appellate tribunal." "The entire case on review is a question of law," and the "complaint, properly read, actually presents no factual allegations, but rather only arguments about the legal conclusion to be drawn about the agency action." Consequently . . . there is "no inherent barrier to reaching the merits" at the motion to dismiss stage. Our review, like that of the district court, is based on the agency record and limited to determining whether the agency acted arbitrarily or capriciously.

Id. (first alteration in original) (first quoting Am. Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1083 (D.C. Cir. 2001); then quoting Marshall Cnty. Health Care Auth. v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993)). The danger with this way of thinking had already been pointed out decades earlier, in the dissent of one of the cases cited. In Marshall Cnty. Health Care Auth. v. Shalala, Chief Judge Mikva said in dissent:

> The majority holds today that on a motion to dismiss under Rule 12(b)(6), a district court may properly review the entire administrative record upon which a complaint is based without converting the motion to dismiss into a motion for summary judgment. The majority reasons that since courts are allowed to take "judicial notice" of facts on the public record when reviewing 12(b)(6) motions to dismiss, courts may also engage in a full review of the administrative record at the pleading stage. I am concerned that this decision will substantially blur an important functional distinction between motions to dismiss under Rule 12(b)(6) and the summary judgment procedure. Rule 12(b) specifically intended for the two procedures to remain separate, even in cases where the two procedures would achieve identical results. These two procedures serve important and different purposes in federal law, and we do mischief in justifying their conflation. Accordingly, I dissent.

Marshall Cnty. Health Care Auth., 988 F.2d at 1227 (Mikva, C.J., dissenting).

84. This was the case in Bread for the City, Inc. v. U.S. Dep't of Agric., 211 F. Supp. 3d 327, 331 (D.D.C. 2016), *aff'd sub nom.* Bread for the City v. U.S. Dep't of Agric., 872 F.3d 622 (D.C. Cir. 2017) ("However, Bread for the City's Complaint raises a purely legal question—whether the text of 7 U.S.C. § 2036(a)(2) required

is a determination that can be made merely by consulting sources of law and the pleadings.[85] The court need only look at what the plaintiff alleges and what the relevant law says about those allegations.

The same is not true for a claim about a lack of substantial evidence or something else where the administrative record must be consulted, such as that the agency acted in an arbitrary and capricious manner. To determine whether substantial evidence exists in an agency challenge, the court must look to the administrative record.[86] This requires that the court look beyond the pleadings, even if the sides agree about what constitutes the administrative record.[87]

This distinction matters. Considering something a judgment on the pleadings forecloses any possibility for the appealing party to add to the administrative record if required. Even if additions are not desired, the inherent notion of a substantial evidence review requires the reviewing court to make determinations about the appropriate weight to give to different components of the record, rather than simply accepting all facts as stated in the complaint. What happens when a court goes beyond the pleadings is specifically addressed in the Federal Rules of Civil Procedure, which states:

> If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.[88]

USDA to purchase more food than it did in fiscal year 2015." (footnote omitted)). The court specifically noted that this required it to look only to the statute and the legislative history, not to the administrative record which had not even been filed with the court. *Id.*

85. George v. Kay, 632 F.2d 1103, 1106 (4th Cir. 1980) ("[T]he district court should have granted the motion for summary judgment rather than the 12(b)(6) motion, which is proper only when the complaint on its face fails to state a claim for relief. If it is necessary for the court to look beyond the pleadings, the 12(b)(6) motion must be converted into a motion for summary judgment and all parties must be given the opportunity to present materials pertinent to such a motion.").

86. Loucks v. Kijakazi, No. 21-1749, 2022 WL 2189293, at *1 (2d Cir. June 17, 2022) ("We conduct a plenary review of the administrative record to determine if there is substantial evidence, considering the record as a whole, to support the Commissioner's decision and if the correct legal standards have been applied." (quoting Estrella v. Berryhill, 925 F.3d 90, 95 (2d Cir. 2019))).

87. This is so since the record is not part of the pleadings. Filing of the administrative record is specifically addressed in the local rules for the District Court of the District of Columbia. D.C. Civ. R. 7(n)(1) ("In cases involving the judicial review of administrative agency actions . . . the agency must file a certified list of the contents of the administrative record with the Court within 30 days following service of the answer to the complaint or simultaneously with the filing of a dispositive motion, whichever occurs first.").

88. FED. R. CIV. P. 12(d).

True questions of law are addressed in the following section.

B. *Reviewing Questions of Law in Administrative Adjudications*

As in Section II.A, this section begins by reviewing the standard of review for questions of law—de novo review. It then provides examples of de novo review in action in two cases involving administrative law. Finally, it addresses the twist on de novo review for agency cases, the *Chevron* doctrine, which allows limited deference to the agency's legal interpretation in certain circumstances.[89]

1. *Questions of Law Are Generally Reviewed De Novo*

Appellate courts traditionally grant no deference to lower courts when reviewing questions of law on appeal. The same idea of de novo deference applies to review of legal questions in agency action as well.

De novo literally translates as "from the beginning" or "anew."[90] A de novo review allows the reviewing court to reconsider all relevant factors without any regard for the result reached on that issue by prior decisionmakers.

2. *Sample Cases Involving Review of Questions of Law*

As in the section on review of facts, this section briefly demonstrates court review of questions of law in a social security case and an immigration case.

a. Law in Social Security

Social security cases are generally very fact specific. True questions of law are therefore rare in such cases, but they do exist.

For instance, the law that applied in *Hargett v. Commissioner of Social Security*[91] required that an opinion of a treating source (such as a doctor) "must be given controlling weight if it 'is well-supported by medically acceptable clinical and laboratory diagnostic techniques' and 'is not inconsistent with the other substantial evidence' in the record."[92]

The claimant, David Hargett, had a statement saying that he "display[ed] capacity ranges in the sedentary and some light capacities with limited to no ability for medium and heavy capacities."[93] The statement

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

90. Firestone v. Time, Inc., 460 F.2d 712, 718 n.11 (5th Cir. 1972).

91. 964 F.3d 546 (6th Cir. 2020).

92. *Id.* at 552 (quoting 20 C.F.R. § 404.1527(c)(2) (2023)).

93. *Id.* at 549 (alteration in original).

was from a medical facility Hargett had been referred to by his treating physician.[94] The treating physician had also signed the report.[95] There was no dispute about the underlying facts, merely the meaning of them.

The ALJ had concluded that Hargett had the capacity for medium work, directly contradicting the statement signed by Hargett's physician.[96] The ALJ had discounted the statement because it "was not based on a treating relationship."[97]

If the statement by Hargett's physician was considered a statement from a treating source, it would have controlling weight. There was a question, however, about whether a treating doctor simply signing a document written by other medical personnel at an unrelated location could be considered as coming from a treating source.[98] This was a question of law.[99] Both sides agreed that the doctor whose signature was at issue was a treating provider and that he had signed the document in question; it was merely the legal effect of this signature that was in dispute.

The Sixth Circuit declined to adopt the rule favored by the agency: the signature of a treating physician could only transform a document produced by someone else into a statement from a treating source if the individual who actually created the document and the physician were part of the same "team or practice."[100] Instead, the court reasoned that since the signature meant the physician had reviewed and agreed with the information on the form, individual facts would need to be considered to determine whether the document should be considered from a treating source.[101]

In this case, the physician had specifically referred Hargett to the physical therapist who completed the form.[102] Particularly given this connection, it made sense to treat the resulting report that the physician signed as a statement from a treating source.[103]

Having reached the legal conclusion that the statement was from a treating source, the court could then evaluate whether there was substantial evidence for the determination reached by the ALJ.[104]

Since the ALJ had not handled the treating source document correctly, the case was remanded for the ALJ to properly consider the supplied evidence.[105]

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94. *Id.*
95. *Id.*
96. *Id.* at 550.
97. *Id.*
98. *Id.* at 551.
99. *Id.*
100. *Id.* at 553.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 553–54. Substantial evidence is discussed further in Section II.A.2.
105. *Id.* at 555.

b. Law in Immigration

A noncitizen can be deported if they have been convicted of "an aggravated felony at any time after admission."[106] Courts determine whether a particular crime of conviction counts as an aggravated felony by using the categorical approach.[107] The categorical approach looks entirely at the statutory terms and does not take into account the specific facts of the conviction at issue.[108] It is therefore a question of law.[109]

Under the categorical approach, the court compares the language of the statute the individual was convicted of to the generic definition of the offense.[110] To count as an aggravated felony, the particular statute the individual was convicted under must "substantially correspond[ ] to" or be narrower than the generic definition.[111]

The generic crime at issue in the example case, *Mendoza-Garcia v. Garland*,[112] was burglary.[113] The Supreme Court defined the generic crime of burglary as the "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime."[114] Burglary is an aggravated felony when "the term of imprisonment [is] at least one year."[115]

First degree burglary under Oregon law occurs when an individual "enter[s] or remain[s] unlawfully in a building with intent to commit a crime therein" when "the building is a dwelling."[116]

These would appear to be a match, except that a prior Ninth Circuit opinion had followed the statutory trail from the term "dwelling" in the statute to the term "building." "[T]he definition of 'building' used in the statute includes nonpermanent and immobile structures, such as 'booths, vehicles, boats, or aircrafts' that were excluded from the generic definition of burglary . . . ."[117]

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106. 8 U.S.C. § 1227(a)(2)(A)(iii) (2018).

107. Mendoza-Garcia v. Garland, 36 F.4th 989, 994 (9th Cir. 2022).

108. In fact, in this case, the court was applying a modified categorical approach since it determined that the statute was divisible—it was able to break out distinct crimes within it. *Id.* at 995. The court separately reviewed the conviction to determine which of two possible crimes had been committed under the Oregon statute and determined that it was the entering of a dwelling. *Id.* This alone did not change the analysis about whether the generic Oregon crime of entering a dwelling could include certain types of non-dwellings as well. *Id.*

109. *Id.* at 993.

110. *Id.* at 994.

111. *Id.*

112. *Id.* at 989.

113. *Id.* at 994.

114. *Id.* (quoting Taylor v. United States, 495 U.S. 575, 599 (1990)).

115. 8 U.S.C. § 1101(a)(43)(G) (2018) (footnote omitted).

116. *Mendoza-Garcia*, 36 F.4th at 994 (quoting OR. REV. STAT. § 164.225(1) (2022)). The statute continues, but the court determined that the other components form a separate offense that is not relevant to this determination.

117. *Id.* (quoting United States v. Cisneros, 826 F.3d 1190, 1194 (9th Cir. 2016)).

However, since that Ninth Circuit opinion, the Supreme Court "held that the inclusion of nonpermanent structures 'designed or adapted for overnight use' does not expand a statute beyond the definition of generic burglary."[118]

There was thus a question about whether the prior Ninth Circuit decision was still good law. The court found that the prior determination had effectively been overruled by the Supreme Court, meaning that dwelling as defined in the Oregon statute still fell within the generic offense.[119] After running through each element of the Oregon statute and comparing it with the generic offense, the court determined that first degree burglary, as defined under Oregon law, was a categorical match to the generic statute.[120]

Because this analysis was conducted de novo, it was done without regard to determinations made by the Board of Immigration Appeals (BIA) or the ALJ. The court determined on its own that the crime was a match and so Mendoza-Garcia was subject to removal.[121] But straight de novo review like this is not used in all cases reviewing legal questions. Some cases also incorporate *Chevron* review, discussed in the following section.

3. Chevron *Adds a Twist to De Novo Review*

Some questions of law require more from the reviewing court than straight de novo review. That is because certain legal interpretations made by the agency can qualify for a different analysis that potentially factors in the agency's interpretation of the statute.

Deference to the agency interpretation is only ever available if the statute the agency is interpreting is ambiguous—i.e., if the court is unable to immediately discern the meaning. If the statute is unambiguous, the meaning is clear and no deference is due. If the statute is ambiguous, two types of deference potentially apply.

The stronger deference is *Chevron* deference. This is available only if the agency interpretation was produced in a manner that is sufficiently formal and legally binding.

If *Chevron* deference is not applicable, the court can instead apply *Skidmore* deference.[122] This is an even weaker form of deference than *Chevron*.

This section begins by covering the mechanics of *Chevron* deference. It then addresses the current precarious legal nature of *Chevron* before discussing *Skidmore*—*Chevron*'s weaker cousin.

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118. *Id.* (quoting United States v. Stitt, 139 S. Ct. 399, 407 (2018)).

119. *Id.* at 995.

120. *Id.* at 997. The court also separately determined that Mendoza-Garcia was convicted of an aggravated felony. *Id.* at 998.

121. *Id.*

122. 323 U.S. 134 (1944).

a. An Introduction to the Traditional *Chevron* Doctrine

Chevron deference, as important as it is to the review of agency rulemaking, is generally not at issue in adjudications. Instead, most legal questions in adjudications are reviewed de novo.[123]

Chevron deference is available to very few adjudications. In order to even potentially qualify for *Chevron* deference, the agency statement on the law should be legally binding and have been made by the highest level of the agency when it is clear that this is intended to be the official position of the agency.[124] Both the National Labor Relations Board (NLRB) and the BIA routinely make future binding law through agency adjudications. But this does not mean that every labor or immigration case results in binding law; for immigration cases in particular, it is only a small fraction. Instead, it is only decisions made by the highest level in the agency that are intended to bind the agency to which *Chevron* deference is potentially due.[125]

In rulemakings, the increasingly prevalent major questions doctrine can pose a stumbling block to *Chevron* review in cases that would otherwise allow it. The major questions doctrine allows courts to consider if the issue is so important that it is difficult to believe Congress would have intended to delegate that choice to the agency.[126] This is far less likely to apply in the types of decisions addressed in adjudications, for these legally binding high-level interpretations, the court can commence the true *Chevron* analysis detailed in the following section.

i. *The Steps of* Chevron

Assuming that the statute in question has qualified as potentially deserving *Chevron* deference—meaning the court has determined that this is something Congress was potentially willing to allow the agency to decide, and the decision was from a sufficiently high level in the agency that it can fairly be said to be the agency's considered determination on the matter,[127]—the court will proceed to step one of the *Chevron* analysis.

123. De novo review is discussed in Section II.B.1.

124. In review of rulemaking, the question is often more abstracted. Gulfcoast Med. Supply, Inc. v. Sec'y, U.S. Dep't of Health & Hum. Servs., No. 04-CV-2610-T-26, 2005 WL 3934860, at *5 (M.D. Fla. Nov. 16, 2005), *aff'd sub nom.* Gulfcoast Med. Supply, Inc. v. Sec'y, Dep't of Health & Hum. Servs., 468 F.3d 1347 (11th Cir. 2006) ("For an agency's interpretation to qualify for *Chevron* deference, Congress must have delegated it authority to make interpretations carrying the force of law.").

125. Dhuka v. Holder, 716 F.3d 149, 156 (5th Cir. 2013) ("[T]hree-member decisions not designated as precedent have no more force under this regulation than single-member decisions. We conclude that a non-precedential opinion of the BIA does not, due to the terms of the regulation itself, bind third parties and is not entitled to *Chevron* deference.").

126. This is discussed further in Section II.B.3.b.

127. The interpretation should be intended by the agency as the final word—meaning from a high level and intended to be the official statement of the agency.

In step one, the court determines whether the relevant language in the statute is ambiguous.[128] This determination is to be made using all available tools of statutory construction.[129] This is why *Chevron* deference really is a form of de novo review.[130] A court is supposed to use all the tools it would use in any other instance to make a determination about the meaning of the statute.[131] If the court finds that the statute is unambiguous, the analysis stops and that plain meaning controls.[132] A *Chevron* analysis that ends at step one is functionally indistinguishable from any other de novo legal interpretation (save for the mention of *Chevron*).[133]

It is only when the court has been unable to determine at step one what the meaning of the statute is that anything even resembling deference to the agency interpretation is available.

BIA selects certain opinions to be published, binding opinions from a three-judge panel. These are the BIA interpretations entitled to deference. Single judge opinions do not qualify for the same level of deference.

128. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

129. This has been true since *Chevron* itself. *Id.* at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

130. *See, e.g.*, Amezcua-Preciado v. U.S. Att'y Gen., 943 F.3d 1337, 1341 (11th Cir. 2019) ("We review *de novo* whether a group proffered by an asylum applicant constitutes a particular social group under the INA. However, our *de novo* review is informed by *Chevron* deference . . . ." (citation omitted)); S.E.R.L. v. Att'y Gen., 894 F.3d 535, 542 (3d Cir. 2018) ("Whether a petitioner's 'proffered particular social group is cognizable under [8 U.S.C. § 1101(a)(42)(A)] is a question of law . . . subject to de novo review,' which, we have said, is 'subject to established principles of [*Chevron*] deference[.]'" (alterations in original) (quoting Gomez-Zuluaga v. Att'y Gen., 527 F.3d 330, 339 (3d Cir. 2008))). But not all courts explicitly view *Chevron* as a form of de novo review. *See, e.g.*, Ottey v. Barr, 965 F.3d 84, 94 (2d Cir. 2020) ("'We afford *Chevron* deference to the BIA's interpretation of th[at] undefined statutory term,' and we conduct *de novo* review of the BIA's determination that a particular state crime is one involving moral turpitude, as that term is thus interpreted." (alteration in original) (quoting Mendez v. Mukasey, 547 F.3d 345, 346 (2d Cir. 2008))).

131. That is not to say that a court is forced to come to a decision, as it would be in a case where the statute was ambiguous. Different courts also stop at different levels of ambiguity. For a long time, courts were very quick to find a statute ambiguous. While that is changing, it has always been that in cases where the court found the intent of Congress clear, it stopped at step one.

132. Delancy v. Crabtree, 131 F.3d 780, 785 (9th Cir. 1997) ("Since the statute is unambiguous, we need not consider whether the Bureau's interpretation constitutes a permissible construction of the statute under *Chevron*.").

133. This can be seen in Roberts v. Sea-Land Servs., Inc., 566 U.S. 93, 113 (2012). The Court held that the statute was unambiguous, mentioning *Chevron* only in a footnote at the end of the opinion to say that since the statute was unambiguous "we do not reach respondents' argument that the Director's interpretation of § 906(c) is entitled to deference under *Chevron*." *Id.* at 113 n.12. This mention does matter though, as discussed further in Section II.B.3.b.

At step two, the court determines whether the agency interpretation is a reasonable interpretation of the statute.[134] In other words, the court looks at potential ways the ambiguous language could be interpreted and asks whether the agency interpretation itself falls within this zone of reasonableness.[135] If so, regardless of whether the court thinks the agency chose the best interpretation, the agency interpretation is upheld.[136] *Chevron* deference is therefore significantly reduced from substantial evidence review. In substantial evidence review, the court from the beginning looks at whether any reasonable person could have come to that determination.[137] It is essentially looking for any valid reason to uphold the agency action.[138] In *Chevron* review, in contrast, the court initially determines what it thinks the statute means, with no consideration for the agency. It is only when the court cannot make this initial determination that it looks to whether the agency interpretation is an acceptable reading.

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134. *Chevron*, 467 U.S. at 843 ("If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if 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." (footnote omitted)).

135. *E.g.*, S. Coast Air Quality Mgmt. Dist. v. EPA, 472 F.3d 882, 895 (D.C. Cir. 2006), *decision clarified on denial of reh'g*, 489 F.3d 1245 (D.C. Cir. 2007) (holding at step two that it was unreasonable for the EPA to maximize its discretion when drafting a rule).

136. Courts can, and do, also look at step two for whether the determination can be considered arbitrary and capricious, even if it might otherwise be within the letter of the law. Amaya v. Rosen, 986 F.3d 424, 432 (4th Cir. 2021), *as amended* (Apr. 12, 2021):

> But under the antecedent requirement set forth in *Chevron*, which the Supreme Court . . . has consistently reiterated, an agency decision, even if not manifestly contrary to the statute, is still unreasonable if it is "arbitrary or capricious in substance." That is what we have here. For the reasons set forth below, the BIA's interpretation was unreasonable.

Id. (citations omitted) (quoting United States v. Mead Corp., 533 U.S. 218, 227 (2001)).

137. Samons v. Nat'l Mines Corp., 25 F.4th 455, 467 (6th Cir. 2022) ("A judge's factual finding is rooted in substantial evidence so long as a reasonable person might consider the evidence adequate to accept the fact.").

138. Salmini v. Comm'r of Soc. Sec., 371 F. App'x 109, 112 (2d Cir. 2010). *Salmini* is a typical example of how lenient courts can get:

> Although we have cautioned that an ALJ "should set forth a sufficient rationale in support of his decision to find or not to find a listed impairment," the absence of an express rationale for an ALJ's conclusions does not prevent us from upholding them so long as we are "able to look to other portions of the ALJ's decision and to clearly credible evidence in finding that his determination was supported by substantial evidence."

Id. (quoting Berry v. Schweiker, 675 F.2d 464, 469 (2d Cir. 1982)).

The agency can still lose at step two if its interpretation is not reasonable.[139] While most agency action is upheld if the analysis gets to step two, this is far from universal.[140] Step two is not a rubber stamp.

ii. Chevron *in Action*

One recent immigration case involving *Chevron* was *Route v. Garland*.[141] Jim Route, a citizen of Micronesia, had legally entered the United States in 2005 as a nonimmigrant as part of a special program with Micronesia.[142] While he was able to freely live and work in the United States, he was not considered a lawful permanent resident.[143] He returned to Micronesia for two months in 2015 before legally reentering the United States.[144] In 2018, he was convicted of unlawful imprisonment in the first degree under Hawaii law.[145] Immigrants can be removed if they have been "convicted of a crime involving moral turpitude committed within five years . . . after the date of admission."[146]

Route was ordered removed by an Immigration Judge.[147] This ruling was affirmed in an unpublished BIA opinion.[148] In this unpublished opinion, the BIA relied directly on a prior published opinion, *Matter of Alyazji*.[149] Since only published opinions like *Alyazji* are entitled to *Chevron* deference, the court reviewed *Alyazji* rather than *Route* using *Chevron*.[150]

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139. Sierra Club v. EPA, 21 F.4th 815, 826 (D.C. Cir. 2021) ("Given that the implementation-based approach is '[un]reasonable in light of the Act's text, legislative history, and purpose,' we cannot defer to it." (alteration in original) (quoting S. Cal. Edison Co. v. FERC, 116 F.3d 507, 511 (D.C. Cir. 1997))).

140. Richard M. Re, *Should Chevron Have Two Steps?*, 89 IND. L.J. 605, 640 (2014) (describing cases decided against the agency under both step one and step two as well as various permutations of *Chevron* in practice).

141. 996 F.3d 968 (9th Cir. 2021).

142. *Id.* at 972. The program meant that he did not need to go through the normal visa requirements.

143. *Id.*

144. *Id.*

145. *Id.* (citing HAW. REV. STAT. § 707-721(1) (2022)).

146. *Id.* at 973 (alteration in original) (quoting 8 U.S.C. § 1227(a)(2)(A)(i)(I) (2018)).

147. *Id.*

148. *Id.*

149. 25 I&N Dec. 397, 398 (BIA 2011).

150. *Route*, 996 F.3d at 975 ("Where the BIA has interpreted a term in the INA in a precedential decision, 'we apply *Chevron* deference regardless of whether the order under review is the precedential decision itself or a subsequent unpublished order that relies upon it.'" (quoting Marmolejo-Campos v. Holder, 558 F.3d 903, 911 (9th Cir. 2009))). In addition to noting that this was an area in which the BIA had traditionally been allowed to make binding law, the court also had to grapple with the fact that the law at issue was pronounced as dicta in *Alyazji*. However, the court did not feel that was problematic; regardless of whether it was dicta, it still indicated a well thought out and reasoned approach to the issue, and it was beneficial for the agency to give broader guidance to the community through similar methods. *Id.*

In *Alyazji*, the BIA determined that the statutory language was ambiguous.[151] The BIA then said:

> Given that [the statute] is focused on admission plus presence, we find that the most natural reading of [this section] is that the phrase "the date of admission" refers to the date of the admission by virtue of which the alien was present in the United States when he committed his crime.[152]

Reviewing *Alyazji* using *Chevron* in step one, the court noted that "we must 'exhaust all the traditional tools of construction' before we 'wave the ambiguity flag.'"[153] However, the court then determined that there was no further guidance in the statute as to which date was "the date of admission."[154]

It then proceeded to step two of *Chevron*.[155] In this section, the court noted that the BIA had also carefully analyzed the statute.[156]

For example, the BIA considered the basic purpose of 8 U.S.C. § 1227(a), which is to remove individuals who are "in and admitted to the United States."[157] "An individual is 'in and admitted to the United States' when he or she is 'present in the United States pursuant to an admission.'"[158] From this structure of § 1227(a), the BIA held that the provision "is focused on admission plus presence."[159] That conclusion is reasonable in light of Congress's decision to apply the removability grounds in § 1227(a) to those individuals who are "in and admitted to the United States."[160]

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151. *Alyazji*, 25 I&N Dec. at 405 ("The statutory language does not specify which of an alien's various admissions should be considered, and thus we find the statute to be ambiguous in that regard."). Note that while the BIA used the term "ambiguous" from *Chevron*, it did not cite *Chevron*. The *Chevron* analysis itself is performed by the court, not the agency, but the agency can make explicit to the court that it found the language potentially ambiguous and carefully determined the most appropriate reading.

152. *Id.* at 406. This updated a prior interpretation that courts had criticized, which determined that an "admission" could occur when the immigrant never left the country but changed status while in the country. *Id.*

153. *Route*, 996 F.3d at 978 (quoting Medina Tovar v. Zuchowski, 982 F.3d 631, 634 (9th Cir. 2020) (quoting Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019))).

154. *Id.* at 979.

155. *Id.*

156. *Id.* at 980.

157. *Id.* (quoting *Alyazji*, 25 I. & N. Dec. at 406).

158. *Id.* (emphasis omitted) (quoting *Alyazji*, 25 I. & N. Dec. at 406).

159. *Id.* (quoting *Alyazji*, 25 I. & N. Dec. at 406).

160. *Id.* (quoting *Alyazji*, 25 I. & N. Dec. at 406 (quoting 8 U.S.C. § 1227(a) (2018))).

The court also noted that there were reasons for the BIA to choose a bright line rule such as always looking to the last point of physical entry to the country rather than doing a fact specific analysis each time.[161] The court therefore concluded that the BIA's interpretation, as announced in *Alyazji*, was reasonable.[162]

Since the BIA in *Route* had relied on this reasonable interpretation, it was also upheld.[163] But the future status of *Chevron* remains in doubt, as the next section discusses.

b. Where *Chevron* Currently Stands

There has been concern for years that the Supreme Court will completely eliminate *Chevron*. In the meantime, *Chevron* is being chipped away at in other ways. Two cases potentially implicating *Chevron* were recently decided by the Supreme Court. Both *American Hospital Association v. Becerra*[164] and *Becerra v. Empire Health Foundation for Valley Hospital Medical Center*[165] conducted detailed statutory analyses to determine the correct meaning of terms in a statute when the agency had issued regulations interpreting that term—exactly when one would expect to see a *Chevron* discussion. However, in both cases, the Court instead directly interpreted the statutory term in question without a single mention of *Chevron*. In one sense, these were effectively *Chevron* step one determinations—the statute was considered unambiguous, so the clear intent of Congress controlled.[166] By failing to mention *Chevron*, however, the Court further weakened the doctrine, providing an alternative path where deference is never an option.[167]

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161. *Id.*

162. *Id.*

163. *Id.* at 982. Route also argued that it was unfair that he was being treated differently than he would have been as a lawful permanent resident, since lawful permanent residents are allowed to make brief trips out of the country without actually counting the reentry for immigration purposes. *Id.* at 980. The court did not consider this problematic, noting that "[w]hile the *Alyazji* interpretation subjects nonimmigrants to harsher immigration consequences than LPRs, we have previously noted 'Congress's well-established policy of affording aliens with legal permanent resident status more benefits than non-permanent residents under the INA.'" *Id.* at 980–81 (quoting Cuevas-Gaspar v. Gonzales, 430 F.3d 1013, 1028 (9th Cir. 2005), *abrogated on other grounds by* Holder v. Martinez Gutierrez, 566 U.S. 583 (2012)).

164. 142 S. Ct. 1896 (2022).

165. 142 S. Ct. 2354 (2022).

166. This is similar to Roberts v. Sea-Land Servs., Inc., 566 U.S. 93 (2012), discussed *supra*, note 133.

167. It also allows the Court to do what it did with the *Lemon* test, where the issue in question was not mentioned in multiple cases until the Court stated that it was obviously no longer good law. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022) ("[T]his Court long ago abandoned *Lemon* and its endorsement test offshoot.").

The *Becerra* cases offer one way to avoid a *Chevron* analysis—pretend it does not exist. The Supreme Court also provided another avoidance mechanism by further strengthening the major questions doctrine in *West Virginia v. Environmental Protection Agency*.[168] In this case, the Court's work was made even easier, since Trump era regulators had already repealed the prior rule at issue arguing that the agency did not have the authority to issue it under the major questions doctrine.[169] The major questions doctrine says that Congress would not have left such a large gap for agencies to fill on issues with major political or economic implications, so the agency should not be rulemaking at all on the issue.[170] Since this area is therefore not open to agency rulemaking, there is no need to proceed further to a *Chevron* analysis.[171]

The major questions doctrine is a powerful way to prevent agency action on an issue, but it is one that is going to be of comparatively little importance in adjudications since those generally deal with individuals rather than broad sweeping approaches to issues. That means the larger impact for adjudication will just be the potential increase in the number of courts opting to avoid *Chevron* altogether as in the *Becera* cases. But courts currently choosing to avoid *Chevron* would likely be the same courts that would choose to decide the issue at step one anyway, so the impact on the individual in the adjudication would be comparatively mild.

Chevron is therefore weakened, but still alive. It is important to remember in all the concern over whether *Chevron* still exists that *Chevron* deference, in the remaining cases where it is available, is still significantly less deferential than the substantial evidence standard used for facts.

c. Other Types of Deference for Questions of Law in Administrative Adjudications—*Skidmore* Deference Is Not Real Deference

Administrative law judicial review is sometimes presented as a question of whether the agency interpretation at issue should get *Chevron* deference or rather *Skidmore* deference. *Chevron* deference, as discussed in Section II.B.3, is true deference assuming the court gets to the second step of the *Chevron* analysis, which is a step it can only reach when the statute is

168. 142 S. Ct. 2587 (2022).

169. *Id.* at 2605. This also shows how administrations working against the administrative state can insert poison pills into unfavored administrative action. *Chevron* has traditionally allowed agencies to change course on issues while still receiving *Chevron* deference, but the major questions doctrine attempts to invalidate any effort at regulation in that area.

170. *Id.* at 2613 ("We are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000))).

171. *Id.* at 2609. The dissent pointed out that while concerns about an agency's scope of expertise could legitimately counsel against according *Chevron* deference to the interpretation, the regulation of greenhouse gasses was entirely within the scope of EPA's expertise. *Id.* at 2635–37 (Kagan, J., dissenting).

ambiguous. *Skidmore* deference, in contrast, is not real deference. Rather, *Skidmore* deference is deference granted according to the degree to which the agency document has "the 'power to persuade.'"[172] In other words, the agency interpretation will be granted deference if the court believes it is correct.[173] If *Skidmore* deference were to disappear overnight, the court would still agree with the agency interpretation when it was convinced the agency was correct.

This is somewhat of a simplification. *Skidmore* can be a slight form of deference by acknowledging the expertise of the agency and factoring that in.[174] It can also be a stronger hurdle, since the focus is supposed to be on the reasoning present in the document itself,[175] not after-the-fact reasoning supplied by the agency.[176] Without *Skidmore*, theoretically, the

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172. Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498, 1510 (2020) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

173. *Id.* ("Because our precedents answer the question before us, we find any competing guidance in the Compendium unpersuasive.").

174. Larson v. Saul, 967 F.3d 914, 926 (9th Cir. 2020). The court in *Larson* said:

> The acquiescence ruling is not sufficiently detailed, careful, or imbued with the "power to persuade," such that it merits strong judicial deference. SSA's explanation for the ruling is not particularly thorough, either . . . . Nonetheless, the Commissioner's preferred interpretation of the uniformed-services provision is at least a "permissible construction of the statute" and the SSA's longstanding, technical expertise in administering the Social Security Act is owed deference.

Id. (citations omitted).

175. Estate of Maglioli v. All. HC Holdings LLC, 16 F.4th 393, 404 (3d Cir. 2021). The court said:

> Even if HHS has something valuable to say on the matter, we do not find it in these statements. The fourth and fifth amendments do not interpret the statutory text, cite any case law (besides *Grable*), or provide any legal reasoning. The general counsel's advisory opinions are likewise unpersuasive. The Secretary's conclusory assertions on the scope of our jurisdiction thus lack the "power to persuade." We now turn to the discussion of jurisdiction in this case, unclouded by HHS's views.

Id. (quoting *Skidmore*, 323 U.S. at 140).

176. A typical example can be seen in Sierra Club v. U.S. Dep't of the Interior, 899 F.3d 260, 288 (4th Cir. 2018). In *Sierra* the court said:

> NPS's invocation of § 460a-8 is a one-sentence recitation of statutory text without any accompanying explanation. And, because NPS makes no effort to specifically apply § 460a-8 to natural gas pipelines or to evaluate contrary arguments, its interpretation wholly lacks explanatory and persuasive power. We therefore accord it no *Skidmore* respect, and the agency's appellate counsel's *post hoc* interpretation of § 460a-8, like its interpretation of § 460a-3 and the Mineral Leasing Act, also warrants no deference.

Id. But see Hernandez v. Garland, 38 F.4th 785, 792 (9th Cir. 2022) ("While the BIA's analysis is not extensive, its reasoning is persuasive and consistent with its subsequent precedential decision in *Hernandez-Romero*. We therefore would defer to it under *Skidmore*."). The court parenthetically noted that "*Skidmore* deference is not 'preclude[d]' just because the BIA's analysis is 'not extensive.'" (alteration in original) (quoting Orellana v. Barr, 967 F.3d 927, 934 (9th Cir. 2020)).

court would more easily accept after-the-fact reasoning. Regardless, it should be harder for an agency determination to be upheld if the court applies *Skidmore* than if it applies *Chevron*.

While the type of deference granted to a legal question can therefore potentially have some influence in the eventual outcome, any of the available legal review standards are significantly stricter than the standard substantial evidence review applies to questions of fact. It is for this reason that it is so critical that mixed questions be addressed through their separate components whenever possible, as discussed in the following section.

III. REVIEW OF MIXED QUESTIONS OF LAW AND FACT

Now that methods for review of questions of fact and law are individually established, it is time to put them together in mixed questions. The type of mixed question most often seen in administrative review involves the application of facts to law. Applying facts to law is one of the primary functions of administrative adjudication—determining whether each individual applicant qualifies for the relief sought based on their individual circumstances.

This Part begins by untangling some of the confusion around mixed questions, both what they are and how they are reviewed. It then explains exactly how courts make errors when reviewing mixed questions and why the incorrect review of mixed questions improperly grants great deference to the agency on questions of law. Finally, it explains how such questions should be addressed: by separating out the factual and legal components of the question for individual review. Once these are separated, the facts should be reviewed first (if necessary) using substantial evidence. The undisputed or substantially established facts can then be applied to the legal standard using appropriate legal review.

A. *Courts are Confused about Mixed Questions*

As mentioned above, there is a great deal of confusion over the proper way to review mixed questions of fact and law. However, it is not merely how to review such questions that is a problem—courts struggle to even determine when something qualifies as a mixed question. This section begins by describing the confusion of what should qualify as a mixed question before addressing the attendant confusion over the proper standard of review for issues identified as mixed questions.

1. *Courts are Confused About What Qualifies as a Mixed Question*

In order to review a mixed question as such, the court must first determine the issue it is dealing with is in fact a mixed question. The most common mixed questions in administrative law involve applying facts to a legal standard.[177] These facts can be disputed facts that the agency must determine, but they can also be uncontested facts.

But not all categorizations follow that logic. Some questions have already been historically categorized as a particular type, locking in a potentially inappropriate standard. Historical category determinations are not limited to administrative law,[178] but they certainly do add to the confusion in this area.

Whether particular actions count as persecution for immigration purposes is one example of such a question used in this Article and is widely understood to be a mixed question, even if there remains significant confusion over the appropriate standard of review.

However, other administrative issues that seem similar have instead historically been classified as entirely questions of fact, like the social security disability analysis, which was detailed in Section II.A.2.a. As discussed in that section, courts must make determinations about many different factual issues. The ALJ must determine exactly what the limitations are that the applicant is dealing with and exactly what they are still capable of doing.[179] Whether an individual is able to sit for long periods of time[180] or lift their arms above their shoulders[181] are undoubtedly questions of fact.

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177. Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 102, 120 (2005). Other potential types that are less relevant to administrative law include determining whether someone's conduct "'was fair' or 'reasonable'" or other evaluative determinations or multiple issues jumbled together. *Id.* at 102. Warner would go further and distinguish between applying facts to established legal standards (definition application) as opposed to applying a true legal interpretation that would create new law going forward, which could change from case to case. *Id.* at 129.

178. *Id.* at 111 (noting that whether an employee was acting within the scope of employment would appear to be an instance of applying fact to law, yet it has traditionally been considered purely a question for the jury). Warner notes additional established determinations. One example involves probable cause, which is generally reviewed de novo, even though it is functionally very similar to a negligence determination. Negligence, in contrast, has traditionally been left to the jury and therefore reviewed deferentially on appeal. *Id.* at 108–09.

179. Assuming the applicant does not automatically qualify at step three of the disability analysis, as described in Section II.A.2.a.

180. Hare v. Soc. Sec. Admin., Comm'r, No. 20-cv-00107, 2021 WL 961784, at *1 (N.D. Ala. Mar. 15, 2021).

181. Jeannette T. v. Kijakazi, No. 21-cv-00133, 2022 WL 1115101, at *3 (D. Conn. Apr. 14, 2022).

But courts have also historically considered the final determination—whether the individual is disabled—to be a question of fact, or have functionally done so by automatically using only substantial evidence review.[182] This view means that every judgment made by the administrator along the way is viewed using the substantial evidence standard. Courts do not always phrase it as such. Some say that they review whether the ALJ applied the correct standard as a question of law, but this recitation sets the court up for the magic word analysis detailed in Section III.B.1.b, since a court cannot actually assess whether a standard was applied correctly without conducting a de novo review of it.

2. *Courts are Confused about the Proper Standard of Review for Mixed Questions*

Even when a court has determined that the question at issue is a mixed question, considerable confusion remains. But this is understandable. Case law supports treating the entire question as a question of law;[183] treating the entire question as a question of fact;[184] looking to whether the question is predominantly legal or factual in character before then

182. Rodriguez v. Kijakazi, No. 20-cv-02440, 2022 WL 3220633, at *15 (M.D. Pa. Aug. 9, 2022) ("[W]e are obliged to affirm this ruling once we find that it is 'supported by substantial evidence, "even [where] this court acting *de novo* might have reached a different conclusion.'" Accordingly, under the deferential standard of review that applies to appeals of Social Security disability determinations, we find that substantial evidence supported the ALJ's evaluation of this case and we will affirm the Commissioner's final decision." (second alteration in original) (quoting Monsour Med. Ctr. v. Heckler, 806 F.2d 1185, 1190–91 (3d Cir. 1986))).

183. *E.g.*, Sherpa v. Barr, 837 F. App'x 826, 828 (2d Cir. 2020) ("[T]his Court reviews factual findings under the substantial evidence standard and questions of law, 'including mixed questions of law and fact and the application of law to fact,' *de novo*." (quoting Lecaj v. Holder, 616 F.3d 111, 114 (2d Cir. 2010))).

184. *E.g.*, Khan v. Holder, 584 F.3d 773, 776 (9th Cir. 2009) ("We review agency factual findings and determinations of mixed questions of law and fact for substantial evidence." (citing INS v. Elias-Zacarias, 502 U.S. 478, 481, 483–84 (1992))); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 960 (2017) (citing ICC v. Union Pac. R.R. Co., 222 U.S. 541, 547–48 (1912) as a Pre-APA case that set the substantial evidence standard later incorporated into the APA). Not only did *ICC* mention the substantial evidence standard, it did so with what it explicitly described as a mixed question:

> In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. . . . [T]he courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.

ICC, 222 U.S. at 547–48. Observers still generally believe in strong deference to agencies on mixed questions, in part because of the influence of *Chevron* on legal questions (even though *Chevron* is only applicable to a small percentage of agency adjudications). John F. Duffy, *On Improving the Legal Process of Claim Interpretation: Administrative Alternatives*, 2 WASH. U. J.L. & POL'Y 109, 128–29 (2000). Duffy said:

> [U]nlike appellate review of lower court decisions on mixed questions of law and fact, judicial review of agency decisions on such questions is ordinarily subject to a rule of deference. . . . [R]eviewing courts will afford,

applying the corresponding standard;[185] and finally, the method advocated for here, breaking the question into its component parts and applying the appropriate standard of review to each.[186]

There is not merely confusion among circuits; there is confusion within circuits.[187] For instance, when reviewing immigration cases in the Ninth Circuit, the circuit has said: "[w]e review *de novo* the Board of Immigration Appeals' (BIA) determination on questions of law and mixed questions of law and fact."[188] Perfectly clear. Except that the Ninth Circuit has also said: "In assessing the BIA's decision, we review 'constitutional and other questions of law de novo' and 'factual findings and mixed questions of law and fact for substantial evidence.'"[189]

Attempts have been made to explain the inconsistency by whether the exact issue in the particular case happened to be primarily factual or primarily legal.[190] Even if that is sometimes true, the fact that it was not made explicit means that it is not possible to check whether it was in fact the issue every time. Additionally, given the Ninth Circuit's immigration

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> and should afford, much greater deference to administrative agencies on mixed questions of fact and law than to lower courts.

Id.

185. *E.g.*, Contreras-Sanchez v. Garland, No. 20-4295, 2021 WL 2926133, at *2 n.2 (6th Cir. July 12, 2021) ("We apply de novo review to mixed questions of law and fact when they require legal exposition, and we apply deferential review to mixed questions that deal heavily in factual issues."); Fon v. Garland, 34 F.4th 810, 817 (9th Cir. 2022) (Graber, J., concurring) (citing Cordoba v. Holder, 726 F.3d 1106, 1113 (9th Cir. 2013), for de novo review of primarily legal questions, and Liang v. Att'y Gen., 15 F.4th 623, 626–30 (3d Cir. 2021) (Jordan, J., concurring), for deferential review of primarily factual questions).

186. *E.g.*, Alom v. Whitaker, 910 F.3d 708, 713 (2d Cir. 2018). *Alom* breaks the questions apart in a clear manner:

> [W]hile we review an IJ's factual findings for substantial evidence, questions of law, such as "what evidence will suffice to carry an asylum applicant's burden of proof," are reviewed de novo. Similarly, where an asylum applicant is deemed credible, the IJ's ultimate conclusion that the facts do not meet the legal definition of persecution is a "mixed question of law and fact, which we review *de novo*."

Id. (first quoting Yan Chen v. Gonzales, 417 F.3d 268, 271 (2d Cir. 2005); then quoting Mirzoyan v. Gonzales, 457 F.3d 217, 220 (2d Cir. 2006)).

187. It would potentially be understandable if courts were applying different standards to different types of mixed questions. After all, in some cases, courts are to distinguish between whether the question is primarily legal or primarily factual and act accordingly. But courts go far beyond that distinction and generally do not even state it as such, making it difficult to determine the meaning behind the choice of standard of review.

188. Gutierrez-Gutierrez v. Garland, No. 19-71206, 2022 WL 1172126, at *1 (9th Cir. Apr. 20, 2022) (quoting Conde Quevedo v. Barr, 947 F.3d 1238, 1241–42 (9th Cir. 2020)).

189. Inventor v. Sessions, 679 F. App'x 544, 545 (9th Cir. 2017) (quoting Bojnoordi v. Holder, 757 F.3d 1075, 1077 (9th Cir. 2014)).

190. *Fon*, 34 F.4th at 817 (Graber, J., concurring).

case load, it seems unlikely for things to have been so consistent. It is instead far more likely that cases have simply taken different approaches based on the standard that happened to be found initially on review.

Other circuits have also noted this disparity in treatment and questioned whether it was due to an overly broad reading of a prior Supreme Court case that did look to whether the question was predominantly legal or factual.[191] That approach is not necessary, however, when the question can in fact be broken down further, as discussed later in this section. Breaking the question down to the different components requires reviewing each component correctly, relying on the standards explained in Part II. Using the incorrect standard has significant repercussions for the decision, since applying the factual review standard to questions of law grants extreme deference to the agency, as explained in the following section.

B. *Improperly Reviewing Mixed Questions Grants Extreme Deference to Agencies*

There are multiple ways a reviewing court can mess up mixed question review, as the first part of this section explains. One thing remains constant, however. A court that fails to properly review the legal component of a mixed question effectively grants extreme deference to the agency on the legal component of that mixed question—far more deference than that available under any true legal standard of review, as the second part of this section explains.

1. *Ways Courts Improperly Review Mixed Questions*

This Article argues that mixed questions are never appropriately reviewed using only substantial evidence, as explained in Section III.A. If the law is sufficiently well established that only factual questions remain, it should be considered a question of fact, not a mixed question. This error can be further compounded by a substantial evidence review that checks only whether substantial evidence exists for each fact individually. This is a logical method to use when determining the facts to apply to the legal standard (the application of which can be reviewed separately), but it is an insufficient method of review for the entire question.

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191. Xue v. Lynch, 846 F.3d 1099, 1105 n.11 (10th Cir. 2017) ("Those circuits treating the existence of persecution as a fact issue appear to rely uncritically on the Supreme Court's twenty-plus-year-old decision in *INS v. Elias-Zacarias* . . . ."). This was likely because in *Elias-Zacarias* the Supreme Court said:

> The BIA's determination that Elias-Zacarias was not eligible for asylum must be upheld if "supported by reasonable, substantial, and probative evidence on the record considered as a whole." It can be reversed only if the evidence presented by Elias-Zacarias was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed.

INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992) (quoting 8 U.S.C. § 1105a(a)(4) (2018)).

But courts can err on mixed question review even when they do not simply say the entire question is reviewed using substantial evidence. It is common for courts to say that they check whether the correct standard was used and whether substantial evidence supports the factual findings. However, checking whether the agency recited the correct standard (the magic words) and checking how that standard was actually applied are different, as discussed in Section III.B.1.b.

a. Reviewing the Entire Question Using Only Substantial Evidence

Why is it so problematic for courts to review mixed questions using only substantial evidence? Whether the underlying facts are undisputed or not (although it is even worse when they are undisputed), substantial evidence review on questions of law (or the legal component of a mixed question) grants the agency the same deference on the legal issues that it does on the factual issues. Courts can further compound this problem by looking only at whether each individual fact is supported by substantial evidence and never even analyzing how those facts fit together.

Such an example can be seen in *Martinez v. United States Attorney General*.[192] This immigration case, like that in Section II.A.2.b, was reviewing an application for asylum and focused on the persecution component. The BIA had denied the application, holding that the individual circumstances detailed by the applicant did not give rise to persecution.[193] But this was the problem, as the concurrence pointed out.[194] The majority opinion took isolated instances of mistreatment and said each one did not rise to the level of persecution, not that they collectively did not rise to that level.[195]

This approach can also be seen in how the majority defined its job as looking to whether there was reasoned consideration, which it did by examining each individual component rather than evaluating the undisputed facts according to the statutory standard.[196] The confusion may in

192. 992 F.3d 1283 (11th Cir. 2021).

193. *Id.* at 1293.

194. *Id.* at 1296 (Martin, J., concurring). As Judge Martin said:

> I think the mistake made by the majority is that its evaluation of Mr. Martinez's experience isolates each incident of harm against him . . . . It's like studying each tree but ignoring the forest. In this way, the majority opinion fails to "evaluate the harms a petitioner suffered *cumulatively*," in the way our caselaw requires us to.

Id. (quoting Shi v. U.S. Att'y Gen., 707 F.3d 1231, 1235 (11th Cir. 2013)).

195. *E.g.*, *id.* at 1293 ("Similarly, the fact that in April 2017 government officials stopped Martinez from flying to Guyana by briefly detaining him and seizing his laptop and cell phone is insufficient to compel a finding of persecution.").

196. *Id.* at 1294. The majority said:

> We have found a lack of reasoned consideration . . . when the BIA: (1) "misstates the contents of the record," (2) "fails to adequately explain its rejection of logical conclusions," or (3) "provides justifications for its decision which are unreasonable and which do not respond to any arguments in the record." Thus, all three circumstances "share a common

part be due to the fact that the Eleventh Circuit has unclear precedent how to review persecution determinations, with cases calling it both a question of law[197] and a question of fact.[198]

This does not merely mean that the legal question is not necessarily reviewed under the appropriate standard for a legal question; it means that no thought is given to the correct legal standard, including whether this is an opinion worthy of deference.[199]

Many courts will still conduct full substantial evidence review even when there is no dispute about the underlying facts (and therefore no need to determine whether any facts qualify for substantial deference). This occurred in *Gjetani v. Barr*,[200] where the Fifth Circuit reviewed undisputed facts about persecution under the substantial evidence standard.[201] It explicitly noted that "circuit precedents (which we are, of course, dutybound to follow) make clear that we use the 'substantial evidence' standard, even when the agency determines the alien is credible and accepts his version of the facts."[202]

The dissent in *Gjetani* pointed out that:

> [T]he IJ and BIA's determination was based on the purely legal conclusion that the undisputed facts were not "persecution" within the meaning of 8 U.S.C. § 1101(a)(42)(A). Determining the meaning of "persecution" as it appears in the statute and applying that standard to undisputed facts is a basic matter of statu-

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> trait: The [BIA's] opinion, read alongside the evidentiary record, forces us to doubt whether we and the [BIA] are, in substance, looking at the same case."

Id. (alterations in original) (quoting Ali v. U.S. Att'y Gen., 931 F.3d 1327, 1334 (11th Cir. 2019)).

197. Medina v. U.S. Att'y Gen., 800 F. App'x 851, 855 (11th Cir. 2020) ("We review all legal conclusions de novo. Whether particular incidents happened and how they relate to each other are questions of fact, subject to the deferential standard of review. But whether a fact pattern constitutes persecution is a question of law, subject to de novo review." (citations omitted)).

198. Aguilera Fernandez v. U.S. Att'y Gen., 857 F. App'x 487, 490 n.3 (11th Cir. 2021). The court skipped any mention of legal review, despite the lack of factual dispute:

> Aguilera Fernandez argues that because the IJ determined his testimony was credible, the facts are undisputed and therefore we must review his past persecution claim *de novo*. We disagree. We have consistently held that our review of the agency's determination that a noncitizen has not established persecution is limited to whether the decision was supported by substantial evidence.

Id.

199. *See* Fon v. Garland, 34 F.4th 810, 822 (9th Cir. 2022) (Collins, J., concurring) (noting that the failure to distinguish between factual and legal issues means the court also gives no thought to whether *Chevron* should apply).

200. 968 F.3d 393 (5th Cir. 2020).

201. *Id.* at 396. The court connected substantial evidence and the immigration requirement that the evidence compel a different result (citing INS v. Elias-Zacarias, 502 U.S. 478, 481 n.1 (1992)).

202. *Id.*

> tory interpretation, which is a "quintessential question of law." . . . Neither the Government nor the majority argues that the term "persecution" as it appears in 8 U.S.C. § 1101(a)(42)(A) is the type of "ambiguous statutory term" for which "the BIA should be accorded *Chevron* deference as it gives [the word] 'concrete meaning through a process of case-by-case adjudication.'" In the absence of such an argument, I would reaffirm that, where the facts are undisputed, "[w]hether a prior assault rises to the level of past-persecution is a question of law that we review *de novo*."[203]

As the dissent explained, reviewing a legal issue under substantial evidence does more than just prevent the court from reflecting on whether *Chevron* deference should be due in this particular case. It means that the court nearly unquestioningly accepts the BIA's interpretation of the legal term at issue, since substantial evidence looks for reasons to uphold the lower decision and it must be upheld if any reasonable person could have interpreted it that way.[204] It also makes it likely that the circuit using substantial evidence will uphold whatever the agency interpretation of the statute is, even while other circuits consider the same issue a question of law and refuse to extend deference.

Some courts do acknowledge that it is not enough to apply substantial evidence to the entire mixed question but still fail to properly analyze the legal component, as explained in the following section.

b. Magic Word Review

Courts engaged in substantial evidence review often add that the court's "review of an ALJ's unfavorable decision is limited to two inquiries: 'whether the ALJ applied the correct legal standards and whether the findings of the ALJ are supported by substantial evidence.'"[205] The danger of

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203. *Id.* at 400–01 (Dennis, J., dissenting) (third and fourth alterations in original) (footnotes omitted) (first quoting Stephens *ex rel.* R.E. v. Astrue, 565 F.3d 131, 137 (4th Cir. 2009); then quoting I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999); and then quoting Morales v. Sessions, 860 F.3d 812, 816 (5th Cir. 2017)). This approach in fact also has support within the circuit. *See* Caliz v. Wilkinson, 844 F. App'x 737, 738 (5th Cir. 2021) ("Whether conduct rises to the level of persecution is an issue of law we review de novo." (citing *Morales*, 860 F.3d at 816)).

204. It also leads to counterintuitive results like a court occasionally acknowledging that a final disability determination is in fact a question of law (or a mixed question as defined in this Article) when disability determinations are almost always reviewed using only substantial evidence. *Compare* Bowers v. Kijakazi, 40 F.4th 872, 874 (8th Cir. 2022) ("When reviewing the denial of disability insurance benefits, we decide whether the findings 'are supported by substantial evidence on the record as a whole.'" (quoting Prosch v. Apfel, 201 F.3d 1010, 1012 (8th Cir. 2000))), *with* Garcia v. Colvin, 741 F.3d 758, 760 (7th Cir. 2013) ("[W]hether the applicant is sufficiently disabled to qualify for social security disability benefits is a question of law that can't be answered by a physician.").

205. Amber R. v. Comm'r of Soc. Sec. Admin., No. 21-cv-00204, 2022 WL 2734426, at *1 (S.D. Ohio July 14, 2022) (quoting Blakley v. Comm'r of Soc. Sec., 581 F.3d 399, 406 (6th Cir. 2009)). The court also further emphasized the require-

such a statement is that the substantial evidence review can easily subsume the legal review. A court can check that (1) the ALJ has recited the correct standard of review, and (2) the facts mentioned by the ALJ appear to have some support in the record and consider its job done. Indeed, a court may be hesitant to disturb the ALJ's determination due to the strong deference required in substantial evidence review.

This turns the legal component of the review into a magic word review—where the reviewing court discerns only whether or not the ALJ has recited the correct magic words for the legal standard.[206] This appears to have occurred in *Pereira v. Barr*.[207] *Pereira* was an immigration case dealing with a withholding of removal based on the Convention Against Torture (CAT). To qualify for relief under the CAT, the applicant must show "it is more likely than not that . . . she would be tortured if removed to the proposed country of removal"[208] and that this torture would occur with the "consent or acquiescence of a public official."[209] "Acquiescence by a public official includes instances of 'willful blindness.'"[210]

This willful blindness standard is specific. As the majority observed, the immigration judge had stated it correctly, saying "[a]cquiescence includes the 'willful blindness of the public official to the activity,' while noting that '[a] government's inability to control private parties does not equate to willful blindness.'"[211]

However, as the dissent noted, when the IJ went to apply the standard:

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ment that "'[u]nless the ALJ has failed to apply the correct legal standards or has made findings of fact unsupported by substantial evidence,' this Court must affirm the ALJ's decision." *Id.* (quoting Emard v. Comm'r of Soc. Sec., 953 F.3d 844, 849 (6th Cir. 2020)). While this was a social security case, similar language is also used in immigration cases and other cases involving administrative review. *See, e.g.*, Bertrand v. Garland, 36 F.4th 627, 631 (5th Cir. 2022) ("[T]he only questions here are whether: (1) the BIA applied the correct legal standard . . . and (2) substantial evidence supported its conclusion."); Deltek, Inc. v. Dep't of Lab., Admin. Rev. Bd., 649 F. App'x 320, 322–23 (4th Cir. 2016) ("But we owe deference to the findings of the ALJ and the Board and must uphold them so long as they are supported by substantial evidence and reached through application of the correct legal standards.").

206. The Supreme Court has also flagged this as a potential problem, noting recently in a case that a failure to allow review of a mixed question in a statute banning review of all factual questions "would forbid review of any Board decision applying a properly stated legal standard, irrespective of how mistaken that application might be." Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062, 1073 (2020). The case is discussed further, *infra* Section III.C.1.b.

207. 777 F. App'x 797 (6th Cir. 2019).

208. *Id.* at 802 (alteration in original) (quoting 8 C.F.R. § 208.16(c)(2) (2023)).

209. *Id.* (quoting 8 C.F.R. § 208.18(a)(1) (2023)).

210. *Id.* at 802–03 (quoting Amir v. Gonzales, 467 F.3d 921, 927 (6th Cir. 2006)).

211. *Id.* at 803 (alterations in original) (quoting the Immigration Judge's opinion).

> The record establishes that the IJ applied the wrong standard. After finding Pereira's testimony credible that the Guatemalan government refused to protect Indigenous women from gang violence, the IJ stated Pereira "ha[d] not shown that the Guatemalan government will seek to torture her specifically, or will willfully accept the torturous conduct of private actors." The IJ's explicit use of the words "willful[ ] accept[ance]" signals that it applied the wrong standard to Pereira's CAT claim. However, the IJ did not stop there. Rather, the IJ went further: "[Pereira] presented no evidence that she has ever been arrested, detained, or abused by Guatemalan officials, and she did not allege that she would be harmed by any Guatemalan officials in the future." The IJ's explicit mention of willful acceptance, in conjunction with its recurrent references to Pereira's failure to show that she would suffer harm at the hand of Guatemalan officials, is "patently inconsistent with the willful blindness standard."[212]

By not actually doing a true review of the application of the facts to the law, the majority failed to check that the correct law was actually used. Failing to fully analyze the law, whether due to magic word review or pure substantial evidence review, effectively grants extreme deference to the agency on legal issues, as described in the following section.

2. *Courts Erroneously Grant Extreme Deference to Agencies when Improperly Reviewing Mixed Questions*

Reviewing mixed questions using only substantial evidence (or using only effectively substantial evidence in magic word review) means that extreme deference is being given to not merely the factual component of that mixed question but the legal component as well. Courts grant deference to agency fact finders on questions of fact. This is done because it is generally acknowledged that agencies are in a superior position to make such determinations. But, just as it is well established in appellate review

212. *Id.* at 803–04 (Donald, J., dissenting) (alterations in original) (quoting Nerghes v. Mukasey, 274 F. App'x 417, 424 (6th Cir. 2008)). The majority disagreed with this characterization, saying that the IJ had properly taken the facts into account by saying that the government had committed resources to fight against the violence, but that seems overcome by the evidence that the standard was not applied and, as described in Section III.C.2, deference is not appropriately given to the application of the facts to the legal standard, only to the underlying facts themselves.

of traditional trials that fact finders are accorded deference on their factual findings,[213] it is equally well established that these initial decisionmakers are not accorded deference on legal determinations.[214]

Commenters have complained for decades about the moderate deference accorded to agencies on questions of law under *Chevron*. But, as discussed in Section II.B.3, *Chevron* deference is limited. It applies only when the court finds that this is the type of determination that Congress appropriately granted to an agency, and even then, only when both the granting statute is ambiguous about the meaning of the term in question and the agency interpretation is considered reasonable. There is no version of *Chevron*, even at its most lenient, that comes close to the deference of substantial evidence: the deference supplied by *Chevron* does not even kick in until the court has already determined that the statute is ambiguous. This is a stark contrast with substantial evidence, which actively looks for ways to uphold the agency decision.[215]

Given both the complaints about *Chevron* and the increased number of judges (and Justices) that disagree with *Chevron* on principle, courts are increasingly reluctant to apply even the strictest form of *Chevron* to agency determinations made after all the procedures traditionally required for agency action to be accorded *Chevron* deference. These procedures include the highly burdensome notice and comment process used for rules, [216] or the precedential three-board-member BIA opinions issued in certain immigration adjudications.[217]

The vast majority of agency adjudications do not involve anywhere near the procedural protections provided by a three-member precedential BIA opinion.[218] But these same courts that are so reluctant to apply *Chevron* grant nearly unlimited deference to these low-level immigration determinations by reviewing a mixed question using only substantial evidence.

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213. Gruttemeyer v. Transit Auth., 31 F.4th 638, 646 (8th Cir. 2022) ("Review is 'highly deferential' to the jury verdict, with all reasonable inferences drawn in favor of the verdict. If, however, the record 'contains no proof beyond speculation to support the verdict, then judgment as a matter of law is appropriate.'" (first quoting Luckert v. Dodge Cnty., 684 F.3d 808, 817 (8th Cir. 2012); then quoting Liberty Mut. Fire Ins. Co. v. Scott, 486 F.3d 418, 422 (8th Cir. 2007))).

214. For agencies, this is true with the possible exception of *Chevon* deference as discussed in Section II.B.3.

215. Adefemi v. Ashcroft, 386 F.3d 1022, 1027 (11th Cir. 2004) ("Under the substantial evidence test, we view the record evidence in the light most favorable to the agency's decision and draw all reasonable inferences in favor of that decision.").

216. Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 220 (2016) ("A premise of *Chevron* is that when Congress grants an agency the authority to administer a statute by issuing regulations with the force of law, it presumes the agency will use that authority to resolve ambiguities in the statutory scheme.").

217. Scialabba v. Cuellar de Osorio, 573 U.S. 41, 57 (2014) (deferring to a precedential (three-board-member) BIA opinion).

218. Shruti Rana, *"Streamlining" the Rule of Law: How the Department of Justice is Undermining Judicial Review of Agency Action*, 2009 U. ILL. L. REV. 829, 847 (2009)

To take a specific type of agency adjudication as an example, immigration cases are generally understood to present mixed questions of fact and law—whether a particular immigrant can qualify for a particular form of relief.[219] And the sheer number of cases involved means that the three-member BIA judges can issue precedential opinions in only a tiny fraction of these cases. These three-member opinions that are intended to be precedential are the only immigration decisions generally understood to qualify for *Chevron* deference.[220]

But treating all immigration appeals as involving only substantial evidence review means that even single member BIA opinions that essentially rubber-stamp the ALJ's opinion are accorded greater deference on any questions of law than when *Chevron* is applied to a precedential opinion.[221] This can be solved, however, as discussed in the following section.

C. *How Courts Should Review Mixed Questions*

This section explains that courts should review mixed questions by breaking them apart into their constituent legal and factual components. The factual components should be reviewed using substantial evidence and the legal components should be reviewed de novo.

The first part of this section covers recent Supreme Court cases that together support this standard. The second part walks through how exactly this should be expanded to mixed questions in administrative law.

1. *Supreme Court Guidance on the Review of Mixed Questions*

The Supreme Court has addressed mixed questions multiple times in the past few years. This section quickly reviews two important cases. The first one discussed, *Google LLC v. Oracle America, Inc.*,[222] talks about the proper approach to a traditional mixed question: as much as possible, the court should break the question into its legal and factual components and evaluate each of those according to the correct standard. The second

(detailing the harms caused by the move to restrict the appeals that can go to three-member panels).

219. *E.g.*, Huo Qiang Chen v. Holder, 773 F.3d 396 (2d Cir. 2014). For further discussion see *supra* Section II.A.2.a.

220. INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) ("[W]e recognized in *Cardoza–Fonseca* that the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'" (citation omitted) (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987))).

221. Granting substantial evidence review to the entire agency decision means that the court not only grants the reviewing agency deference on the fact finding, it grants the reviewing agency the same extreme deference when determining whether those agency-determined facts rise to the level required by the statute.

222. 141 S. Ct. 1183 (2021).

case discussed, *Guerrero-Lasprilla v. Barr*,[223] deals with a particular subset of mixed questions—those where the facts are undisputed. Such issues can be considered questions of law.

These two cases set up the approach for true mixed questions immediately after.

a. Courts Should Break Apart Mixed Questions into Their Factual and Legal Components when Possible

In *Google*, the Court addressed whether Google's use of sections of computer code from Sun Microsystems (since acquired by Oracle) constituted fair use.[224] A jury determined that Google had "'shown by a preponderance of the evidence that its use' . . . 'constitutes a "fair use" under the Copyright Act.'"[225] This determination was appealed, and part of the question was whether this was a purely factual question such that the jury verdict would be due significant deference.[226]

On appeal, the Supreme Court determined that the fair use question was in fact a mixed question of law and fact.[227] The Court said that it had previously "described the 'fair use' doctrine, originating in the courts, as an 'equitable rule of reason' that 'permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'"[228]

Therefore, in reviewing fair use, a court should accept as true the underlying facts as determined by a jury, but the court should make the final determination about whether those facts meet the judge-created standard of fair use by itself. Or, more generally, for mixed questions "a reviewing court should try to break such a question into its separate factual and legal parts, reviewing each according to the appropriate legal standard."[229]

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223. 140 S. Ct. 1062 (2020).

224. *Google*, 141 S. Ct. at 1190.

225. *Id.* at 1195 (quoting the trial court record).

226. *Id.* at 1199.

227. *Id.*

228. *Id.* at 1196 (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)). This doctrine was codified to include nonexclusive factors that courts were to consider when doing the analysis:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (2018).

229. *Google*, 141 S. Ct. at 1199.

Having broken the mixed question down in this way, the Court proceeded to work through the different elements of fair use using facts supported by the jury verdict to determine that "Google's copying of the Sun Java API was a fair use of that material as a matter of law."[230]

This case specifically addressed court review of a jury verdict.[231] While the Court has so far refrained from applying it directly to review in an administrative case, there is no reason to believe it could not be appropriately used in judicial review of agency action. Having shown how to break apart mixed questions, the next case explains that mixed questions with uncontested facts are legal questions.

b. Mixed Questions with Undisputed Facts are Legal Questions

The year before *Google* was decided, the Supreme Court clarified the standard of review when the case concerns the application of undisputed facts to a legal standard. The case in question, *Guerrero-Lasprilla*, addressed the review of an order of removal.[232] Review of the order depended on 8 U.S.C. § 1252(a)(2)(D), which completely prevented judicial review of such orders unless the court was considering "constitutional claims or questions of law."[233] The Court needed to determine whether the mixed question at issue was a question of law that would therefore allow review.[234]

More specifically, two petitioners sought review of removal orders years after their statutory review windows had closed, after "various judicial and Board decisions" had been issued that would potentially affect their claim, arguing that the time limit should be equitably tolled.[235] There was no dispute about the underlying facts. The question was "whether the statutory phrase 'questions of law' includes the application of a legal standard to undisputed or established facts."[236] The court held that it did—it is a legal question when undisputed facts are applied to a legal standard—and remanded for reconsideration in light of that decision.[237]

This decision, along with *Google* from the prior section, build the appropriate method for reviewing mixed questions as described in the following section.

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230. *Id.* at 1209.

231. *Id.* at 1200 (explaining why this type of analysis would not violate the Seventh Amendment's constitutional right to trial by jury).

232. Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062, 1067 (2020).

233. *Id.*

234. *Id.* at 1068.

235. *Id.* at 1067.

236. *Id.* at 1068.

237. *Id.* at 1073.

2. *Courts Should Review Mixed Questions Involving Disputed Facts Using "Substantially Established Facts"*

As *Google* states,[238] a court should attempt to break a mixed question into its legal and factual components. Each component can then be reviewed according to the correct standard. Facts, as established in section II.A.1, are reviewed using substantial evidence. If there is substantial evidence in the record for the fact, the fact should be considered "substantially established."

Guerrero-Lasprilla says that mixed questions with undisputed facts can be viewed as legal questions.[239] Extending this idea, once the facts have been "substantially established," a court is really facing a mixed question with established facts and can proceed as *Guerrero-Lasprilla* suggests.

This means for true mixed questions, a court can then treat the remaining legal components of the question using the appropriate legal standard—de novo review (including *Chevron* when appropriate), as discussed in Section II.B. The substantially established facts can then function as uncontested facts do in cases like *Guerrero-Lasprilla*. The court should determine whether those facts suffice for the requirements of the statute.

Since many administrative determinations do require the application of facts to legal standards, review in this dual method is necessary to protect against the concerns raised in Section III.B, like preventing review through the incantation of magic words or the extreme deference granted to questions of law through full substantial evidence.

If the court is unable to determine what the agency's factual determinations were (in order to conduct substantial evidence review to determine the substantially established facts), the appropriate response is to remand to the agency for a clearer statement of the facts. This is one way in which agency review is easier than traditional trial court review. There would be extreme hesitation in remanding a case for a new trial simply because a reviewing court was not completely clear about what the established facts were, and courts generally assume facts as necessary to conduct the review.[240] It would be impossible to conduct the review with the same jury in the same mental place they were in when the trial occurred initially, and a new jury would raise the possibility of a different factual conclusion at enormous expense to both sides. But remand to agencies is normal and appropriate and has already been done in some instances for further factual determination.[241]

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238. *See supra* Section III.C.1.a.

239. *See supra* Section III.C.1.b.

240. SIBIA Neurosciences, Inc. v. Cadus Pharm. Corp., 225 F.3d 1349, 1354 (Fed. Cir. 2000) ("[W]e must presume that the jury resolved all factual disputes in favor of the prevailing party, and we must leave those findings undisturbed as long as they are supported by substantial evidence.").

241. *E.g.*, Smith v. Kijakazi, 14 F.4th 1108, 1110 (9th Cir. 2021) ("The ALJ's conclusion that Smith was not disabled at the time of the hearing was supported by

CONCLUSION

Mixed question review is critically important in the review of many administrative adjudications. A court reviewing a mixed question, however, should not treat it as an indivisible and inviolable unit but should instead break it apart into the factual and legal components.

If the facts are disputed, the factual component should be reviewed first using substantial evidence, just as facts would normally be reviewed. Factual determinations that survive substantial evidence review should be considered "substantially established facts."

Just as a court can review a mixed question with undisputed facts as a legal question, a court can review a mixed question with "substantially established facts" in the same manner, determining whether those facts suffice to meet the legal standard. This will ensure that courts are not inadvertently giving the most extreme deference possible to agency legal interpretations that would otherwise not warrant such deference. It will also enable the court to separately analyze whether agency specific legal deference like *Chevron* is appropriate for the legal component of the mixed question at issue.

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substantial evidence. But the court nonetheless reverses and remands this case to the agency for further factfinding, since the ALJ did not adequately consider how Smith's symptoms changed over time.").