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The New Moral Turpitude Test: Failing *Chevron* Step Zero

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ARTICLES

The New Moral Turpitude Test

FAILING *CHEVRON* STEP ZERO

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INTRODUCTION

In the waning days of the Bush administration, Attorney General Michael Mukasey decided *In re Silva-Trevino*,[1] in which he reversed over a century of immigration law precedent by creating a new moral turpitude test.[2] Attorney General Mukasey altered the "categorical approach," which immigration judges use to decide whether a noncitizen is removable for a criminal conviction. Under the traditional categorical approach, immigration judges look only at the elements of the statute of conviction and, if necessary, the record of conviction to determine whether the offense involved moral turpitude. The new moral turpitude test is a total overhaul of the categorical approach; it allows judges to look behind the record of conviction and engage in a factual inquiry, thus potentially subjecting many more noncitizens to removal for a crime involving moral turpitude.

The Attorney General's broad, sweeping change to immigration law was not made through the notice-and-

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[1] 24 I. & N. Dec. 687 (Att'y Gen. 2008).

[2] *Id.* at 688.

comment rulemaking process. Indeed, he did not even notify the parties to the adjudication that he was contemplating a reversal of years of precedent. Thus, parties had no opportunity to brief the issue; nor did outside groups have an opportunity to comment as amici until after the Attorney General already had published the decision. Rather, the decision was made at the eleventh hour of the Bush administration, after election results had determined that a Democratic administration would gain control of the Department of Justice (DOJ) two months later.

In this article, I argue that courts should refuse deference to *Silva-Trevino* notwithstanding the principles of deference embodied in the Supreme Court's decision in *Chevron, U.S.A., Inc. v. NRDC*.[3] *Chevron* introduced a now well-known two-step analysis to determine whether an agency's decision deserves deference: first, courts determine whether Congress's intent was clear in its statutory language; second, if Congress was not clear, courts defer to the agency's interpretation, so long as it is reasonable.[4] The Court later introduced what scholars call "*Chevron* step zero—the initial inquiry into whether the *Chevron* framework applies at all."[5] In an important step zero decision, the Court decided *United States v. Mead Corp.*,[6] holding that courts should not defer to agency interpretations of law issued through informal procedures because such interpretations do not have the force of law.[7] I argue that the Attorney General did not decide *Silva-Trevino* using law-like procedures: the decision-making process demonstrated neither transparency nor careful consideration. Therefore, under *Mead*, *Silva-Trevino* does not have the force of law and should not be given *Chevron* deference.

In Part I, I describe the removal process for noncitizens and the categorical approach, the method by which immigration judges determine removability for a criminal conviction. I also describe the *Silva-Trevino* decision, in which the Attorney General rejected the traditional categorical approach for resolving whether an offense is a "crime involving moral

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[3] 467 U.S. 837 (1984).

[4] *Id.* at 842-43.

[5] Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001).

[6] 533 U.S. 218 (2001).

[7] *Id.* at 226-27.

turpitude."[8] In addition, I discuss the secretive process by which the Attorney General rendered the decision in *Silva-Trevino*.

In Part II, I discuss different types of deference courts give to agency decisions, including the light amount of deference under *Skidmore v. Swift & Co.*[9] and the heavy deference under *Chevron*. I focus on the Court's decision in *Mead*, in which the Court refused *Chevron* deference, but applied *Skidmore* deference, to an agency decision that did not have the force of law.

In Part III, I argue that the Attorney General's decision in *Silva-Trevino* should not survive *Chevron* step zero because the decision-making process did not allow public input before significantly changing immigration law. As the process by which the Attorney General made his decision did not ensure transparency or careful consideration, the *Chevron* analysis should not apply, pursuant to the Court's decision in *Mead*. I also discuss arguments that *Chevron* deference should apply due to the *Silva-Trevino* decision's binding effect and authoritative nature.

In Part IV, I propose solutions for both courts and the DOJ to grapple with the *Silva-Trevino* decision. As discussed in Part III, courts can refuse deference at *Chevron* step zero. Refusing *Chevron* deference means that courts will apply *Skidmore* deference, a multifactor approach giving deference to the agency's interpretation based on the thoroughness, consistency, and validity of its position. I argue that, under *Skidmore* deference, the Attorney General's decision in *Silva-Trevino* is likely to fail. Another solution is directed at the agency: the current agency head, Attorney General Eric H. Holder, can reconsider *Silva-Trevino* by vacating the decision and commencing rulemaking. He also can *sua sponte* reconsider the decision, but ask for briefing from affected parties before his final decision. Either rulemaking or a more participatory adjudication would cure the process problems of the original decision, allowing for public input that ensures transparency and careful consideration by the agency. This article concludes that, whether through judicial review or agency action, the lack of procedural fairness and transparency leading to the new moral turpitude test must be corrected through re-examination of the issue in a fashion that allows for

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[8] *In re* Silva-Trevino, 24 I. & N. Dec. 687, 688-89 (Att'y Gen. 2008).

[9] 323 U.S. 134 (1944).

the participation of interested parties and the full consideration of the implications of the issue.

I. THE NEW MORAL TURPITUDE TEST IN CONTEXT

A. From Arrest to Removal

The new moral turpitude test impacts all citizens facing charges of violating the Immigration and Nationality Act (INA)[10] by having been convicted of a "crime involving moral turpitude" (CIMT).[11] Consider the hypothetical situation of Juan, a noncitizen who has been convicted of larceny under state law.[12] Years after Juan completed his sentence, he is stopped for a routine traffic stop. The police officer runs a background check on Juan and contacts the Immigration and Customs Enforcement agency (ICE), a subagency of the Department of Homeland Security (DHS),[13] which takes Juan into custody.[14] A trial attorney who works for DHS files a charging document called a "Notice to Appear" in immigration court, thus commencing removal proceedings.[15] The Notice to

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[10] 8 C.F.R. § 1003.15(b) (2008).

[11] *See* 8 U.S.C. § 1182(a)(2)(A)(i)(I) (rendering inadmissible noncitizen who has been convicted of or admitted to the essential elements of a CIMT); 8 U.S.C. § 1227(a)(2)(A)(i) (2008) (proscribing removal for conviction for one CIMT committed within five years of admission if the crime is punishable by at least a one-year sentence); 8 U.S.C. § 1227(a)(2)(A)(ii) (removal for two CIMT convictions, not arising out of a single scheme of criminal misconduct, committed at any time after admission).

[12] Juan's story is not a true story; however, it is based on sets of facts from different clients the author has represented.

[13] The Department of Homeland Security, which Congress created in 2002 by passing the Homeland Security Act, absorbed most of the immigration functions of the former Immigration and Naturalization Service, including the enforcement of immigration laws. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2192 (2002) (codified at 6 U.S.C. § 251 (2003)). ICE became responsible for detention, removal, and investigations. *See ICE Overview*, ICE.GOV, http://www.ice.gov/about/overview (follow "Strategic Plan" link) (last visited Feb. 3, 2011).

[14] *See* 8 U.S.C. § 1357(a)(2) (2006); 8 C.F.R. § 287.5(c) (2005). This type of cooperation between states and ICE is facilitated by 8 U.S.C. § 1357(g), under which ICE may enter into written agreements with states or localities in which state or local officers, with proper training, act as ICE agents. 8 U.S.C. § 1357(g)(1)-(2). Currently, ICE has these types of agreements with sixty-nine law enforcement agencies in twenty-four states. *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, ICE.GOV, http://www.ice.gov/news/library/factsheets/287g.htm (last visited June 1, 2011).

[15] *See* 8 C.F.R. §§ 1003.13, 1003.14(a), 1003.15(c) (2008). Prior to 1996, noncitizens who had been admitted to the United States were in "deportation" proceedings, whereas those who were stopped attempting to enter the United States were in "exclusion" proceedings. The 1996 reforms to the Immigration and Nationality Act discontinued the use of the term "deportation" and replaced it with "removal." Immigration judges still preside over deportation or exclusion proceedings, however, if

Appear charges Juan with a violation of INA[16] for having been convicted of a CIMT (his larceny conviction).[17]

The immigration judge, an employee of the Executive Office for Immigration Review (EOIR) within the DOJ, decides Juan's case.[18] She first decides whether he is removable for such offense, i.e., whether he has been "convicted,"[19] and, if so, whether his offense is a CIMT.[20] If the judge finds Juan removable, he may apply for any relief from removal for which he is eligible.[21] At a later hearing, the judge decides whether Juan merits that relief; she makes this decision after a trial-like hearing at which both Juan and the DHS trial attorney may present evidence.[22] At the conclusion of this hearing, the judge decides whether Juan will be deported or remain in the United States.[23] The two parts of a removal proceeding can be likened to a criminal trial: first the judge determines whether Juan is "guilty" (deportable); if so, she decides his "sentence" (if she grants him relief from removal, he stays in the United States).[24]

Either Juan or the DHS trial attorney may appeal the immigration judge's decisions to the Board of Immigration

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proceedings commenced prior to April 1, 1997. 5 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 64.01 (rev. ed. 2010).

[16] 8 C.F.R. § 1003.15(b).

[17] *See supra* note 11.

[18] *See* 8 C.F.R. § 1003.0 (2007); 8 C.F.R. § 1003.12 (2008).

[19] *See* 8 U.S.C. § 1101(a)(48)(A) (2010) (defining "conviction" for immigration purposes).

[20] The process by which the judge determines whether a state offense is a CIMT is discussed more *infra* Part I.B.

[21] One common example of relief from removal is cancellation of removal, which is a discretionary waiver for long-term permanent residents who have been convicted of a removable offense, where Juan must show that he has been a lawful permanent resident for at least five years, has resided continuously in the United States for at least seven years, and has not been convicted of an "aggravated felony." 8 U.S.C. § 1229b(a) (2008). Other forms of relief include: (1) adjustment of status (i.e. application for a greencard), *see, e.g.*, *id*. § 1255; (2) asylum, *see id*. § 1158(a) (2009); (3) withholding of removal under 8 U.S.C. § 1231(b)(3) (which requires the applicant to show a 51% likelihood of persecution if removed), *see* INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987); INS v. Stevic, 467 U.S. 407, 429 (1984); and (4) withholding or deferral of removal under the Convention Against Torture (which requires the applicant to show a 51% likelihood that his government will torture him if he is removed), *see* 8 C.F.R. §§ 208.16-208.18 (2009).

[22] *See, e.g.*, 8 U.S.C. § 1229a.

[23] *See* 8 C.F.R. § 1003.37 (2008).

[24] One form of relief, voluntary departure, would not allow Juan to stay in the United States. Voluntary departure allows Juan to leave voluntarily, without the consequences of a removal order. *See* 8 U.S.C. § 1229c (2006); *see also id.* § 1182(a)(9)(A)(ii) (2010) (stating that a noncitizen who has an order of removal is inadmissible for ten years after the date of removal).

Appeals (BIA), a fourteen-member body[25] that sits within EOIR and decides appeals of decisions of immigration judges nationwide.[26] At any point of this process, the Attorney General may vacate an immigration judge's or BIA panel's decision and certify an issue to him- or herself.[27] Once Juan has a final order of removal, issued either by the BIA or the Attorney General, he may appeal to the Circuit Court of Appeals for the federal circuit court in which the immigration judge completed proceedings.[28] On appeal, the attorney arguing against Juan is from the Office of Immigration Litigation (OIL) of the DOJ Civil Division.[29] The federal circuit courts may hear issues of law or constitutional issues in immigration cases, as opposed to pure questions of discretion.[30] In Juan's case, this means that a circuit court will more likely hear whether his offense is a CIMT (a question of law), rather than whether, in the exercise of discretion, he merits relief from removal.[31]

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[25] The BIA is authorized to have up to fifteen members, although there are currently fourteen permanent and three temporary Board members. 8 C.F.R. § 1003.1(a)(1) (2009); *EOIR Fact Sheet: Board of Immigration Appeals Biographical Information*, U.S. DEP'T OF JUST. (April. 2011), http://www.justice.gov/eoir/fs/biabios.htm.

[26] *See* 8 C.F.R. § 1003.1(b). The American Bar Association (ABA) recently addressed the problems inherent in the current system, in which immigration judges and the BIA lack independence because they are located within an executive branch agency responsible for law enforcement; other problems with the system include inefficiency and perceptions that the system is both unfair and that judges lack professionalism. *See* AM. BAR ASS'N, COMM'N ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 43-48 (2010), *available at* http://new.abanet.org/Immigration/PublicDocuments/ReformingtheImmigrationSystemExecutiveSummary.pdf. The ABA proposed a restructuring of the current system, either by converting the judges and BIA into Article I judges or, in the alternative, creating an independent agency to adjudicate immigration cases. *See id.* at 48.

[27] *See* 8 C.F.R. § 1003.1(h)(i).

[28] *See* 8 U.S.C. § 1252(b)(2) (2005).

[29] While DOJ Civil Division attorneys usually are generalists, OIL "focuses exclusively on immigration cases." Margaret Taylor, *Behind the Scenes of* St. Cyr *and* Zadvydas*: Making Policy in the Midst of Litigation*, 16 GEO. IMMIGR. L.J. 271, 293 n.122 (2002); *see also* 28 C.F.R. § 0.45(k) (2008); Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345, 1345-49 (2000) (discussing that some agencies can litigate on their own behalf while others must be represented by the DOJ).

[30] 8 U.S.C. § 1252(a)(2)(B), (D). Scholars have discussed the difficulty of separating issues of law from issues of discretion. *See, e.g.*, Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703 (1997).

[31] *See* 8 U.S.C. § 1252(a)(2)(B), (D).

B. The Categorical Approach

Juan was not convicted under a state statute named "the offense of moral turpitude." How does the immigration judge determine whether the crime of his conviction was a CIMT? The INA does not define CIMT in the same way that it defines, for example, what is an aggravated felony.[32] Judges must rely on precedent decisions by the BIA and federal courts defining the term; for example, convictions involving fraud,[33] theft,[34] and serious bodily injury[35] all have been held to be CIMTs.

Dating back to when "moral turpitude" first appeared in the immigration laws,[36] courts have preferred an elements-based analysis to determine whether an offense involves moral turpitude.[37] This analysis requires a judge to determine the elements of the criminal offense, i.e., the minimum acts that the prosecution must prove beyond reasonable doubt in order for the jury to convict.[38] The judge then considers whether this "minimum conduct" involves moral turpitude.[39] If the minimum conduct does not involve moral turpitude, an adjudicator cannot

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[32] *See, e.g.*, 8 U.S.C. § 1101(a)(43) (2010) (defining twenty-one different categories of offenses that are aggravated felonies); *see also* Abdelqadar v. Gonzales, 413 F.3d 668, 671-72 (7th Cir. 2005) ("'[A]ggravated felony' is a defined term, while 'crime involving moral turpitude' is not."). The term CIMT has been challenged as void for vagueness, but the term withstood that challenge in *Jordan v. DeGeorge*, 341 U.S. 223, 232 (1951).

[33] *See Jordan*, 341 U.S. at 227; *In re* Flores, 17 I. & N. Dec. 225, 228 (B.I.A. 1980).

[34] A theft offense that punishes a defendant for permanently, as opposed to temporarily, depriving the owner of the rights and benefits of ownership is a crime involving moral turpitude. *See In re* D-, 1 I. & N. Dec. 143, 144-45 (B.I.A. 1941).

[35] *See In re* Sejas, 24 I. & N. Dec. 236, 236-37 (B.I.A. 2007); *In re* Fualaau, 21 I. & N. Dec. 475, 477-78 (B.I.A. 1996).

[36] The term "moral turpitude" first appeared in federal immigration law in 1891; the Act of March 3, 1891, excluded from the United States the following persons:

> All idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous or contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also any person whose ticket or passage is paid for with the money of another or who is assisted by others to come, unless it is affirmatively and satisfactorily shown on special inquiry that such person does not belong to one of the foregoing excluded classes . . . .

Act of March 3, 1891, Ch. 551, 26 Stat. 1084 (1891).

[37] *See* United States *ex rel.* Mylius v. Uhl, 210 F. 860, 863 (2d Cir. 1914). For a longer discussion of this elements-based analysis, see Rebecca Sharpless, *Toward a True Elements Test:* Taylor *and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 979-80 (2008).

[38] *See In re* Winship, 397 U.S. 358, 363 (1970).

[39] *See In re* Short, 22 I. & N. Dec. 949, 950 (B.I.A. 1999).

consider the underlying facts that led to the conviction.[40] This approach, commonly called the "categorical approach," later became the method by which immigration judges determined removability for firearms offenses, aggravated felony convictions, and all other criminal grounds of removability.[41]

The elements of a particular offense do not always line up neatly with the elements of the ground of removability.[42] State statutes can be multisectional or disjunctive; often there are elements of the offense that fit within the removability ground and elements that do not. When a noncitizen has been convicted under such a statute, which is called a "divisible" statute, immigration judges consult the record of conviction to determine the nature of the conviction.[43] The record of conviction is limited to the documents upon which the jury relied to convict: the charging document and jury instructions.[44] In the case of a plea, the plea agreement is also part of the record of conviction.[45] Documents such as the police report do not typically form the basis of the facts presented to the jury, but are merely one version of the facts leading to the conviction.[46] Thus, the facts leading up to a conviction—what happened on the street—do not matter to an immigration judge.[47] Using the categorical approach, the judge may only consider the elements of the criminal statute and, if necessary, the documents contained in the record of conviction.[48]

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[40] *See Mylius*, 210 F. at 863.

[41] *See, e.g.*, *In re* Velazquez-Herrera, 24 I. & N. Dec. 503, 513 (B.I.A. 2008) (using categorical approach to determine removability for a crime of child abuse pursuant to 8 U.S.C. § 1227(a)(2)(E)(i)); *In re* Pichardo-Sufren, 21 I. & N. Dec. 330, 334 (B.I.A. 1996) (using categorical approach to determine removability for a firearms offense pursuant to former 8 U.S.C. § 1251(a)(2)(B)(i)); *In re* Alcantar, 20 I. & N. Dec. 801, 810-13 (B.I.A. 1994) (using categorical approach to determine removability for an aggravated felony pursuant to former 8 U.S.C. § 1251(a)(2)(A)(iii)).

[42] *See* Dulal-Whiteway v. Dep't of Homeland Sec., 501 F.3d 116, 128 (2d Cir. 2007), *abrogated by* Nijhawan v. Holder, 129 S. Ct. 2294 (2009).

[43] *See Pichardo-Sufren*, 21 I. & N. Dec. at 334.

[44] *See In re* Milian-Dubon, 25 I. & N. Dec. 197, 199 (B.I.A. 2010).

[45] *See id.* (citing Shepard v. United States, 544 U.S. 13, 16, 26 (2005)).

[46] *See In re* Teixeira, 21 I. & N. Dec. 316, 320 (B.I.A. 1996). This consideration of the record of conviction is commonly called the "modified categorical approach." *See, e.g.*, *Dulal-Whiteway*, 501 F.3d at 122. For the purposes of this article, I will refer to both the categorical and the modified categorical approach collectively as the "categorical approach."

[47] *See In re* Torres-Varela, 23 I. & N. Dec. 78, 84 (B.I.A. 2001) ("The crime must be one that necessarily involves moral turpitude without consideration of the circumstances under which the crime was, in fact, committed.").

[48] The development of the categorical approach in immigration law has been influenced by the categorical approach used in the criminal sentencing context. *See* Taylor v. United States, 495 U.S. 575, 581 (1990) (determining whether a state

Applying the categorical approach, the judge in Juan's case will look at the statute of conviction, larceny. The state in which Juan was convicted has a broad larceny statute, which defines some offenses that involve moral turpitude (permanent takings) and some that do not (temporary takings).[49] The judge then looks at the record of conviction, which includes the charging document and Juan's plea agreement.[50] If these documents do not indicate whether he was convicted for a permanent or temporary taking, Juan is not removable, as the burden is on DHS to prove removability.[51]

C. In re Silva-Trevino*: The New Moral Turpitude Test*

In *Silva-Trevino*, a 2008 decision, Attorney General Mukasey overhauled the categorical approach by creating a new

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burglary conviction was a predicate burglary offense under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), in order to enhance the defendant's sentence for being a "career" criminal; holding that if the statute of prior conviction was broader than the generic burglary statute, the sentencing court only could look to the documents upon which the jury relied to convict, such as the charging paper and jury instructions); *see also Shepard*, 544 U.S. at 19 (applying *Taylor*'s reasoning to prior convictions that were based on plea agreements). Many of the reasons for the use of the categorical approach in immigration cases track the reasons for its use in the criminal sentencing context. Like the sentencing statute, most of the criminal removal grounds are premised on a "conviction." *See Taylor*, 495 U.S. at 600; *Dulal-Whiteway*, 501 F.3d at 125 (reasoning that uses of the word "conviction" in the sentencing and removal contexts are analogous and thus the categorical approach as used in *Taylor* is the appropriate approach for criminal removal cases); *In re* Velazquez-Herrera, 24 I. & N. Dec. 503, 513 (B.I.A. 2008) ("[W]here a ground of deportability is premised on the existence of a 'conviction' . . . the focus of the immigration authorities must be on the crime of which the alien was *convicted*, to the exclusion of any other criminal or morally reprehensible acts he may have *committed*."). In addition, immigration judges, like sentencing judges, do not have time to retry a prior conviction. *See Taylor*, 495 U.S. at 601 ("[T]he practical difficulties and potential unfairness of a factual approach are daunting."); *Pichardo-Sufren*, 21 I. & N. Dec. at 335; *see also infra* notes 208-11 and accompanying text. However, unlike the criminal sentencing context, the use of the categorical approach in removal proceedings is not mandated by the Sixth Amendment, as there is no right to a jury trial in removal proceedings. *See Shepard*, 544 U.S. at 24 (citing Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)) (reasoning that a sentencing judge's factual inquiry into the underlying offense would raise Sixth Amendment concerns, since any fact other than a prior conviction that raises the limit of a possible sentence must be found by a jury, not a judge, in the absence of a defendant's waiver of such rights); Ali v. Mukasey, 521 F.3d 737, 741 (7th Cir. 2008). Also, the burdens of proof do not line up in criminal and removal cases; in a criminal case, the prosecution must prove every element "beyond reasonable doubt," whereas in a removal case, the government must prove every element of a removal ground by "clear and convincing evidence." *See* 8 U.S.C. § 1229a(c)(3)(A) (2006); Nijhawan v. Holder, 129 S. Ct. 2294, 2303 (2009).

[49] *See In re* D-, 1 I. & N. Dec. 143, 144-45 (B.I.A. 1941) (holding that theft with intent to steal is a CIMT, whereas theft with intent to deprive the owner of his rights for a temporary period is not a CIMT).

[50] *See In re* Milian-Dubon, 25 I. & N. Dec. 197, 199 (B.I.A. 2010) (citations omitted).

[51] *See* 8 U.S.C. § 1229a(c)(3)(A).

three-part test to determine whether an offense is a CIMT.[52] In the first step, an immigration judge "must determine whether there is a 'realistic probability, not a theoretical possibility,'" that the statute under which the noncitizen was convicted reaches "conduct that does not involve moral turpitude."[53] In the second step, if the statute is divisible, judges must use the traditional categorical approach, looking to the record of conviction to determine whether the offense involved moral turpitude.[54] The third step is where the Attorney General significantly broke with the traditional categorical approach: "When the record of conviction is inconclusive, judges may, to the extent they deem necessary and appropriate, consider evidence beyond the formal record of conviction."[55]

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[52] *See In re* Silva-Trevino, 24 I. & N. Dec. 687, 689-704 (Att'y Gen. 2008).

[53] *Id*. at 689-90 (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)). The Attorney General stated, "Imagination is not . . . the appropriate standard under the framework set forth in this opinion. Instead, the question is whether there is a 'realistic probability, not a theoretical possibility,' that the . . . statute would be applied to reach conduct that does not involve moral turpitude." *Id.* at 708 (quoting *Duenas-Alvarez*, 549 U.S. at 193). The "realistic probability" test requires respondents to cite actual (not hypothetical) cases in which the relevant criminal statute is applied to conduct that does not involve moral turpitude. *See In re* Loussaint, 24 I. & N. Dec. 754, 757 (B.I.A. 2009) (citing *Silva-Trevino*, 24 I. & N. Dec. at 698). This new approach shifts the burden to respondents to produce a case in which nonturpitudinous conduct was actually punished by the statute, a task that can be extremely difficult since many criminal statutes are enforced through plea agreements that never produce a published, written decision. *See, e.g.*, Nunez v. Holder, 594 F.3d 1124, 1138 n.10 (9th Cir. 2010) (holding that under the realistic probability test, a respondent can use unpublished cases interpreting the statute of conviction to prove that the statute punishes nonturpitudinous conduct); Jean-Louis v. Attorney General, 582 F.3d 462, 482 (3d Cir. 2009) (reasoning that the realistic probability test appears to shift the burden from the government, who must prove removability pursuant to 8 U.S.C. § 1229a(c)(3), to the respondent, who must prove that nonturpitudinous conduct is actually punished under the statute of conviction); Norton Tooby & Dan Kesselbrenner, *Living With* Silva-Trevino 8-11, NAT'L IMMIGR. PROJECT (2009), *available at* http://nationalimmigrationproject.org/legalresources/cd_pa_Living%20With%20Silva-Trevino%20-%202009.pdf (arguing that the realistic probability test impermissibly places the burden of proof on the respondent to find cases interpreting the statute of conviction to prove that the statute punishes nonturpitudinous conduct and discussing cases in which circuit courts have interpreted the realistic probability test).

[54] *Silva-Trevino*, 24 I. & N. Dec. at 690.

[55] *Id.* Step three of the new CIMT analysis was foreshadowed by two 2007 BIA decisions in which the BIA started to reject the categorical approach, allowing judges to peer behind the record of conviction and engage in a factual, not categorical, inquiry. *See In re* Gertsenshteyn, 24 I. & N. Dec. 111, 115-16 (B.I.A. 2007) (creating a bifurcated approach for analyzing prostitution aggravated felony offenses under 8 U.S.C. § 1101(a)(43)(K)(ii), which requires judges to use the categorical approach to determine whether the offense involves prostitution, but permits judges to use a factual inquiry to determine whether the offense was committed for "commercial advantage"); *see also In re* Babaisakov, 24 I. & N. Dec. 306, 322 (B.I.A. 2007) (applying the bifurcated approach to another aggravated felony ground, 8 U.S.C. § 1101(a)(43)(M)(i), and holding that judges should use the categorical approach to

The Attorney General wrote a detailed opinion describing the reasons for overhauling the categorical approach in the CIMT context.[56] He first pointed to some ambiguity in the INA,[57] which would allow the agency to command deference in this new analysis.[58] The Attorney General next discussed a "patchwork" of circuit court decisions on the use of the categorical approach; in the name of the uniform application of immigration law, he wished to create one approach to the CIMT analysis with his decision in *Silva-Trevino*.[59] The Attorney General also concluded that the categorical approach can be underinclusive, since some noncitizens who committed offenses that actually involved moral turpitude would be free from removal if they were convicted under a broad statute, or overinclusive, since some courts consider the "general nature" of the crime and its classification in "common usage."[60]

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determine whether the offense involves fraud, but may use a factual inquiry to determine whether the loss to the victim exceeded $10,000). In *Nijhawan v. Holder*, the Supreme Court applied the bifurcated approach for analyzing fraud aggravated felony offenses under 8 U.S.C. § 1101(a)(43)(M)(i); the Court held that judges would use the categorical approach to determine whether the offense involves fraud, but may use a factual inquiry to determine the loss to the victim. *See* 129 S. Ct. 2294, 2301-02 (2009).

[56] *See Silva-Trevino*, 24 I. & N. Dec. at 688-704.

[57] *See id.* at 693. For example, two deportation statutes use the phrase "convicted of" a CIMT, which would indicate Congressional preference for the categorical approach; however, one inadmissibility statute uses the phrase "committing" a CIMT. *See id.* (citing 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i), (ii)); *see also In re* Velazquez-Herrera, 24 I. & N. Dec. 503, 513 (B.I.A. 2008) (reasoning that where a ground of removability is based on the existence of a conviction for a particular offense, "the focus of the immigration authorities must be on the crime of which the alien was *convicted*, to the exclusion of any other criminal or morally reprehensible acts he may have *committed*"). He also highlighted the use of the word "involving" in the phrase "crime involving moral turpitude" to indicate a Congressional preference for a factual inquiry. *See Silva-Trevino*, 24 I. & N. Dec. at 693 ("[Congress] said that deportation was the consequence when the crime involved moral turpitude, and I can only assume that it meant when moral turpitude *was in fact involved*." (quoting Marciano v. INS, 450 F.2d 1022, 1028 (8th Cir. 1971) (Eisele, J., dissenting) (emphasis added))).

[58] *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981-82 (2005) (giving *Chevron* deference to an agency's statutory interpretation even though it conflicts with prior agency and circuit court interpretations).

[59] *See Silva-Trevino*, 24 I. & N. Dec. at 694; *infra* note 317.

[60] The Attorney General, citing the dissenting opinion in *Marciano*, highlighted the potential for the categorical approach to yield over- or underinclusive determinations:

> I cannot believe that Congress intended for [persons who have actually committed crimes involving moral turpitude] to be allowed to remain simply because there might have been no moral turpitude in the commission by other individuals (real or hypothetical) of crimes described by the wording of the same statute under an identical indictment . . . . [However,] [t]he statute says deportation shall follow when the crime committed involves moral turpitude, not when that type of crime "commonly" or "usually" does.

The Attorney General discussed a major argument in favor of the categorical approach, that of administrative efficiency.[61] He reasoned that "administrative efficiency . . . is 'secondary to the determination and enforcement of' statutory language and 'obvious legislative intent.'"[62] He disagreed with the BIA's prior reasoning that permitting inquiry beyond the record of conviction would provide "no clear stopping point" to re-litigation of past crimes.[63] He stated that his new approach "is not an invitation to relitigate the conviction itself;"[64] however, he provided little guidance to judges on how to determine whether an offense involved moral turpitude if the statute is divisible. He merely stated, "[A] hierarchy of evidence certainly may be appropriate to ensure administrative workability and to avoid engaging in a retrial of the alien's prior crime."[65]

Of note was the Attorney General's decision-making process. The opinion in *Silva-Trevino* was the result of a secret process in which he certified the decision to himself without indicating to the parties that he was considering overhauling the categorical approach.[66] In Mr. Silva-Trevino's case, the BIA had decided that his offense was not a CIMT and remanded the case to the immigration judge to hold a hearing on relief from removal.[67] The BIA's decision did not question established precedent on the categorical approach or the standard for determining whether a crime involves moral turpitude.[68] One year later, Mr. Silva-Trevino's lawyer was informed by the BIA

Silva-Trevino, 24 I. & N. Dec. at 695 (quoting *Marciano*, 450 F.2d at 1027-28 (Eisele, J., dissenting)).

[61] *See id.* at 702; *infra* notes 208-11. The Attorney General also discussed why the categorical approach as used in the sentencing context was not a good fit for immigration cases. First, he reasoned that "moral turpitude" is never an element of a noncitizen's prior offense; while it is "simple" for a sentencing court employing the categorical approach to search for the necessary elements in the statute of conviction for the prior offense, an immigration court never will find "moral turpitude" listed in the elements of the statute. *Silva-Trevino*, 24 I. & N. Dec. at 700-01. The Attorney General also reasoned that the Sixth Amendment does not apply to removal cases, so the constitutional concern arising in sentencing cases does not mandate the categorical approach in immigration cases. *See id.* at 701.

[62] *Id.* at 702 (quoting *Marciano*, 450 F.2d at 1029 (Eisele, J., dissenting)).

[63] *Id.* (quoting *In re* Pichardo-Sufren, 21 I. & N. Dec. 330, 336 (B.I.A. 1996)).

[64] *Id*. at 703.

[65] *Id.*

[66] *See* Memorandum of Law of *Amici Curiae* American Immigration Lawyers Association et al. in Support of Reconsideration 1, 5-6, *In re* Silva-Trevino, 24 I. & N. Dec. 687 (Att'y Gen. 2008) (No. A013 014 303) [hereinafter Reconsideration Memo], *available at* http://www.aila.org/content/default.aspx?docid=27391.

[67] *Silva-Trevino*, 24 I. & N. Dec. at 692.

[68] Reconsideration Memo, *supra* note 66, at 5 (citing B.I.A. Op. dated Aug. 8, 2006).

that the Attorney General had certified the case to himself.[69] The notice did not identify the issues that the Attorney General would consider; nor did it "define the scope of his review, . . . provide a briefing schedule, or . . . apprise counsel of the applicable briefing procedure."[70] Mr. Silva-Trevino's attorney attempted to inquire about the reason for referral to the Attorney General, but received no response.[71] Because the certification order was not made public, stakeholders—immigrants' rights organizations, immigration judges, ICE, and many others—were not given the opportunity to give input on this drastic change to immigration law.[72]

The Attorney General decided *Silva-Trevino* on November 7, 2008, days after the election results determined that a new administration would gain control of the DOJ.[73] On November 19, 2008, the decision was first made public and therefore binding on all future parties.[74] Three days later, Mr. Silva-Trevino's lawyer received a faxed copy of the decision.[75] He filed a motion to reconsider, which included a lengthy amicus brief signed by several immigrants' rights organizations, on December 5, 2008.[76] In a one-paragraph order dated January 15, 2009, (two business days before the Bush administration left office), Attorney General Mukasey denied the motion for reconsideration, stating:

> Having reviewed the motion and supporting materials, including briefs submitted by various nonprofit organizations as *amici curiae*, I find no basis for reconsideration of the decision. Among other things, this matter was properly certified and decided in accordance with settled Department of Justice procedures, and there is no entitlement to briefing when a matter is certified for Attorney General review.[77]

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[69] *Id.* Title 8 of the C.F.R. § 1003.1(h)(i) gives the Attorney General authority to review any decision by the BIA.

[70] Jean-Louis v. Attorney General, 582 F.3d 462, 470-71 n.11 (3d Cir. 2009); Reconsideration Memo, *supra* note 66, at 1, 5-6.

[71] Reconsideration Memo, *supra* note 66, at 6.

[72] *See Jean-Louis*, 582 F.3d at 470-71 n.11; Reconsideration Memo, *supra* note 66, at 6.

[73] *See In re* Silva-Trevino, 24 I. & N. Dec. 687 (Att'y Gen. 2008).

[74] Reconsideration Memo, *supra* note 66, at 6; 8 C.F.R. § 1003.1(g) (2010).

[75] Reconsideration Memo, *supra* note 66, at 6.

[76] *See generally id.*

[77] Att'y Gen. Order No. 3034-2009 (Jan. 15, 2009) (order denying motion for reconsideration), *available at* http://bibdaily.com/pdfs/Silva%20Trevino%20recon%20denied%201-15-09.pdf.

Attorney General Mukasey, on his way out of office, thus introduced and affirmed a new moral turpitude test in immigration law. Immigration judges, the BIA, and federal courts were left with the task of implementing the new test.

II. MANY TYPES OF DEFERENCE

Immigration judges, the BIA, and federal courts now must grapple with *Silva-Trevino*'s new moral turpitude test. An outstanding question is, if the test were challenged in court, whether the Attorney General's decision should command deference by courts under *Chevron*.[78] This section examines different types of deference in administrative law and discusses how such deference relates to the type of agency action at issue.

A. From Skidmore *to* Chevron *Deference*

Soon after the New Deal's "watershed period in the creation of new federal administrative agencies,"[79] courts agreed that Congress could delegate law-making power to agencies.[80] Courts then had to decide who should have the final

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[78] Only one circuit court, the Third Circuit, has examined this question in any detail; this decision is discussed in Part IV, *infra*. *See* Jean-Louis v. Attorney General, 582 F.3d 462 (3d Cir. 2009). The Eighth Circuit, without significant discussion, refused to apply *Silva-Trevino* because it conflicted with the court's precedent. *See* Guardado-Garcia v. Holder, 615 F.3d 900, 902-03 (8th Cir. 2010). The Seventh Circuit, without discussion, held that it would defer to *Silva-Trevino* and remanded for the agency to apply the *Silva-Trevino* test in the first instance. *See* Mata-Guerrero v. Holder, 627 F.3d 256, 261 (7th Cir. 2010). The Ninth Circuit declined to consider a challenge to the retroactive application of the *Silva-Trevino* framework; the court remanded the case because the petitioner's hearing did not comport with due process. *See* Castruita-Gomez v. Holder, 394 F. App'x 421, 422-23 (9th Cir. 2010). The Ninth Circuit declined to consider another challenge to the *Silva-Trevino* framework; the court granted the government's motion to remand the case to the BIA "in order to more fully articulate its analysis in a manner consistent with the multi-step approach set forth in *Matter of Silva-Trevino*." Order, Zamudio-Ramirez v. Holder, No. 09-71083 (Apr. 13, 2010). In both Ninth Circuit cases, immigrants' rights organizations filed *amicus* briefs highlighting the various problems with the Attorney General's decision. *See* Brief of *Amici Curiae* Immigrant Defense Project et al., *Castruita-Gomez*, 394 F. App'x 421 (9th Cir. 2010) (No. 06-74582) [hereinafter Castruita-Gomez *Amicus* Brief], *available at* http://www.immigrantdefenseproject.org/webPages/other.htm; Brief of *Amici Curiae* Immigrant Defense Project et al., Zamudio-Ramirez v. Holder, No. 09-71083 (9th Cir. Mar. 12, 2010) [hereinafter Zamudio-Ramirez *Amicus* Brief], *available at* http://www.immigrantdefenseproject.org/webPages/other.htm.

[79] JERRY L. MASHAW, RICHARD A. MERRILL & PETER M. SHANE, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM, CASES AND MATERIALS 5 (6th ed. 2009).

[80] *See* Yakus v. United States, 321 U.S. 414, 423-26 (1944) (upholding Congressional delegation of authority to set prices during wartime, which was implemented by the Office of Price Administration); *see also* Cass R. Sunstein,

say in the interpretation of statutes that delegated such law-making power to the agencies: courts or the agencies themselves. The Supreme Court initially decided that courts would give a light amount of deference to the agency because of its technical expertise in the subject matter.[81] In *Skidmore v. Swift & Co.*,[82] the Supreme Court in 1944 described a certain level of deference that was due to agency decisions:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act [Fair Labor Standards Act], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[83]

The Supreme Court thus decided that the agency's technical expertise and manner in which it decided an issue of statutory interpretation gave it the "power to persuade" a court.[84] Over the course of forty years, however, the Court changed its opinion on just how persuasive an agency's interpretation was.

In its 1984 decision, *Chevron, U.S.A., Inc. v. NRDC*,[85] the Supreme Court held that a reviewing court should defer to the agency's reasonable interpretation of an ambiguous term that appears in the statute the agency was charged to administer.[86] The Court held,

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Constitutionalism After the New Deal, 101 HARV. L. REV. 421, 447 (1987) (discussing *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), which invalidated the National Industrial Recovery Act as an unconstitutional delegation of law-making power, and stating that "[t]he constitutional assault eventually disintegrated in the face of prolonged and persistent popular support of regulatory administration").

[81] Professor Colin Diver discusses different forms of deference that courts may give to agency decisions. *See* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 565-66 (1985). He argues that under one interpretation of *Skidmore v. Swift*, 323 U.S. 134 (1944), courts should give no more than "courteous regard" to agency decisions. *See id.* at 565.

[82] 323 U.S. 134 (1944).

[83] *Id.* at 140.

[84] *Id.*; *see also* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 13 (1990) [hereinafter Anthony, *Agency Interpretations*] (referring to this analysis as "*Skidmore* consideration," under which "the agency interpretation is a substantial input and counts for something . . . [b]ut the authoritative act of interpretation remains with the court").

[85] 467 U.S. 837 (1984).

[86] *Id.* at 843-44.

> [i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.[87]

In what is famously known as the *Chevron* two-step analysis,[88] first a reviewing court, "employing traditional tools of statutory construction,"[89] determines whether the statute is ambiguous. If the statute is clear, the court gives effect to that meaning.[90] If the statute is ambiguous, the court defers to the agency's interpretation, so long as it is reasonable.[91] In determining whether a given interpretation is reasonable, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."[92]

The Court justified the rule by reasoning that the agency's expertise surpassed that of a court when the question involved a technically complex issue.[93] Issues that agencies regulate also involve competing interests from several parties; the Court reasoned that Congress may not have desired to wade into the fray and preferred to delegate the question to the more expert agency.[94] If Congress used ambiguous terms, even if "unable to

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[87] *Id.*

[88] *See* Sunstein, Chevron *Step Zero*, *supra* note 5, at 190. Scholars have debated how many steps *Chevron* has. *See, e.g.*, Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611 (2009); *but see* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009).

[89] *Chevron*, 467 U.S. at 843 n.9. Scholars have discussed what the "traditional tools of statutory construction" are. *See, e.g.*, Kenneth Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 75-78 (2008).

[90] *Chevron*, 467 U.S. at 842-43.

[91] *Id.* at 844.

[92] *Id.* at 843 n.11.

[93] *Id.* at 865. "The leading [normative] theory for *Chevron* is that agencies have greater policy expertise than courts." Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2135 (2002). Professor Cass Sunstein cites this theory's roots in legal realism: "Perhaps the two-step inquiry is based on a healthy recognition that in the face of ambiguity, agency decisions must rest on judgments of value, and those judgments should be made by political rather than judicial institutions." Sunstein, Chevron *Step Zero*, *supra* note 5, at 197. However, Professor Elhauge writes that the "the legal realists' hope that legal ambiguities could be resolved by objective policy expertise has long ago grown quaint." Elhauge, *supra*, at 2135. This is because expertise cannot resolve which statutory interpretation has the "best" policy implications; also, "[i]n practice, it is rare to find a field of social policy where there are no experts on opposing sides of an issue, each retained by a rival camp, undermining any claim to an objective expert resolution." *Id.*

[94] *Chevron*, 467 U.S. at 865 ("Perhaps [Congress] consciously desired the [agency] to strike the balance at this level, thinking that those with great[er] expertise

forge a coalition on either side of the question,"[95] it could satisfy all constituents by simply deflecting the details to the agency.[96]

Chevron greatly expanded the level of deference that a court would give to an agency's interpretation of a statute,[97] creating a significant break from *Skidmore*.[98] Although praised for the clear line that it drew for courts reviewing agency action,[99]

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and charged with responsibility for administering the provision would be in a better position to do so.").

[95] *Id.*

[96] Scholars cite the political justifications for the *Chevron* doctrine, explaining why Congress delegates interpretive authority to the agency. *See, e.g.*, Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 566-71 (2009) [hereinafter Bressman, Chevron*'s Mistake*]. Professor Bressman describes that under a positive political theory, Congress is composed of members who wish to spend time on activities that improve their re-election chances; members lack both time and expertise to devote to technically complex issues, so they delegate them to agencies. *Id.* at 566-67 (citing David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 962-67 (1999)). Congress never has time to develop the expertise needed; moreover, Congress cannot efficiently convert any expertise directly into law because all decisions made by legislative committees must pass through the floor, which works as a policy middle man that can alter legislation. *Id.* at 567 (citing Epstein & O'Halloran, *supra* note 96, at 967). Agencies, on the other hand, are not hampered by this process and their rulings can become law directly. *Id.* She cites Congress' desire to "write just enough policy to receive a positive response for its actions, while deflecting any negative attention for the burdensome details to the agency." *Id.* at 568. In addition, "Congress may choose . . . ambiguous words to obtain consensus," since both parties can claim a victory and then later influence agency decision makers to support their own legislative agendas when sorting out the details. *Id.* at 571. "By choosing words that 'mean all things to all people,' Congress can obtain the requisite support to enact a bill while preserving opportunities to recommence the battle at another time and in another place." *Id.* at 571-72 (citing and quoting Robert A. Katzmann, *The American Legislative Process as a Signal*, 9 J. PUB. POL'Y 287, 290 (1989)); *see also* Elhauge, *supra* note 93, at 2127 (interpreting *Chevron* as a default rule that constrains judges to maximize political preference satisfaction because "[t]he policy views that govern actions of agency heads . . . generally come about as close to an accurate barometer of current political preferences as courts can get").

[97] Professor Sunstein states that "shortly after it appeared, *Chevron* was quickly taken to establish a new approach to judicial review of agency interpretations of law, going so far as to create a kind of counter-*Marbury* for the administrative state." Sunstein, Chevron *Step Zero*, *supra* note 5, at 188-89; *cf.* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[98] *See* Merrill & Hickman, *supra* note 5, at 853-56; *see also* Christensen v. Harris Cnty., 529 U.S. 576, 589 (2000) (Scalia, J., concurring in part and concurring in judgment) (citations omitted) ("*Skidmore* deference to authoritative agency views is an anachronism, dating from an era in which we declined to give agency interpretations (including interpretive regulations, as opposed to 'legislative rules') authoritative effect . . . . That era came to an end with our watershed decision in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*").

[99] *See, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512 (1989).

Chevron left many questions unanswered in administrative law.[100] One such unanswered question was how the agency's use of procedures affects a reviewing court's deference.

B. United States v. Mead Corporation: *Deference Tailored to the Agency's Procedures*

The Supreme Court has determined that an agency has a great deal of discretion in determining the type of procedure to employ when it sets policy.[101] However, in *United States v. Mead Corporation*,[102] the Supreme Court in 2001 held that an agency's choice of procedures affect whether that decision will command *Chevron* deference.

An agency can make a decision through a spectrum of formal and informal procedures.[103] On one end of the spectrum is notice-and-comment rulemaking.[104] Courts have interpreted

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[100] *See* Merrill & Hickman, *supra* note 5, at 840-52 (discussing fourteen questions left unresolved by *Chevron* and four decisions in which Court attempted to answer some of the unresolved questions).

[101] SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) (*Chenery II*); *see also* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 765-66 (1969) (plurality opinion) (refusing to compel agency to establish law through rulemaking process before applying it in adjudication); NLRB v. Bell Aerospace, 416 U.S. 267, 294-95 (1974) (holding that a reviewing court only will examine the agency's choice of procedures under the "abuse of discretion" standard). The Supreme Court in *Chenery II* stated: "To insist upon one form of action to the exclusion of the other is to exalt form over necessity." *Chenery II*, 332 U.S. at 202. However, the Court expressed a preference for rulemaking: "[t]he function of filling in the interstices of the [statute] should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future." *Id.* The Court recognized that adjudication often may be necessary to set policy because "[p]roblems may arise in a case which the administrative agency could not reasonably foresee," or "the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule," or even that "the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule." *Id.* at 202-03.

[102] 533 U.S. 218 (2001).

[103] Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1449 (2005) [hereinafter Bressman, *How* Mead *Has Muddled*] ("All procedures are not created equal."). Not all agencies have the authority to engage in a range of policy-making tools; Congress determines which types of policy-making tools an agency can use. *See, e.g.*, M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1386-90 (2004).

[104] In this article, I refer to informal rulemaking as "notice-and-comment rulemaking" or "rulemaking." Informal rulemaking is governed by 5 U.S.C. § 553. The term "informal" distinguishes this form of rulemaking from formal rulemaking, which requires an oral hearing complete with procedural requirements. Congress directs agencies as to which form of rulemaking to employ; when the statute requires rules to be made "on the record after opportunity for an agency hearing," the agency should engage in formal rulemaking, governed by 5 U.S.C. §§ 553, 556 and 557. *See* 5 U.S.C. § 553(c) (2008). Because agencies utilize informal rulemaking more often than formal rulemaking, in this article, I discuss informal rulemaking as one end of the "process"

the notice-and-comment rulemaking provisions of the Administrative Procedure Act (APA) in such a way that these procedures have "come to resemble an elaborate 'paper hearing.'"[105] An agency must provide supporting documentation with the notice of proposed rulemaking, respond in detail to all substantial comments, and proffer a lengthy justification for the final rule, including explanations of why it rejected alternatives.[106] As one scholar states, "notice-and-comment rulemaking fosters logical and thorough consideration of policy . . . [and] promotes predictability . . ., [a]t a minimum, it allows affected parties, who participate in the formulation of a rule, to anticipate the rule and plan accordingly."[107]

Adjudications fall somewhere in the middle of this spectrum.[108] They provide important procedural protections to individual litigants, as they result from a detailed trial-like gathering of evidence by the agency.[109] While normally binding only on the parties to that proceeding, many orders operate as precedent, which will bind future parties.[110] Compared to

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spectrum. *See* MASHAW, MERRILL & SHANE, *supra* note 79, at 507-10 (discussing statutes that require formal rulemaking, many of which were enacted prior to the APA); *see also id.* at 509-10 (discussing cases in which agencies abandoned programs because statutes mandating formal rulemaking made implementation of a new policy "virtually impossible").

[105] Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 553 (2006); Magill, *supra* note 103, at 1390-91 ("[T]oday, promulgating an important legislative rule is a labor-intensive enterprise. While there are many reasons for this, it is unquestionably due in part to judicially imposed requirements that an agency must follow if it expects to survive a challenge to its action in court . . . .").

[106] *See* Stephenson, *supra* note 105, at 553-54 (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); La. Fed. Land Bank Ass'n v. Farm Credit Admin., 336 F.3d 1075, 1080-81 (D.C. Cir. 2003); Conn. Light & Power Co. v. Nuclear Regulatory Comm'n, 673 F.2d 525, 530-32 (D.C. Cir. 1982)).

[107] Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 542 (2003) [hereinafter Bressman, *Beyond Accountability*].

[108] *See id.*

[109] *See* Magill, *supra* note 103, at 1391. There are two types of adjudications, formal and informal. Formal adjudications, which are governed by 5 U.S.C. §§ 554, 556, and 557, are mandated when the statute requires a hearing to be "on the record after opportunity for an agency hearing." These are trial-type procedures, which include requirements that the parties be given notice of the "matters of fact and law asserted," § 554(b)(3), an opportunity for "the submission and consideration of facts [and] arguments," § 554(c)(1), and an opportunity to submit "proposed findings and conclusions" or "exceptions," § 557(c)(1), (2). Informal adjudications, the basic requirements of which are set forth in § 555, do not mandate such procedures. *See* 5 U.S.C. § 555 (2010).

[110] *See* Bressman, *Beyond Accountability*, *supra* note 107, at 542 (noting that the National Labor Relations Board (NLRB) frequently uses adjudication as a policy-

rulemaking, adjudications as policy-making tools for agencies do not provide opportunity for input to the same extent because they involve only a limited class of persons.[111] Adjudications also may not be able to issue broad pronouncements in the same way as rulemaking because they are tailored to the facts of an individual litigant's case, which may lead to bad facts making bad law.[112] Additionally, adjudications create retroactive rules because the agency applies the new policy to the individual whose case is before it.[113]

On the other end of the spectrum are procedures such as guidance documents, policy statements, and interpretive rules.[114] This guidance can appear in manuals used by agency personnel, private letter rulings, advice given over the phone, and public notices such as press releases or congressional testimony.[115] While these procedures assure virtually no public input or deliberation and do not have binding effect, they are

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making tool); Magill, *supra* note 103, at 1385 (noting that the NLRB and the Federal Trade Commission largely make policy by adjudicating individual cases, whereas the Federal Communications Commission does so by promulgating legislative rules); *see also* Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693, 695 (2005) ("Even though most agencies possess general policymaking processes, administrative adjudications remain a critical part of administrative policymaking.").

[111] *See* Bressman, *Beyond Accountability*, *supra* note 107, at 542; Magill, *supra* note 103, at 1391, 1396. In his dissenting opinion in *Wyman-Gordon*, Justice Douglas praised the value of rule-making procedures for its facilitation of input from the public:

> Agencies discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice . . . . Public airing of problems through rulemaking makes the bureaucracy more responsive to public needs and is an important brake on the growth of absolutism in the regime that now governs all of us.

NLRB v. Wyman-Gordon Co., 394 U.S. 759, 777-78 (1969) (Douglas, J., dissenting).

[112] *See* Bressman, *Beyond Accountability*, *supra* note 107, at 542; Magill, *supra* note 103, at 1396.

[113] *See* Bressman, *Beyond Accountability*, *supra* note 107, at 542. *But see* Magill, *supra* note 103, at 1435 (noting an example in which courts required the NLRB to apply a new policy announced in adjudication prospectively only).

[114] Interpretive rules explain a statute or regulation; they are interpretations of already-existing legal norms and therefore do not have legal effects on private parties. *See* Magill, *supra* note 103, at 1386, 1412.

[115] *Id.* at 1391. Professor Magill states the purposes for such guidance:

> Some of these instruments are designed to control the discretion of the agency's front-line bureaucrats, some to advise regulated parties how to comply with regulatory requirements or how the agency will exercise its enforcement discretion, and others to advance the agency's position about its authority with respect to a one-time but important controversy.

Id. at 1391-92.

less costly and more efficient for an agency.[116] Which procedure should an agency choose to make policy? How does the choice of procedures interface with the *Chevron* doctrine?

In *Mead*, the Court examined a Customs Service tariff ruling letter, which set tariff classifications for particular imports.[117] The ruling letters represented the official position of the Customs Service with respect to the particular transaction, yet were subject to modification or revocation without notice to any person other than the person to whom the letter was addressed.[118] The regulations governing such letters provided that they were binding only on the party to that transaction: "no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter."[119] The ruling letters were not subject to notice and comment before being issued and generally could be modified without notice and comment.[120] They did not need to be published; they needed only to be made "available for public inspection."[121] Any of the forty-six port-of-entry Customs offices or the Customs Headquarters Office could issue such ruling letters.[122] Additionally, most ruling letters contained little or no reasoning, although the letter at issue in the case set out its rationale in some detail.[123]

Discussing whether *Chevron* deference should be given to such ruling letters, the Court held that an agency interpretation merits *Chevron* deference "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[124] The Court reasoned that Congress can explicitly or implicitly delegate legislative power to an agency to fill in the details of a statutory ambiguity,[125] and that express authorization to engage in the process of rulemaking or adjudication is a "very good indicator of delegation meriting

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[116] *See id.*

[117] United States v. Mead Corp., 533 U.S. 218, 222, 224-25 (2001).

[118] *Id.* at 222-23 (citing 19 C.F.R. §§ 177.9(a), (c) (2000)).

[119] *Id.* at 223 (quoting 19 C.F.R. § 177.9(c)).

[120] *Id.* (citing 19 U.S.C. § 1625(a) (1996); 19 C.F.R. § 177.10(c)).

[121] *Id.* (quoting 19 U.S.C. § 1625(a)).

[122] *Id.* at 224 (citing 19 C.F.R. § 177.11(a)).

[123] *Id.*

[124] *Id.* at 226-27.

[125] *Id.* at 229.

Chevron treatment."[126] Linking *Chevron* deference to formal procedures, the Court held, "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."[127] The Court noted that the overwhelming majority of cases applying *Chevron* deference involved review of the fruits of notice-and-comment rulemaking or formal adjudication, yet acknowledged that it sometimes accorded *Chevron* deference to agency decisions without such administrative formality.[128]

The Court refused *Chevron* deference to the rulings letter at issue in *Mead* because such letters were "best treated like 'interpretations contained in policy statements, agency manuals, and enforcement guidelines.'"[129] Therefore, the letters lacked the "force of law."[130] The Court did not, however, entirely disregard the agency's interpretation and conduct a de novo review of the legal question. Rather, the Court reverted to its pre-*Chevron* level of deference under *Skidmore*, which gave some, but not automatic, deference to an agency's decision.[131] The Court recognized the myriad of administrative statutes and reasoned that there is more than one variety of judicial deference.[132] The Court thus remanded the case for consideration of whether the agency's decision was due some deference because of its specialized knowledge.[133]

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[126] *Id.*

[127] *Id.* at 230.

[128] *Id.* at 230-31.

[129] *Id.* at 234 (quoting Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000)).

[130] *Id.*

[131] *Id.* (citing Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944)).

[132] *Id.* at 236.

[133] *Id.* at 235, 239. *Mead* was not the first time the Court opined about the level of *Chevron* deference to be given to administrative procedures that were less formal than notice-and-comment rulemaking. In *Christensen*, the Court considered whether the Fair Labor Standards Act (FLSA) prohibited a State or subdivision thereof from compelling employees to utilize accrued compensatory time in lieu of paying it out to the employees. *Christensen*, 529 U.S. at 580-81. The county had written to the U.S. Department of Labor's Wage and Hour Division, who wrote an opinion letter interpreting the FLSA and regulations to preclude the county from compelling such use of compensatory time. *Id.* The Court rejected the petitioners' claim that the county violated the FLSA, reasoning that the petitioners' reading of the statute, the reading shared by the Department of Labor in its opinion letter, was "backwards." *Id.* at 588. In its discussion of whether the Department of Labor's opinion letter merited *Chevron* deference, the Court stated:

> Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-

The Supreme Court in *Mead* did not set a hard-and-fast rule that only agency interpretations resulting from formal notice-and-comment rulemaking deserved *Chevron* deference. In fact, two years after the *Mead* decision, the Court rejected an argument that only agency interpretations resulting from notice-and-comment rulemaking merited *Chevron* deference.[134] This failure to set a clear rule is one of scholars' criticisms of the decision.[135] *Mead* has been both praised and disparaged; its meaning has been the topic of much scholarship following the decision.

C. Exploring Chevron *Step Zero*

Scholars and courts alike have pondered the meaning of the *Mead*[136] and, particularly, the threshold question of

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> comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference . . . . Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in *Skidmore v. Swift & Co.*, but only to the extent that those interpretations have the "power to persuade."

Id. at 587 (quoting *Skidmore*, 323 U.S. at 140).

[134] *See* Barnhart v. Walton, 535 U.S. 212 (2002). In *Barnhart*, at issue was the Social Security Administration's interpretation of the meaning of "disability." *Id.* at 214. The agency had recently, "perhaps in response to this litigation," promulgated regulations to answer the question at issue in the case. The Court deferred to the agency's reasonable interpretation, partly because it was issued through notice-and-comment rulemaking, but also because it was a long-standing interpretation, which the agency had previously expressed through less formal procedures. *Id.* at 221. The Court stated, "the fact that the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due." *Id.* (citation omitted).

[135] *See, e.g.*, Bressman, *How* Mead *Has Muddled*, *supra* note 103, at 1475; Sunstein, Chevron *Step Zero*, *supra* note 5, at 193. Several scholars argue that the Court "wanted to regain the interpretive power that courts lost to *Chevron* by increasing the hurdles that agencies face under *Chevron*." Bressman, *How* Mead *Has Muddled*, *supra* note 103, at 1482. In this sense, *Mead* is seen as a power grab by courts. *See* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 225 (2001) (hypothesizing that the *Mead* Court's rhetoric about congressional intent may be to "cloak judicial aggrandizement"); Ronald J. Krotoszynski, Jr., *Why Deference? Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 751 (2002) (arguing that *Mead* "represents a naked power grab by the federal courts"); *see also* Elhauge, *supra* note 93, at 2157 n.463 (discussing the assumption that judges intend to maximize their own statutory preferences).

[136] *See, e.g.*, Bressman, *How* Mead *Has Muddled*, *supra* note 103, at 1475; Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 833 (2002) [hereinafter Merrill, *Meta-Rules and Meta-Standards*] ("[*Mead*] comes up short in terms of articulating a meta-rule to guide lower courts in future controversies."); Sunstein, Chevron *Step Zero*, *supra* note 5, at 193 (criticizing *Mead*'s "force of law" test as "a crude way of determining whether *Chevron* deference is appropriate"); *see also* Wilderness Soc'y v. U.S. Fish & Wildlife

"*Chevron* step zero—the initial inquiry into whether the *Chevron* framework applies at all."[137] The *Mead* Court left undefined what it means for an agency decision to have the "force of law."[138] Professor Thomas Merrill identifies three factors relevant to whether a decision has the force of law: "(1) whether Congress has prescribed relatively formal procedures; (2) whether Congress has authorized the agency to adopt rules or precedents that generalize to more than a single case; and (3) whether Congress has authorized the agency to prescribe legal norms that apply uniformly throughout its jurisdiction."[139] Accordingly, justifications for *Mead* given by court opinions and scholarship divide into three categories: (1) the importance of procedures; (2) the importance of binding effect; and (3) the importance of authoritativeness.

1. The Importance of Procedures

Some courts have interpreted *Mead* to require agencies to use procedures that guarantee public participation in order to pass *Chevron* step zero.[140] Other courts have indicated that

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Serv., 316 F.3d 913, 921 (9th Cir.) ("After *Mead*, we are certain of only two things about the continuum of deference owed to agency decisions: *Chevron* provides an example of when *Chevron* applies, and *Mead* provides an example of when it does not."), *rev'd en banc* 353 F.3d 1051 (9th Cir. 2003).

[137] Sunstein, Chevron *Step Zero*, *supra* note 5, at 191 (attributing the term "Chevron Step Zero" to Merrill & Hickman, *supra* note 5, at 836). In his article Chevron *Step Zero*, Professor Sunstein discusses the force of law holding in *Mead* and the related cases of *Barnhart* and *Christensen*. *See id.* at 211-31. He also discusses a separate Step Zero trilogy involving *Chevron* deference when the agency is deciding interstitial or major questions. *See id.* at 231-47 (discussing MCI Telecomms. Corp. v. AT&T, 512 U.S. 218 (1994), Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995), and FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)).

[138] *See* Merrill, *Meta-Rules and Meta-Standards*, *supra* note 136, at 813 (stating that the *Mead* Court did not identify the triggering conditions for determining when an agency has been given the power to act with the force of law).

[139] *Id.* at 814. Professor Merrill discussed a possible fourth factor, "whether the agency had sought to exercise such authority," which he discounted because the *Mead* Court collapsed this inquiry into the question of whether Congress authorized the agency to act with authority. *Id.* at 814 n.41. He also discussed a fifth factor, "whether Congress has provided for de novo review of the agency action that incorporates the interpretation," which he discounted because the Court held in *United States v. Haggar Apparel Co.*, 526 U.S. 380, 394 (1999), that an agency's regulation merits *Chevron* deference notwithstanding a statutory provision of de novo review by a court. *Id.*

[140] For example, in *Krzalic v. Republic Title Co.*, 314 F.3d 875 (7th Cir. 2002), the Seventh Circuit Court of Appeals refused *Chevron* deference to a Department of Housing and Urban Development (HUD) Statement of Policy because of the lack of formal procedures that preceeded the agency interpretation. *See id.* at 881. The Court reasoned,

procedures, while necessary to the step zero question, are weighed with other factors such as whether the agency's decision had binding effect.[141] Why is an agency's choice of procedures so critical to the *Mead* inquiry?

Several scholars have discussed the importance of procedural formality to *Mead*'s "force of law" test. Professor Cass Sunstein reads *Mead* as "motivated by a concern that *Chevron* deference would ensure an insufficient safeguard against agency decisions not preceded by formal procedures."[142] By awarding *Chevron* deference to agency decisions reached through formal procedures, *Mead* "attempt[s] to carry forward a central theme in administrative law: developing surrogate safeguards for the protections in the Constitution itself."[143] Formal procedures promote "'fairness and deliberation' by, for example, giving people an opportunity to be heard and offering

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> [i]f an agency is to assume the judicial prerogative of statutory interpretation that *Chevron* bestowed upon it, it must use . . . something more formal, more deliberate, than a simple announcement. A simple announcement is too far removed from the process by which courts interpret statutes to earn deference.

Id.; *see also* Vill. of Barrington v. Surface Transp. Bd., No. 09-1002, 2011 WL 869904, at *8 (D.C. Cir. Mar. 5, 2011) (applying *Mead* to grant *Chevron* deference to an informal agency decision because the proceedings in the case included several Federal Register notices and many opportunities for public participation prior to the agency's decision); Freeman v. Quicken Loans, Inc., 626 F.3d 799, 805 (5th Cir. 2010) (refusing *Chevron* deference to a HUD Statement of Policy and reasoning, "[w]here the agency has not used a deliberative process such as notice-and-comment rulemaking, or where the process by which the agency reached its interpretation is unclear, the court cannot presume Congress intended to grant the interpretation the force of law"); *but see* Rubie's Costume Co. v. United States, 337 F.3d 1350, 1355 (Fed. Cir. 2003) (holding that a Customs classification ruling, which was published pursuant to a deliberative notice-and-comment rulemaking process, was not entitled to *Chevron* deference because the court read *Mead* to deny *Chevron* deference to all Customs classification rulings).

[141] In an opinion written only days after *Mead*, the Court of Appeals for the D.C. Circuit awarded *Chevron* deference to a formal advisory opinion of the Federal Election Commission (FEC) because the interpretation resulted from a process in which the FEC made its advisory opinion public and received written comments by all interested parties; in addition, the advisory opinions had binding legal effect because any person involved in a materially indistinguishable transaction could rely on the opinion. *See* Fed. Election Comm'n v. Nat'l Rifle Ass'n of Am., 254 F.3d 173, 185-86 (D.C. Cir. 2001). The court reasoned that the formal procedures and binding effect of the FEC advisory opinion distinguished it from the Labor Department letter, which the Court held did not merit *Chevron* deference in *Christensen*. *See id.* at 186 (citing *Christensen*, 529 U.S. at 587); *see also* Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv., 475 F.3d 1136, 1142-45 (9th Cir. 2007) (granting *Chevron* deference to a U.S. Fish and Wildlife Service policy statement because it resulted from "procedural rigors" of notice-and-comment and the policy was treated as legally binding).

[142] Sunstein, Chevron *Step Zero*, *supra* note 5, at 227.

[143] *Id.* at 225.

reasoned responses to what people have to say,"[144] whereas "informal processes . . . are unlikely to promote values of participation and deliberation."[145] Professors Thomas Merrill and Kristin Hickman write that the "correspondence between the delegation to act with the force of law and the existence of rights of public participation is not accidental"[146] because "[g]eneral norms of democratic governance and traditions of due process both stress the importance of affording affected persons the right to be heard before they are subjected to the coercive power of the state."[147]

In addition, formal procedures maintain constitutional checks and balances between the three branches of government by ensuring transparency, which prevents problems in the law-making process such as faction (agency capture by well-organized interest groups) and government self-interest (government actors pursuing their own self-interest to the public detriment).[148] Formal procedures allow affected parties to detect improper motives by government actors or expose agency capture by a well-organized interest group, and thus assign blame to the appropriate agency actors.[149]

Scholars argue that *Mead* allows agencies to engage in a cost-benefit analysis, weighing the cost of formal procedures, which command deference, against the more efficient and inexpensive informal rulings, which risk being overruled by a reviewing court.[150] Professor Matthew Stephenson interprets

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[144] *Id.* (quoting United States v. Mead Corp., 533 U.S. 218, 230 (2001)).

[145] *Id.*; *see also* Barron & Kagan, *supra* note 135, at 234 ("[T]he [*Mead*] Court's focus appears to follow from the view that deference should depend on whether agency action has a connection to the public and whether that action results from disciplined consideration.").

[146] Merrill & Hickman, *supra* note 5, at 886. While Professors Merrill and Hickman were not writing in response to the *Mead* decision, as it had not yet been published, they discussed the "force of law" holding in *Christensen* in their article *Chevron's Domain*. *See id.* at 882-88 (citing Christensen v. Harris Cnty., 529 U.S. 576, 576 (2000)).

[147] *See id.* at 886.

[148] *See* Bressman, *Beyond Accountability*, *supra* note 107, at 496-98; Sunstein, *Constitutionalism After the New Deal*, *supra* note 80, at 450.

[149] *See* Bressman, *Beyond Accountability*, *supra* note 107, at 506.

[150] *See id.* at 539 ("The law-like decisionmaking requirement . . . ensure[s] that agencies put their money where their mouths are."); E. Donald Elliott, *Reinventing Rulemaking*, 41 DUKE L.J. 1490, 1491 (1992) ("As in the television commercial in which the automobile repairman intones ominously 'pay me now, or pay me later,' the agency has a choice: It can go through the procedural effort of making a legislative rule now and avoid the burdens of case-by-case justification down the road, or it can avoid the hassle of rulemaking now, but at the price of having to engage in more extensive, case-by-case justification down the road."); Merrill, *Meta-Rules and Meta-Standards*, *supra* note 136, at 822 ("It is now clear, agencies must make a certain investment in administrative processes to obtain the *Chevron* payoff. In the vocabulary

the rationale in *Mead* to have arisen "because courts tend to view formal process as a proxy for variables that the court considers important but cannot observe directly, such as the significance of the issue to the agency's mission or the degree to which the agency's judgment reflects a sensible balancing of the relevant considerations."[151] Thus, agencies that want to advocate a more aggressive reading of a statute "must decide whether it is worth paying the costs associated with formal procedures in order to 'purchase' greater judicial toleration of a more aggressive interpretation of the statute."[152] He argues that *Mead* increases an agency's incentive to use more formal procedures if the agency desires an aggressive reading of a statute; agency interpretations made through less formal procedures must be more textually plausible in order to command *Chevron* deference.[153] Because *Mead* allows only formal procedures to invoke *Chevron* deference, whereas informal procedures receive the less deferential *Skidmore* review, "the legal system, considered as a whole, will provide an ample check on agency discretion and the risk that it will be exercised arbitrarily—in one case, through relatively formal procedures and in another, through a relatively careful judicial check on agency interpretations of law."[154]

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of *Christensen* and *Mead*, agencies must take whatever procedural steps are necessary to assure that their interpretation has the 'force of law.'"); Merrill & Hickman, *supra* note 5, at 887 ("If an agency is willing to treat an interpretation as legally binding, and in so doing to subject itself to the procedural requirements associated with action that is legally binding, then the agency would be 'rewarded' by having its interpretation given mandatory deference by the courts."); Stephenson, *supra* note 105, at 547-48 ("The very costliness of formal procedures provides [a reviewing] court with valuable information about how important the interpretive question at issue is to the agency's policy agenda."); Sunstein, Chevron *Step Zero*, *supra* note 5, at 225-26 ("*Mead* puts agencies to a salutary choice; it essentially says, '*Pay me now or pay me later*.' Under *Mead*, agencies may proceed expeditiously and informally, in which case they can invoke *Skidmore* but not *Chevron*, or they may act more formally, in which case *Chevron* applies.").

[151] Stephenson, *supra* note 105, at 530-31. "The court may, for example, believe that procedural formality facilitates the accurate evaluation of complex issues, promotes reasoned deliberation, or prevents special-interest capture." *Id.* at 547-48. He writes, "although procedural formality and textual plausibility increase the agency's odds of surviving judicial review, they are also both costly to the agency." *Id.* at 531.

[152] *Id. But see* Ronald M. Levin, Mead *and the Prospective Exercise of Discretion*, 54 ADMIN. L. REV. 771, 796-97 (2002) (reasoning that agencies rarely consider the standard of review when deciding which formal procedure to follow).

[153] Stephenson, *supra* note 105, at 534.

[154] *See* Sunstein, Chevron *Step Zero*, *supra* note 5, at 226.

Professor Lisa Schultz Bressman interprets *Mead* through a positive political theory lens:[155] as an important tool in the Congressional oversight of agencies.[156] She cites two theories of monitoring mechanisms: "police patrols," which are direct forms of oversight such as committee hearings,[157] and "fire alarms," which enlist private parties to gather information and notify Congress of proposed changes to regulatory policy.[158] Congress can use administrative procedures to place constituents into the administrative process, where they may alert members of Congress to agency action that will change the status quo before the action is final.[159] The procedures "thus shift monitoring costs from Congress to its constituents."[160] *Mead*, which requires agencies to use such procedures, ensures that Congress maintains proper oversight over agency action.[161] Critical to this analysis is the question of where to strike the balance—agencies need only use procedures that provide enough information to constituents to facilitate "fire alarm" oversight; any additional procedures merely add cost without providing more information.[162]

Critics reason that the Court's holding in *Mead* requires too many procedures, which consume agency time and

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[155] Bressman, Chevron*'s Mistake*, *supra* note 96, at 567 (citing Epstein & O'Halloran, *supra* note 96, at 962). For a more detailed discussion of positive political theory see *supra* note 96.

[156] Bressman, Chevron*'s Mistake*, *supra* note 96, at 580. Professor Bressman notes that while *Mead* values procedures—which are a mechanism to facilitate legislative monitoring—*Mead* "botches the implementation" because it links procedures to rule-of-law values, as opposed to legislative monitoring. *Id.*

[157] *Id.* at 570 (citing Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984)).

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *See id.*; *see also* Elhauge, *supra* note 93, at 2145 (discussing the *Mead* case and stating, "the reason the doctrine depends not just on how much power the agency was granted, but on how the agency exercises its power, is that only certain methods of exercise provide the reasonable assurance that the agency action reflects current governmental preferences"). Professor Bressman interprets the case of *Barnhart* through the lens of informational oversight by Congress. In *Barnhart*, the Court gave deference to the agency, not because of the procedures used, but for a number of other reasons, one of which was the longstanding nature of the agency's position. Bressman, Chevron*'s Mistake*, *supra* note 96, at 582 (citing Barnhart v. Walton, 535 U.S. 212, 222 (2002)). This is another way that Congress ensures that the agency reflects congressional preferences, because Congress can "rely on positions that the agency has maintained before or taken during the course of legislative drafting." *Id.* at 583.

[162] *See* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1785 (2007) [hereinafter Bressman, *Procedures as Politics*].

resources; the result is an ossification of administrative law.[163] The most formal of procedures commonly used by agencies, notice-and-comment rulemaking, "both symboliz[es] and amplif[ies] all that the public finds most distasteful in government."[164] However, "the Constitution strikes a balance between efficiency and procedural formality, committing us to a certain degree, perhaps a large degree, of inefficiency. As the onerous requirements of the legislative process attest, efficiency often yields to procedural formality and the values it secures."[165] Also, the *Mead* Court did not require agencies to use the most formal procedures to command *Chevron* deference;[166] standard procedures such as notice-and-comment rulemaking and adjudication are mere examples of the types of procedures that are acceptable to guarantee *Chevron* deference.[167] Professor Bressman states, "unmitigated formalism is neither necessary nor wise. We instead should afford Congress or agencies a little leeway to create administrative law-making procedures beyond trial-type or paper hearings, but require that those procedures adhere to certain specified limits—in particular, that the resulting policy is transparent, rational, and binding."[168]

2. The Importance of Binding Effect

Several courts have emphasized the importance of binding effect to the *Mead* holding.[169] Some courts have

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[163] *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (arguing that the majority's opinion would ossify statutory law because the agency's flexibility to interpret the law in a new way would cease upon the first judicial resolution of the question); Barron & Kagan, *supra* note 135, at 230-31 ("These procedures consume significant agency time and resources and thereby inhibit needed regulatory (or, for that matter, deregulatory) initiatives. *Mead* inevitably will channel additional agency action into this already overburdened administrative mechanism, as agencies sometimes adopt notice-and-comment procedures for no other reason than to gain *Chevron* deference."); *see also* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385-86 (1992). *But see* Bressman, *Procedures as Politics*, *supra* note 162, at 1819, nn.381-82 (discussing empirical studies that have shown administrative procedures do not ossify practice).

[164] Barron & Kagan, *supra* note 135, at 232.

[165] Bressman, *How* Mead *Has Muddled*, *supra* note 103, at 1490-91.

[166] *See Mead*, 533 U.S. at 227.

[167] Bressman, *How* Mead *Has Muddled*, *supra* note 103, at 1450.

[168] *Id.*

[169] *See, e.g.*, Garcia-Quintero v. Gonzales, 455 F.3d 1006, 1012 (9th Cir. 2006) ("In light of *Mead*, the 'essential factor' in determining whether an agency action warrants *Chevron* deference is its precedential value."); High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 647 (9th Cir. 2004) (declining to extend *Chevron* deference to a Forest Service permitting decision because the agency was not "acting in a way that would have precedential value for subsequent parties").

concluded that binding effect alone is instructive on whether an agency action passes *Chevron* step zero,[170] whereas others have emphasized both binding effect and the formality of procedures to the *Mead* inquiry.[171]

Scholars also have discussed the importance of binding effect to the *Chevron* step zero inquiry. Professor Ronald Levin argues that the *Mead* inquiry should turn not on what procedures were used, but whether the agency action is binding, i.e., it "alters or determines legal rights or obligations."[172] Professor Sunstein writes that the *Mead* inquiry can turn on either the formality of the agency's procedures or the binding effect of the agency's decision.[173] Professor Bressman also writes that both binding effect and procedural formalities were important to the Court's holding in *Mead*.[174] She describes "binding effect" as "immediate and irrevocable until officially renounced . . .";[175] thus, "[b]inding effect is the promise of consistent application."[176] She views *Mead* as an application of the constitutional requirements for law making—careful consideration, transparency, and consistent application—to agency action.[177] In this sense, *Mead*'s "law-like decision-making requirement" ensures that agencies exercise

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[170] For example, in *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1067 (9th Cir. 2003), the Ninth Circuit Court of Appeals reversed a prior panel ruling that extended *Chevron* deference to a U.S. Fish and Wildlife Service permit because of the public participation in the process. *See id.*; Wilderness Soc'y v. U.S. Fish & Wildlife Serv., 316 F.3d at 922. The en banc panel held that the permit did not merit *Chevron* deference because it would not bind the agency in permitting other activity. *See* Wilderness Soc'y v. U.S. Fish & Wildlife Serv., 353 F.3d at 1068; *see also* Schneider v. Feinberg, 345 F.3d 135, 143, 147 (2d Cir. 2003) (holding that the tables to guide compensation under the September 11th Victim Compensation Fund of 2001, although not subject to formal rulemaking procedures, were entitled to *Chevron* deference because they applied equally to all claimants seeking compensation from the Fund).

[171] *See* Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv., 475 F.3d 1136, 1142-45 (9th Cir. 2007); Fed. Election Comm'n v. Nat'l Rifle Ass'n of Am., 254 F.3d 173, 185-86 (D.C. Cir. 2001).

[172] *See* Levin, *supra* note 152, at 775; *see also id.* at 794-96 (arguing that *Mead*'s requirement of procedures to guarantee *Chevron* deference was unnecessary because the administrative requirements of finality and ripeness already require an agency to carefully consider the implications of its positions).

[173] Sunstein, Chevron *Step Zero*, *supra* note 5, at 222-26. Professor Sunstein writes that an agency decision has the "force of law" if it is "binding on private parties in the sense that those who act in violation of the decision face immediate sanctions . . . [and] if the agency is legally bound by it as well." *Id.* At 222. He reasons, however, that both binding effect and formality of procedures are important to the *Mead* "force of law" holding. *See id.* at 223-26.

[174] Bressman, *How* Mead *Has Muddled*, *supra* note 103, at 1488-89.

[175] *Id.* at 1489.

[176] *Id.*

[177] *Id.* at 1479-80.

their policy-making authority "in ways that generally promote consistency and specifically prevent ad hoc departures at the behest of narrow interests."[178]

Professor Robert Anthony, an original proponent of the position the Court eventually adopted in *Mead*,[179] argues that an agency's decision should not have the "force of law," or binding effect, unless the agency has used formal procedures to reach the decision.[180] He defines an agency decision with "binding effect" as one that "is to be applied rigidly to private persons without first affording them a realistic chance to challenge its policy,"[181] whereas if the agency "is open to reconsideration of the policy, the document shows neither the intent to bind nor such an effect."[182] He defends his position by citing the values of fairness, transparency, and deliberation inherent in the rulemaking process, all of which lend legitimacy to the agency's decision.[183] He writes: "The accuracy and thoroughness of an agency's actions are enhanced by the requirement that it invite and consider the comments of all the world, including those of directly affected persons who are able, often uniquely, to supply pertinent information and analysis."[184]

3. The Importance of Authoritativeness

Scholars also have discussed the importance of an agency decision's authoritativeness to the *Mead* analysis.[185] By

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[178] Bressman, *Beyond Accountability*, *supra* note 107, at 539; *see also id.* ("By announcing a rule that binds all similarly situated parties, agencies may stem requests for deviations except through official channels.").

[179] *See* Anthony, *Agency Interpretations*, *supra* note 84.

[180] *See id.* at 4; *see also* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1314-15 (1992) [hereinafter Anthony, *Interpretive Rules*].

[181] Anthony, *Interpretive Rules*, *supra* note 180, at 1330.

[182] *Id.*

[183] *Id.* at 1373.

[184] *Id.*; *see also* Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 403 ("[A]n agency may receive more cooperation and less obstruction from regulated interests that have a hand in shaping the rules within which they must function."); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 409 (citing as a benefit of notice-and-comment rulemaking that the agency receives useful information from previously unknown sources and its decision is subject to the discipline of having to respond to these comments).

[185] Courts interpreting *Mead* generally have focused on the agency's choice of procedures and whether those procedures have binding effect, as opposed to the authoritative nature of the decision. *See, e.g.*, Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv., 475 F.3d 1136, 1142-43 (9th Cir. 2007); Krzalic v. Republic Title Co., 314

this reasoning, the procedures used by the agency are of little importance to the *Chevron* deference question. As stated by Professor Sunstein, "[i]f policymaking expertise and democratic accountability are relevant, then perhaps Congress should be understood to have delegated law-interpreting power whether or not formal procedures are involved."[186] Professor Sunstein suggests that the formality of the procedures used may not be the sole reason that the *Mead* Court refused to give the tariff ruling letters *Chevron* deference. Rather, the Court emphasized the number of such letters produced every year; in this way, "*Mead* emerges as a highly pragmatic case resting on the evident problems with deferring to the numerous lower-level functionaries who produce mere letter rulings."[187]

Professor David Barron and now Justice Elena Kagan argue that *Chevron* deference should depend on *who* is making the decision within the agency, not *how* the decision is made.[188] They agree with the *Mead* Court that "deference should depend on whether agency action has a connection to the public and whether that action results from disciplined consideration."[189] However, they argue that those values—connection to the public (namely, accountability) and discipline—can be served by courts giving *Chevron* deference only to decisions made by the head of the agency.[190] They discuss what a statutory delegatee—the

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F.3d 875, 881 (7th Cir. 2002). Other courts, instead of examining how the agency made the decision at issue, have focused only on whether Congress gave the agency the authority to act with the force of law. *See, e.g.*, Local 446 v. Nicholson, 475 F.3d 341, 354 (D.C. Cir. 2007). Several courts have applied the multi-factor set forth in the Supreme Court's decision in *Barnhart*, which made *Chevron* deference depend on the complexity of the statutory scheme, the agency's expertise and the careful consideration the agency had given to the issue over a long period of time. *See* Barnhart v. Walton, 535 U.S. 212, 222 (2002); Mylan Labs. v. Thompson, 389 F.3d 1272, 447 (D.C. Cir. 2004); Kruse v. Wells Fargo Home Mortgage, Inc., 383 F.3d 49, 59-61 (2d Cir. 2004); Schuetz v. Banc One Mortgage Corp., 292 F.3d 1004, 1011-12 (9th Cir. 2002).

[186] Sunstein, Chevron *Step Zero*, *supra* note 5, at 227; *see also* Levin, *supra* note 152, at 794 (criticizing *Mead* for its inconsistency with the policy reasons for *Chevron*, including the agency's expertise, political accountability, and capacity to maintain national uniformity of a program).

[187] Sunstein, Chevron *Step Zero*, *supra* note 5, at 230-31.

[188] Barron & Kagan, *supra* note 135, at 204; *see also* United States v. Mead Corp., 533 U.S. 218, 258 (2001) (Scalia, J., dissenting) (reasoning that *Chevron* deference should turn on whether the agency's decision was authoritative); Christensen v. Harris Cnty., 529 U.S. 576, 589-90 n.* (2000) (Scalia, J., concurring in part and concurring in judgment).

[189] Barron & Kagan, *supra* note 135, at 234.

[190] *Id.* at 234-57. They reason that the majority in *Mead* could have reached the same result based on the extreme decentralization of the decision making in the case. *See id.* at 257-58.

officer to whom the agency's organic statute has granted authority over a given administrative action—must do in order for her decision to get *Chevron* deference.[191] The agency's decision must bear the delegatee's name, the delegatee must give a meaningful review to the decision, and she must adopt the decision as her own prior to the final issuance of the decision.[192] Barron and Kagan argue, "by offering an incentive to certain actors to take responsibility for interpretive choice, the principle advances both accountability and discipline in decision making."[193] A standard that conditions *Chevron* deference on the decision-making structure, but more particularly, the involvement of high-level agency officials in the decision making, "will encourage high-level officials to assume full and visible responsibility for interpretive rulings, while ensuring that meaningful review lies behind these public acclamations."[194]

The differing views within scholarship and case law suggest significant uncertainty in this area of administrative law. However, one certain point is that the level of deference an agency action receives can be crucial to whether it survives a legal challenge. What type of deference should courts apply when reviewing the Attorney General's decision in *Silva-Trevino*? The next section explores this question.

III. EXAMINING *SILVA-TREVINO* AT *CHEVRON* STEP ZERO

When considering whether *Silva-Trevino* deserves *Chevron* deference, courts first must consider the question at *Chevron* step zero—the question of whether the *Chevron* framework applies at all.[195] In this section, I examine the Attorney General's decision in *Silva-Trevino* under *Mead*. I focus on the importance of procedures to the *Mead* holding. I argue that *Silva-Trevino* should not command *Chevron* deference because, though Congress provided the DOJ with authority to use relatively formal procedures,[196] the agency chose

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[191] *Id.* at 237-40.

[192] *Id.*

[193] *Id.* at 204.

[194] *Id.* at 256.

[195] *See* Sunstein, Chevron *Step Zero*, *supra* note 5, at 191.

[196] *See* 8 U.S.C. § 1103(g)(2) (2006) ("The Attorney General shall establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section.").

the least participatory form of policy making. In addition, I examine how the agency's choice of adjudication over rule making to announce the new moral turpitude test impacts the *Chevron* step zero question. Finally, I explore whether the *Silva-Trevino* decision's binding effect and authoritativeness will lead courts to conclude that the *Chevron* framework applies.

A. The Secretive Process: Fostering Neither Fairness Nor Deliberation

Was the Attorney General's decision in *Silva-Trevino* an administrative procedure that "foster[s] the fairness and deliberation that should underlie a pronouncement of such force"[197] as required by the court in *Mead* for an agency action to merit *Chevron* deference? As stated recently by the Third Circuit Court of Appeals, "[t]he unusual circumstances of *Silva-Trevino*'s referral to, and adjudication by, the Attorney General bear mention."[198] *Silva-Trevino* was the result of a secret process in which the Attorney General certified the decision to himself without indicating to the parties or any interested groups that he was considering overhauling the categorical approach.[199] The Attorney General altered over a century of immigration law without input from members of the public or the affected party himself.

In deciding *Silva-Trevino*, the agency did not employ the tools at its disposal, i.e., formal procedures, "that provide surrogate safeguards for the protections in the Constitution."[200] The Attorney General made a pronouncement of great force[201]

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[197] *See* United States v. Mead Corp., 533 U.S. 218, 230 (2001).

[198] Jean-Louis v. Att'y Gen., 582 F.3d 462, 470 n.11 (3d Cir. 2009).

[199] *See supra* notes 66-77 and accompanying text. The regulation at 8 C.F.R. § 1003.1(h)-(i) gives the Attorney General authority to review any decision by the BIA. One issue, which is outside of the scope of this article, is whether the regulation permitting the AG to certify BIA decisions to himself is *ultra vires*. The provision at 8 U.S.C. § 1101(a)(47)(A) states that removal orders become final upon affirmation by the BIA or expiration of the period in which the respondent may seek review. The regulation at 8 C.F.R. § 1003.1(h)(i), which predated section 1101(a)(47)(A), gives authority to the Attorney General to alter the BIA's decision, notwithstanding the statute's directive that such a BIA decision should be final. Thus, the regulation is inconsistent with the statute and thus is arguably invalid. *See* William v. Gonzales, 499 F.3d 329, 334 (4th Cir. 2007) (holding that a regulation that prohibits the filing of a motion to reopen from outside the U.S. is inconsistent with the statute, which allows one motion to reopen, and therefore the regulation lacks authority and is invalid).

[200] Sunstein, Chevron *Step Zero*, *supra* note 5, at 225.

[201] *See* United States v. Mead Corp., 533 U.S. 218, 230 (2001); *see also In re* Silva-Trevino, 24 I. & N. Dec. 687, 688 (AG 2008) ("The Board of Immigration Appeals and the Federal courts have long struggled in administering and applying the Act's

through a process that did not embody important constitutional requirements for law making, namely, transparency and careful consideration.[202] No member of the public had any idea that the agency was considering a complete overhaul of the categorical approach before the decision was published.[203] Any deliberation that occurred behind the scenes of the Attorney General's decision likely was one-sided, as opponents of the new policy were not given a voice in the discussion.[204] This type of deliberation hardly exudes transparency, since the discussion took place behind closed doors.[205] Lacking transparency, the decision-making process in *Silva-Trevino* did not allow affected parties to detect improper motives by government actors and assign blame.[206] Therefore, the Attorney General's decision was not "subject to the political control and public scrutiny we demand for agencies as compensation for their lack of direct accountability."[207]

Which affected parties did the Attorney General exclude from the decision-making process, and what considerations would they have brought to the table? First, the Attorney General did not seek input from his own immigration judges on how this decision would impact their workload. The categorical approach developed in immigration law largely out of a desire

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moral turpitude provisions . . . . My review of this case presents an opportunity to establish a uniform framework for ensuring that the Act's moral turpitude provisions are fairly and accurately applied.").

[202] *See* Anthony, *Interpretive Rules*, *supra* note 180, at 1373; Bressman, *How* Mead *Has Muddled*, *supra* note 103, at 1479.

[203] *See* Reconsideration Memo, *supra* note 66, at 7.

[204] *See id.* at 4-6.

[205] In *Home Box Office v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), the D.C. Circuit reasoned that an agency's reliance on ex parte communications after a notice of rulemaking in informal rulemaking was improper because (1) a court cannot assess the truth of the agency's assertions if the knowledge was gained without the benefit of the adversarial process and (2) a court must assess whether the agency's rule is sufficient based on the whole record; ex parte communication leaves out a piece of this record. *Id.* at 55-57; *see also id.* at 56 ("Equally important is the inconsistency of secrecy with fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law."); *but see* Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981) (refusing to interpret the APA to mandate disclosures that the statute did not clearly require and discussing the benefits of informal communications to agencies). Professor Bressman writes that from a positive political theory standpoint, ex parte communications are problematic, "not so much because they imperil basic fairness or allow political compromise to guide agency decisions . . . [r]ather, they are problematic because they deprive outsiders of access to information about agency action." Bressman, *Procedures as Politics*, *supra* note 162, at 1787.

[206] *See* Bressman, *Beyond Accountability*, *supra* note 107, at 506.

[207] Bressman, *How* Mead *Has Muddled*, *supra* note 103, at 1479.

for administrative efficiency.[208] In fiscal year 2009, the fifty-five immigration courts in the United States received 391,829 cases to hear and completed 352,233 such cases;[209] these numbers indicate that each judge completed an average of 1500 cases.[210] Given the high volume of cases, the categorical approach ensures a more efficient removal hearing.[211]

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[208] *See In re* Pichardo-Sufren, 21 I. & N. Dec. 330, 335 (B.I.A. 1996). However, one circuit court judge, writing in 1971, opined about the introduction of the categorical approach into immigration law:

> At the time the rule was first expounded, it is probable that many, if not most, federal administrative agencies were deemed by courts to be incapable of deciding such complex questions as when an act "involved moral turpitude" from the standpoint both of expertise and of proper role. Administrative law has evolved considerably since that time. In contemporary government we are quite prepared to delegate innumerable complicated and subtle questions like this one to administrative agencies. To the extent that the rule was developed because of a then-justified fear of administrative incapacity, an extent which is not revealed by the decisions, it should long since have lost its force.

Marciano v. INS, 450 F.2d 1022, 1027 n.3 (8th Cir. 1971) (Eisele, J., dissenting).

[209] U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2009 STATISTICAL YEARBOOK B1-B2, *available at* http://www.justice.gov/eoir/statspub/fy09syb.pdf. In fiscal year 2010, the now fifty-seven immigration courts in the United States received 392,888 cases to hear and completed 353,247 cases. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2010 STATISTICAL YEARBOOK B1-B2 [hereinafter EOIR STATISTICAL YEARBOOK], *available at* http://www.justice.gov/eoir/statspub/fy10syb.pdf.

[210] The Honorable Dana Leigh Marks, President of the National Association of Immigration Judges (NAIJ), recently stated:

> [W]hile the average Federal district judge has a pending caseload of 400 cases and three law clerks to assist, in Fiscal Year ("FY") 2009, immigration judges completed over 1500 cases per judge on average, with a ratio of one law clerk for every four judges. Under these circumstances, it is not surprising that a recent study found immigration judges suffered greater stress and burnout than prison wardens or doctors in busy hospitals.

Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary (June 17, 2010) (Written statement of Hon. Dana Leigh Marks, President, NAIJ), *available at* http://judiciary.house.gov/hearings/pdf/Marks100617.pdf (citing Stuart L. Lustig et al., *Burnout and Stress Among United States Immigration Judges*, 13 BENDER'S IMMIGR. BULL. 2 (2008); Stuart L. Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57 (2008)). The General Accounting Office in 2006 noted the need for immigration judges to better control their caseload. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-771, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: CASELOAD PERFORMANCE REPORTING NEEDS IMPROVEMENT (2006), *available at* www.gao.gov/products/GAO-06-771.

[211] *See* Letter from Carolyn B. Lamm, President, ABA, to Eric H. Holder, Jr., Att'y Gen., 2 (Jan. 22, 2010) [hereinafter ABA Letter], *available at* http://www.abanet.org/poladv/letters/immigration/2010jan26_silvatrevino_l.pdf ("The categorical approach streamlines the complex immigration system by providing immigration adjudicators with a mechanism to determine the consequences of a criminal conviction by reference only to the criminal statute and, in some cases, the criminal court record of conviction."); *see also* Dulal-Whiteway v. Dep't of Homeland Sec., 501 F.3d 116, 132 (2d Cir. 2007), *abrogated by*

In response to *Silva-Trevino*, the National Association of Immigration Judges issued a statement on the decision's impact on the immigration courts.[212] The judges wrote, "[i]n a court system that has been widely recognized as overburdened and lacking sufficient resources, the heightened level of inquiry mandated by *Silva-Trevino* has the potential to cause an inordinate amount of additional work for immigration judges."[213] The judges were concerned that the decision "implicates complicated legal arguments in such cases and creates the prospect of a significant amount of additional hearing time to resolve the factual and legal issues it creates . . . ."[214] The Attorney General mentioned administrative efficiency in his decision,[215] yet he provided no solution for immigration judges to control their dockets; the decision merely made the empty promise that the new approach was "not an invitation to relitigate the conviction itself."[216]

Nijhawan v. Holder, 129 S. Ct. 2294 (2009) ("We have emphasized that the BIA and reviewing courts are ill-suited to readjudicate the basis of prior criminal convictions . . . . It was this very concern about collateral trials, and the oppressive administrative burden they impose, that led the BIA to adopt (and us to endorse) the categorical approach to removability in the first instance."). In 1996, the BIA summarized the administrative efficiency arguments for using the categorical approach:

> [T]he principle of not looking behind a record of conviction provides this Board with the only workable approach in cases where deportability is premised on the existence of a conviction. If we were to allow evidence that is not part of the record of conviction as proof [of deportability], we essentially would be inviting the parties to present any and all evidence bearing on an alien's conduct leading to the conviction, including possibly the arresting officer's testimony or even the testimony of eyewitnesses who may have been at the scene of the crime. Such an endeavor is inconsistent both with the streamlined adjudication that a deportation hearing is intended to provide and with the settled proposition that an Immigration Judge cannot adjudicate guilt or innocence.

Pichardo-Sufren, 21 I. & N. Dec. at 335.

[212] Statement, Nat'l Ass'n of Immigration Judges, Impact of *Silva-Trevino* on the Immigration Courts, (Apr. 1, 2010) (on file with author) [hereinafter NAIJ Statement].

[213] *Id.*

[214] *Id.*

[215] *See In re* Silva-Trevino, 24 I. & N. Dec. 687, 702 (AG 2008).

[216] *Id.* at 703. The Attorney General, in a footnote, cited some examples of how judges would apply his new approach. *See id.* at 703 n.3. However, these examples merely reiterate the categorical approach; the Attorney General did not explain what evidence a judge may consider to determine whether an offense involves moral turpitude if the statute is divisible and the record of conviction is not clear. The Attorney General did not discuss, for example, whether a judge should accept a hearsay document (such as a police report) proving that a respondent's offense involves moral turpitude. While the Federal Rules of Evidence do not apply and thus hearsay is not per se barred from immigration court, evidence submitted in removal hearings must be probative and its use must be fundamentally fair. *See* Bustos-Torres v. INS, 898 F.2d 1053, 1056 (5th Cir. 1990); *In re* Barcenas, 19 I. & N. Dec. 609, 611 (B.I.A.

Presumably, the Attorney General would concern himself with the workload of immigration judges, as they are DOJ employees, yet their concerns were not heard or considered before the publication of *Silva-Trevino*.

The Attorney General also failed to seek input from immigrants' rights organizations, who could have foreseen the myriad of problems stemming from the abandonment of the categorical approach, which inevitably leads to the re-litigation of past crimes.[217] How would detained, pro se respondents in removal proceedings[218] relitigate criminal cases when they are often detained far from where their convictions take place?[219] How would *any* respondent relitigate these cases without the formal rules of evidence,[220] Sixth Amendment right to a trial by

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1988). In many cases, using a hearsay document such as a police report would be fundamentally unfair to prove removability. *See, e.g.*, Yongo v. INS, 355 F.3d 27, 31 (1st Cir. 2004) (reasoning that "[h]ighly unreliable hearsay might raise due process problems"). Additionally, if an immigration judge allows a hearsay document into evidence to prove the nature of the crime, the judge also should allow the noncitizen to present testimony or other evidence on the nature of the crime in order to protect the noncitizen's right to present evidence on his own behalf. *See* 8 U.S.C. § 1229a(b)(4) (2006). Thus, the only way to circumvent a violation of a respondent's due process and statutory rights is to engage in what may amount to a retrial of the criminal case in immigration court, which the Attorney General claimed would not happen as a result of his decision in *Silva-Trevino*. *See* Silva-Trevino, 24 I. & N. Dec. at 703.

[217] *See supra* note 216.

[218] Respondents often are pro se, since persons in removal proceedings do not have the right to a court-appointed attorney. *See* 8 U.S.C. § 1229a(b)(4)(A). In addition, many respondents who face removal for a criminal conviction are subject to mandatory detention because of their criminal offenses, which makes it difficult for them to get pro bono assistance. *See* 8 U.S.C. § 1226(c) (1996); *see also* EOIR STATISTICAL YEARBOOK, *supra* note 209, at G1 (showing that in fiscal year 2010, 164,742 respondents—fifty-seven percent of the total number of cases heard by immigration courts—appeared pro se in removal proceedings). These factors are exacerbated due to the shorter case calendar for these cases, which gives a detainee even less time to prepare defenses to removal. *See, e.g.*, DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL § 9.1(e) (2008), *available at* http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm (noting that proceedings for detained noncitizens are expedited).

[219] *See* ABA Letter, *supra* note 211, at 2 (citing *Huge Increase in Transfers of ICE Detainees*, Transactional Records Access Clearinghouse (Dec. 2, 2009), *available at* http://trac.syr.edu/immigration/reports/220; Dep't of Homeland Security, Office of the Inspector General, *Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers* (Dec. 2, 2009), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-13_Nov09.pdf); *see also* Letter to Eric H. Holder, Att'y Gen., from the American Immigration Law Foundation (AILF), et al. *In re Silva-Trevino*, at 2 (Mar. 3, 2009) [hereinafter AILF Letter], *available at* http://www.ailf.org/lac/SignOnLettertoHolder-3-3-09.pdf.

[220] *See* Baliza v. INS, 709 F.2d 1231, 1233 (9th Cir. 1983) ("Administrative proceedings are not, however, bound by strict rules of evidence."); *In re* Rina, 15 I. & N. Dec. 453, 455 (B.I.A. 1975) ("[The Federal Rules of Evidence], of course, have no binding effect in administrative deportation proceedings.").

jury,[221] Fourth Amendment exclusionary rule,[222] and Fifth Amendment privilege against self-incrimination?[223] How would respondents relitigate cases that are decades old, yet now form the basis of removal, when witnesses are unavailable, memories have faded, documents have been misplaced and evidence is stale?[224]

There are other problems arising from *Silva-Trevino* that immigrants' rights groups could have raised during the decision-making process. For example, would the decision have a retroactive effect on noncitizens who accepted guilty pleas in reliance on the categorical approach?[225] Would the decision wreak havoc on the criminal justice system, since many noncitizens would no longer accept guilty pleas without the predictability of the categorical approach?[226] Several of these

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[221] *See* Dulal-Whiteway v. Dep't of Homeland Sec., 501 F.3d 116, 132 (2d Cir. 2007), *abrogated by* Nijhawan v. Holder, 129 S. Ct. 2294 (2009) ("[I]t goes without saying that there is no Sixth Amendment right to a jury determination of removability.").

[222] The Supreme Court has stated, in dicta, that the exclusionary rule may only apply in immigration proceedings if there has been an egregious violation of the Fourth Amendment. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1050-51 (1984).

[223] *See In re* R, 4 I. & N. Dec. 720, 721 (B.I.A. 1952) ("The fifth amendment to the Constitution of the United States protects a witness testifying in deportation proceedings from giving evidence which would tend to show his guilt under a Federal criminal statute. Where there is no such showing, an alien may be compelled to testify.").

[224] *See* ABA Letter, *supra* note 211; AILF Letter, *supra* note 219, at 2. Since there is no statute of limitations on most criminal grounds of removal, a removal hearing can be based on a conviction where the events in question occurred years ago. *See, e.g.*, *In re* Lettman, 22 I. & N. Dec. 365, 366 (B.I.A. 1998) (holding that a noncitizen convicted of an aggravated felony is subject to deportation, regardless of the date of the conviction, when the alien is placed in deportation proceedings on or after March 1, 1991 and the crime falls within the aggravated felony definition).

[225] *See* Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc., 467 U.S. 51, 60 n.12 (1984) ("[A]n administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests."); *Chenery II*, 332 U.S. 194, 203 (1947) (holding that an agency may give retroactive force to a new rule created through administrative action, but "the retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles"); Miguel-Miguel v. Gonzales, 500 F.3d 941, 950-53 (9th Cir. 2007) (holding that the BIA's new rule, announced in an adjudication, that drug trafficking crimes are *per se* "particularly serious crimes" that bar an applicant from protection under 8 U.S.C. § 1231(b)(3) was impermissibly applied retroactively to the respondent); *see also* Retail Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380, 391 (D.C. Cir. 1972) (establishing five-factor balancing test for determining whether an agency impermissibly applied an adjudicatory decision to a party).

[226] This question is of considerable importance in light of the Supreme Court's 2010 decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), in which the Court held that it was ineffective assistance of counsel for a defense attorney to fail to advise a noncitizen about the immigration consequences of a guilty plea. *See id.* at 1482-83; *see also* INS v. St. Cyr, 533 U.S. 289, 323 n.50 (2001) (reasoning that "competent defense counsel, following the advice of numerous practice guides," would advise a noncitizen about the immigration consequences of a guilty plea). The categorical approach allows attorneys to more accurately predict the immigration consequences of a guilty plea. *See*

issues could have been more thoroughly explored if, prior to the publication of *Silva-Trevino*, the Attorney General had reached out to groups such as immigrants' rights organizations,[227] the American Bar Association,[228] or his own immigration judges.[229] Had the agency used formal procedures, it could have guaranteed "the fairness and deliberation that should underlie a pronouncement of such force"[230] by "giving people an opportunity to be heard and offering reasoned responses to what people have to say."[231]

The *Silva-Trevino* decision-making process highlights Professor Bressman's argument that procedures perform an important role in Congressional oversight of agencies, which is why the Supreme Court placed such value on procedures in *Mead*.[232] Congress monitors immigration agencies through "fire alarm" oversight;[233] it relies on private parties to gather information and notify Congress of proposed changes to regulatory practice.[234] Administrative procedures allow constituents a role in the agency's decision-making process, so that constituents can alert Congress to changes long before the agency irreversibly alters the status quo.[235] In the *Silva-Trevino* decision-making process, immigrants' rights organizations, the ABA and immigration judges could have alerted Congress that the agency was considering an overhaul of the categorical approach.[236] In light of the cost and due process concerns raised,

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ABA Letter, *supra* note 211, at 3 ("[Under *Silva-Trevino*,] defense attorneys are unable to reliably predict the immigration consequences of contemplated dispositions. The resulting uncertainty will make fewer immigrant defendants willing to enter into plea agreements, thereby increasing the number of trials and imposing a substantial new burden on the criminal justice system as a whole."). Circuit courts have reasoned that the categorical approach jurisprudence in immigration law "has provided predictability, enabling aliens to better understand the immigration consequences of a particular conviction." Jean-Louis v. Attorney General, 582 F.3d 462, 482 (3d Cir. 2009); *see also* Nicanor-Romero v. Mukasey, 523 F.3d 992, 1004 (9th Cir. 2008).

[227] *See* Reconsideration Memo, *supra* note 66; *see also* AILF Letter, *supra* note 219.

[228] *See* ABA Letter, *supra* note 211 (urging Attorney General Holder to withdraw Attorney General Mukasey's decision in *Silva-Trevino*); AM. BAR. ASS'N RESOLUTION 113: PRESERVING THE CATEGORICAL APPROACH IN IMMIGRATION ADJUDICATIONS (Aug. 4, 2009) [hereinafter ABA RESOLUTION].

[229] *See* NAIJ Statement, *supra* note 212.

[230] *See* United States v. Mead Corp., 533 U.S. 218, 230 (2001).

[231] *See* Sunstein, Chevron *Step Zero*, *supra* note 5, at 225.

[232] *See* Bressman, Chevron*'s Mistake*, *supra* note 96, at 570.

[233] *Id.* (citing McCubbins & Schwartz, *supra* note 157, at 166).

[234] *Id.*

[235] *See id.*

[236] *See* AILF Letter, *supra* note 219; ABA Letter, *supra* note 211; ABA RESOLUTION, *supra* note 228; NAIJ Statement, *supra* note 212; Reconsideration Memo, *supra* note 66.

Congress may have decided to entrench the categorical approach by amending the INA.[237] Yet these groups did not have the opportunity to comment until *after* the decision was a fait accompli.[238] Even a mere notice to Mr. Silva-Trevino about the issues that the Attorney General would consider, or a request for amicus briefing on the issue, would have allowed requisite political participation to ensure adequate Congressional oversight.[239]

The *Silva-Trevino* decision-making process also highlights scholars' argument that courts should take cues from the agency by the procedures it uses and provide deference accordingly.[240] Professor Stephenson, explaining *Mead*'s rationale, states: "[C]ourts tend to view formal process as a proxy for variables that the court considers important but cannot observe directly, such as the significance of the issue to the agency's mission or the degree to which the agency's judgment reflects a sensible balancing of the relevant considerations."[241] Thus, agencies that want to advocate a more aggressive reading of a statute "must decide whether it is worth paying the costs associated with formal procedures in order to 'purchase' greater judicial toleration of a more aggressive interpretation of the statute."[242] The Attorney General in *Silva-Trevino* advocated for an aggressive interpretation of the statute, one that changed years of case law.[243] Yet the agency, by using such paltry procedures, gave the signal to courts that the new moral turpitude test is of limited importance, and certainly not important enough to spend money writing regulations or even asking for outside input in an adjudication.[244] Thus courts should provide a check on the agency's actions in *Silva-Trevino*; because the agency acted expeditiously and informally, courts should not confer *Chevron*

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[237] *See* Reconsideration Memo, *supra* note 66, at 30-33.

[238] *See id.* at 7-11.

[239] *See* Bressman, *Procedures as Politics*, *supra* note 162, at 1785. In other important immigration decisions, the BIA has requested briefing from immigrants' rights organizations. *See* Reconsideration Memo, *supra* note 66, at 8-9 (citing *In re Soriano*, 21 I. & N. Dec. 516 (Att'y Gen. 1997), and *In re Hernandez-Casillas*, 20 I. & N. Dec. 262 (Att'y Gen. 1990), as examples of cases in which prior attorneys general sought input from the public in the form of amicus briefs).

[240] *See, e.g.*, Stephenson, *supra* note 105, at 547-48; Sunstein, Chevron *Step Zero*, *supra* note 5, at 225-26.

[241] Stephenson, *supra* note 105, at 530-31.

[242] *Id.* at 531.

[243] *See In re* Silva-Trevino, 24 I. & N. Dec. 687, 690, 696-704 (Att'y Gen. 2008).

[244] *See* Reconsideration Memo, *supra* note 66, at 7-11.

deference.[245] Had the agency followed formal procedures, these procedures would have provided their own checks on the agency action, so courts could more easily defer to the decision.[246]

B. The Choice of Adjudication over Rulemaking

In *Silva-Trevino*, the Attorney General chose to overhaul the categorical approach through adjudication instead of notice-and-comment rulemaking. Adjudication has its advantages in that it is more efficient and less costly to the agency; the agency also can frame the issues more narrowly in an adjudication.[247] The Supreme Court has held that the agency has wide discretion to choose between rulemaking and adjudication.[248] However, courts need not give *Chevron* deference to the end product of that choice of policy-making form;[249] rather, *Mead* announced a rule that "structures scope-of-review doctrine systematically by telling all agencies that there is a link between the policymaking form chosen and the standard of review applied."[250]

There are good reasons for a reviewing court to decide, in the case of *Silva-Trevino*, that "the choice of adjudication over rulemaking for making policy [was] significant if not suspect."[251] First, the categorical approach that the Attorney

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[245] *See* Sunstein, Chevron *Step Zero*, *supra* note 5, at 225-26.

[246] *See id.*

[247] *See* Magill, *supra* note 103, at 1397.

[248] *See Chenery II*, 332 U.S. 194, 203 (1947). The Court also has held that adjudications should command *Chevron* deference in the same manner that rulemaking commands deference. *See* INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999).

[249] *See* Magill, *supra* note 103, at 1425 ("An agency can choose its form . . . but it does not choose what follows from that choice. What follows—the process the agency must follow; the legal effect of its action; and whether, when, and under what standard the action can be challenged in court—are fixed by other sources of law."); *see also id.* at 1405 (explaining the *Chenery II* principle, which is an "otherwise puzzling judicial reaction to agency choice of procedure" by arguing that "because the judiciary has indirect opportunities to shape the consequences of an agency's choice of form, it need not directly evaluate the choice of form in any given case").

[250] *Id.* at 1431.

[251] *See* Bressman, *Beyond Accountability*, *supra* note 107, at 536. Professor Bressman discusses the *Chenery II* decision, in which the Court stated that agencies have broad discretion to choose procedures; however, she notes that *Chenery II* was decided in 1947, when agencies hardly used rulemaking. Today, she argues, "agencies now routinely use rulemaking, which makes the choice of adjudication over rulemaking for making policy significant if not suspect." *Id.* at 535-36; *see also id.* at 537 ("*Mead* . . . begins a partial weaning from *Chenery II* and unlimited choice of procedures. As such, it shows that administrative law has begun to record a concern for arbitrariness in this area."); Magill, *supra* note 103, at 1384-85 ("In the 1950s and 1960s, most administrative agencies implemented their statutes by deciding individual

General upended was well-entrenched; noncitizens had relied substantially and in good faith on the previous interpretation, which had existed for over a century.[252] Also, the new policy announced in *Silva-Trevino* is not context-specific or so specialized that it is impossible to capture in a rule.[253] Rather, the agency wished to create a new framework for deciding all moral turpitude cases, not just cases with facts similar to Mr. Silva-Trevino's.[254] When, as in *Silva-Trevino*, the agency is considering a ruling that is both well-entrenched and not context-specific, it is preferable to make policy by rulemaking, "rather than by picking a sacrificial lamb and making policy through adjudication."[255]

The Attorney General chose adjudication to announce the overhaul of the categorical approach, but did he respect the elements of the form of policy making he chose?[256] The APA does not govern removal proceedings;[257] therefore, the adjudication in *Silva-Trevino* does not fall squarely into the box of a "formal" or "informal" adjudication.[258] However, it clearly was an adjudication affecting liberty interests and therefore must comply with the requirements of due process.[259] Consistent with the notions of due process, parties should be given notice of the potential change in law and allowed to brief the issues; the adversarial system allows both parties to present arguments to a neutral adjudicator and contest their opponents' arguments.[260] The agency must respond to

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cases; by the 1970s, a detectable shift had occurred and most administrative agencies pursued their mandates by promulgating legislative rules.").

[252] *See* NLRB v. Bell Aerospace, 416 U.S. 267, 295 (1974); Pfaff v. United States Dep't of Housing and Urban Dev., 88 F.3d 739, 748 n.4 (9th Cir. 1996) ("Adjudication is best suited for incremental developments to the law, rather than great leaps forward."); Magill, *supra* note 103, at 1424.

[253] *See Bell Aerospace*, 416 U.S. at 294; *Chenery II*, 332 U.S. at 202-03; Magill, *supra* note 103, at 1424.

[254] *See In re* Silva-Trevino, 24 I. & N. Dec. 687, 689 (Att'y Gen. 2008) ("[T]his opinion establishes an administrative framework for determining whether an alien has been convicted of a crime involving moral turpitude.").

[255] Magill, *supra* note 103, at 1424.

[256] *See id.* at 1410-11 ("[A]n agency is generally free to choose among all of its available policymaking forms and, as long as the agency respects the elements of the form it has chosen, its choice of preferred form will not be directly evaluated by courts.").

[257] *See* Marcello v. Bonds, 349 U.S. 302, 310 (1954) (reasoning that the legislative history of the INA indicates a desire by Congress to incorporate some, but not all, of the procedural protections of the APA into the INA).

[258] See *supra* note 109 for a description of the procedural differences between formal and informal adjudications.

[259] *See* Bd. of Regents v. Roth, 408 U.S. 564, 569-70 (1972); Yamataya v. Fisher, 189 U.S. 86, 100-01 (1903).

[260] *See, e.g.*, Chike v. INS, 948 F.2d 961 (5th Cir. 1991) (due process violation found when pro se respondent in deportation hearing was not given notice of the BIA's

each argument in order to pass judicial scrutiny under the reasoned decision-making requirement.[261] Thus, in adjudications, "public input is ensured, and the agency has a substantial incentive to be responsive to that input."[262] While public input is not guaranteed in the same manner as in notice-and-comment rulemaking,[263] stakeholders often have opportunity for input through amicus briefs, either requested by the agency[264] or by a party to the adjudication.[265]

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briefing schedule and the government was allowed to file a brief); Reconsideration Memo, *supra* note 66, at 7-8.

[261] The "reasoned decision-making requirement" or "hard look doctrine," requires the agency to explain its reasons enough to determine whether its decision was arbitrary and capricious. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 407-08, 420 (1971) (remanding a decision to approve construction of a highway through a park because the agency did not state the reasons for choosing that particular route; holding that the agency must offer "some explanation" to allow the court to determine whether "the [agency] acted within . . . [its] authority and if the [agency's] action was justifiable under the applicable standard"); *see also* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) (applying the reasoned decision-making requirement to notice-and-comment rulemaking and defining an agency decision that was arbitrary and capricious as one that (1) relied on factors Congress did not intend it to consider, (2) entirely failed to consider an important aspect of the problem, (3) offered an explanation for decision making that runs counter to evidence before the agency, or (4) was so implausible that it cannot be ascribed to a difference in view or product of agency expertise); Bressman, *Beyond Accountability*, *supra* note 107, at 476 (discussing that the passage of the APA in 1946 allowed judges to seize on the "arbitrary and capricious" standard of review contained therein and require agencies to produce a record reflecting consideration of all relevant issues to facilitate judicial review). Because the agency's decision must not be arbitrary and capricious, the agency must anticipate problems with its reasoning. Scholars argue that the best way to anticipate such problems is to open up the process to challengers before the decision is final; formal procedures facilitate this crucial input from the public. *See, e.g.*, Bressman, *Procedures as Politics*, *supra* note 162, at 1781.

[262] Merrill & Hickman, *supra* note 5, at 885.

[263] *See id.* at 886 ("At a minimum, at least one interested party will exist to act as the virtual representative of other similarly situated persons.").

[264] For example, in *Wyman-Gordon*, the Supreme Court discussed how the NLRB had "invited certain interested parties" to file briefs and participate in oral arguments prior to its ruling in *Excelsior Underwear, Inc. v. Amalgamated Clothing Workers*, 156 N.L.R.B. 1236 (1966), which set forth a new policy requiring employers to provide unions with lists of names of employees before elections. *See* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 762-63 (1969) (plurality opinion) (quoting *Excelsior Underwear*, 156 N.L.R.B. at 1238); *see also* Reconsideration Memo, *supra* note 66, at 8-9 (citing *In re* Hernandez-Casillas, 20 I. & N. Dec. 262 (B.I.A. 1990), and *In re* Soriano, 21 I. & N. Dec. 516 (B.I.A. 1996), as examples of cases in which prior attorneys general sought input from the public in the form of amicus briefs).

[265] *See* Merrill & Hickman, *supra* note 5, at 886. Professor Magill writes:

> As courts encouraged and embraced notice-and-comment rulemaking as a policymaking tool, the exclusion of parties from adjudication began to look anachronistic. Instead of requiring agencies to rely on rulemaking under certain circumstances, the courts recognized participation rights for parties who were interested in (but were not the objects of) adjudications and thus made some adjudications look a little bit more like rulemaking.

Silva-Trevino is an example of adjudication in its least participatory form. The basic requirements for due process were not met. Mr. Silva-Trevino was given no notice of the potential change in law;[266] moreover, it is highly likely that Mr. Silva-Trevino's opponents, in ex parte communications with the office of the Attorney General,[267] were allowed to make their case without an opposing party present.[268] The Attorney General did not ask for any briefing from interested stakeholders; nor could Mr. Silva-Trevino ask for amici to weigh in because he did not know that the Attorney General was considering a major overhaul of the categorical approach until after the publication of the decision.[269] Adjudication at its best can be closer to the deliberation that occurs in notice-and-comment rulemaking.[270] Adjudication at its worst, i.e., *Silva-Trevino*, should command less deference from courts because of

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Magill, *supra* note 103, at 1440.

[266] *See* Reconsideration Memo, *supra* note 66, at 7.

[267] *Id.* at 9 ("[I]t appears highly likely that the certification process in this case began with some *ex parte* communication with the Attorney General."); *see also id.* at 10 ("[T]here is a troubling possibility that the certification process in this case may have been used by the Office of Immigration Litigation to shore up its litigation positions in court.").

[268] In immigration cases, the APA's strict prohibition on ex parte communication in adjudications does not apply because the APA does not apply to removal proceedings. *See* 5 U.S.C. §§ 554(d), 557(d) (2006); Marcello v. Bonds, 349 U.S. 302, 310 (1954). However, the due process clause of the Fifth Amendment guarantees a neutral judge. *See* Vasha v. Gonzales, 410 F.3d 863, 872 (6th Cir. 2005). In a challenge to the use of ex parte communications in the immigration context, the District Court for the Middle District of Pennsylvania stated:

> The decisions of EOIR adjudicators are entitled to a "presumption of regularity," and a party alleging irregularity bears the burden of proving it . . . . Consequently, in order to warrant a hearing on their claim of political interference and *ex parte* communications, Petitioners must make a "strong showing" of impropriety by administrative officials.

Yang v. Reno, 925 F. Supp. 320, 331 (M.D. Pa. 1996) (citing McLeod v. INS, 802 F.2d 89, 95 n.8 (3d Cir. 1986); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971)).

In *Sierra Club*, Judge Patricia Wald reasoned that ex parte communications are permissible in rulemaking because "[o]ur form of government simply could not function efficiently or rationally if key executive policymakers were isolated from each other and from the Chief Executive." Sierra Club v. Costle, 657 F.2d 298, 406 (D.C. Cir. 1981). However, Judge Wald reasoned that one instance where it is necessary to reveal ex parte communications is when "such conversations directly concern the outcome of adjudications or quasi-adjudicatory proceedings" because "there is no inherent executive power to control the rights on individuals in such settings." *Id.* at 407.

[269] Reconsideration Memo, *supra* note 66, at 6.

[270] *See* Magill, *supra* note 103, at 1440; *see also id.* at 1397 (noting that there is often a more extensive vetting of views if the agency presents its view to an administrative tribunal).

the due process violations to the individual and the lack of deliberation by the agency.[271]

It would go too far to suggest that the *Silva-Trevino* decision only merits *Chevron* deference if the agency followed the strict requirements of notice-and-comment rulemaking.[272] In *Mead*, the Court did not require agencies to use the most formal procedures to command *Chevron* deference;[273] standard procedures such as notice-and-comment rulemaking and adjudication are mere examples of the types of procedures that are acceptable to guarantee *Chevron* deference.[274] Professor Bressman states, "[U]nmitigated formalism is neither necessary or wise . . . . We instead should afford Congress or agencies a little leeway to create administrative law-making procedures beyond trial-type or paper hearings."[275] However, courts should "require that those procedures adhere to certain specified limits—in particular, that the resulting policy is transparent, rational, and binding."[276] As the decision-making process in *Silva-Trevino* was neither transparent, nor its results rational, the decision should not merit *Chevron* deference.

C. Can Silva-Trevino *Survive Step Zero?*

It could be argued that a court reviewing *Silva-Trevino* would have adequate reasons to decide that the decision passes *Chevron* step zero. The decision had binding effect on future

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[271] In *Alaska Dep't of Health & Social Servs. v. Ctrs. for Medicare & Medicaid Servs.*, 424 F.3d 931, 939 (9th Cir. 2005), the Ninth Circuit examined an agency's adjudication under *Mead* and conferred *Chevron* deference to the decision because of the multiple opportunities for participation by the parties and deliberation by the agency. *Id.* at 939. The court stated:

> Here, the formal administrative process afforded the State included the opportunities to petition for reconsideration, brief its arguments, be heard at a formal hearing, receive reasoned decisions at multiple levels of review, and submit exceptions to those decisions. These hallmarks of "fairness and deliberation" are clear evidence that Congress intended the Administrator's final determination to "carry[] the force of law."

Id. (quoting United States v. Mead Corp., 533 U.S. 218, 227 (2001) (alteration in original)).

[272] *See* Anthony, *Agency Interpretations*, *supra* note 84, at 46 ("It is manifestly too late in the day to suggest that *Chevron* acceptance should apply only to interpretations embodied in legislative rules."); Bressman, *Beyond Accountability*, *supra* note 107, at 535 (discussing scholars' praise for notice-and-comment rulemaking to set policy, but observing "[w]hen push comes to shove, few scholars want to reduce agency flexibility").

[273] *See Mead*, 533 U.S. at 227.

[274] Bressman, *How* Mead *Has Muddled*, *supra* note 103, at 1450.

[275] *Id.*

[276] *Id.*

parties, and was made by the agency head. However, both of these arguments fall short of effectively establishing that the decision should receive *Chevron* deference.

First, the Attorney General's decision in *Silva-Trevino* has binding effect on future parties.[277] *Silva-Trevino* was published and thus precedent-setting,[278] making its binding effect "immediate and irrevocable until officially renounced."[279] The decision's binding effect distinguishes it from the tariff ruling letter at issue in *Mead*, for which the "binding character as a ruling stop[ped] short of third parties."[280] While other importers were warned against assuming any right of detrimental reliance on the tariff ruling letter in *Mead*,[281] any noncitizen facing CIMT charges is subject to the Attorney General's new approach.[282]

Binding effect is also the "promise of consistent application."[283] One might question how *Silva-Trevino* promises consistent application, due to the decision's clear inconsistency with over a century of practice.[284] Yet this type of change in agency position should merit the same level of deference as an original agency interpretation. The Supreme Court in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*[285] held that "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the

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[277] *See, e.g.*, Levin, *supra* note 152, at 774-75; *see also* Garcia-Quintero v. Gonzales, 455 F.3d 1006, 1012 (9th Cir. 2006) (quoting Miranda Alvarado v. Gonzales, 449 F.3d 915, 922 (9th Cir. 2006) ("In light of *Mead*, the 'essential factor' in determining whether an agency action warrants *Chevron* deference is its precedential value.")).

[278] The regulation provides:

> By majority vote of the permanent Board members, selected decisions of the Board rendered by a three-member panel or by the Board en banc may be designated to serve as precedents in all proceedings involving the same issue or issues. Selected decisions designated by the Board, decisions of the Attorney General, and decisions of the Secretary of Homeland Security to the extent authorized in paragraph (i) of this section, shall serve as precedents in all proceedings involving the same issue or issues.

8 C.F.R. § 1003.1(g).

[279] *See* Bressman, *How* Mead *Has Muddled*, *supra* note 103, at 1488-89.

[280] *See* United States v. Mead Corp., 533 U.S. 218, 233 (2001).

[281] *See id.* at 233 (citing 19 C.F.R. § 177.9(c)).

[282] *See In re* Silva-Trevino, 24 I. & N. Dec. 687, 688 (Att'y Gen. 2008); *see generally* Tooby & Kesselbrenner, *supra* note 53.

[283] Bressman, *How* Mead *Has Muddled*, *supra* note 103, at 1488-89.

[284] *See* United States *ex rel.* Mylius v. Uhl, 210 F. 860, 863 (2d Cir. 1914); *Silva-Trevino*, 24 I. & N. Dec. at 688-704.

[285] 545 U.S. 967 (2005).

Chevron framework."[286] The Court reasoned, "[I]f the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.'"[287] While the Attorney General significantly changed immigration law, he explained his reasons for doing so, anticipating some of his opponents' arguments and rebutting them in a lengthy decision.[288]

However, the decision's binding effect alone should not be enough to create the "force of law."[289] Merely calling the decision precedent does not automatically confer *Chevron* deference; the *Mead* Court stated: "[P]recedential value alone does not add up to *Chevron* entitlement."[290] Reflecting on this sentence from the *Mead* decision, Professor Merrill states, "This would seem to negate any claim that authority to articulate a rule of decision is a *sufficient* condition of power to act with the force of law."[291]

Why is declaring that an agency decision is precedent insufficient to create the "force of law"? In the context of agency adjudication, precedential value does not confer the "force of law" in the same manner as court-made precedential case law. Professor Richard Murphy has noted, "[t]he law-like quality of case-law flows from precedential force; one should expect an interpretation of law adopted in a given case to function as *law* in later cases precisely because stare decisis requires courts to defer to past judicial opinions."[292] As underscored by the Supreme Court's decision in *Brand X*, an agency, unlike a court, can easily alter well-settled precedent, "provided that its explanation for its departure can survive judicial review for arbitrariness. Because agency 'precedents' do not bind later agency decision making in any serious way, they do not possess the same potential as judicial precedents to create generally

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[286] *See id.* at 981.

[287] *Id.* (quoting Smiley v. Citibank, 517 U.S. 735, 742 (1996)).

[288] *See Silva-Trevino*, 24 I. & N. Dec. at 688-704.

[289] *See* Merrill, *Meta-Rules and Meta-Standards*, *supra* note 136, at 817.

[290] United States v. Mead Corp., 533 U.S. 218, 232 (2001) (reasoning that interpretive rules may sometimes function as precedents, but are not accorded *Chevron* deference "as a class").

[291] Merrill, *Meta-Rules and Meta-Standards*, *supra* note 136, at 817 (emphasis in original).

[292] Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1042 (2005) [hereinafter Murphy, *Judicial Deference*].

applicable and binding *law*."[293] In *Silva-Trevino*, the Attorney General suddenly reversed years of case law, invoking *Brand X* to remind challengers that agencies can change their minds.[294] The ease with which he could make such a change conflicts with the "rule-of-law idea that regulated parties ought to be able to identify the law and to expect that it will persist for some reasonable period of time."[295]

Moreover, the decision is binding in name only, as the Attorney General did not "exercise [his law-making] authority in ways that generally promote consistency and specifically prevent ad hoc departures at the behest of narrow interests."[296] Professor Bressman writes, "By announcing a rule that binds all similarly situated parties, agencies may stem requests for deviations except through official channels."[297] As noted by the amici who asked the Attorney General to reconsider his decision in *Silva-Trevino*, it appears that the Attorney General abandoned the traditional categorical approach upon request of the Office of Immigration Litigation (OIL) of the DOJ, which wanted to shore up its litigation positions in court.[298] It appears that OIL was permitted to request a deviation from prior case

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[293] *Id.* Professor Murphy argues for a "commitment theory," under which courts should give *Chevron* deference to agency decisions that reflect a longstanding commitment or those that are difficult for the agency to change in the future (because, for example, the agency interpretation was promulgated through notice-and-comment rulemaking, which would require new rulemaking to change). *See id.* at 1065. Agency interpretations announced in formal adjudications do not have the promise of consistent application because they can be amended cheaply by the agency "with little or no procedural ado." *Id.* at 1071. Therefore, Professor Murphy disagrees with the majority in *Mead* that formal adjudications should receive *Chevron* deference. *See id.* at 1071-72.

[294] *See In re* Silva-Trevino, 24 I. & N. Dec. 687, 689 (Att'y Gen. 2008).

[295] Murphy, *Judicial Deference*, *supra* note 292, at 1026; *see also* Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1040-41 (2007) (arguing that post-*Brand X*, agencies will have great difficulty persuading private parties to rely on agency interpretations).

[296] Bressman, *Beyond Accountability*, *supra* note 107, at 539; *see also* Bressman, *How* Mead *Has Muddled*, *supra* note 103, at 1479-80 ("The Constitution . . . demands consistent application, as evident in Article I, the Due Process Clause, and elsewhere. Thus, it requires procedural formalities to promote predictable and fair lawmaking, not simply accountable lawmaking.").

[297] Bressman, *Beyond Accountability*, *supra* note 107, at 539.

[298] *See* Reconsideration Memo, *supra* note 66, at 10. The agency's attempt to look behind the record of conviction already had met some resistance in the circuit courts; for example, the Second Circuit rejected the BIA's decision in *Gertsenshteyn*, which allowed for a factual inquiry into whether a prostitution aggravated felony offense was committed for commercial advantage. *See* Gertsenshteyn v. Mukasey, 544 F.3d 137, 147-49 (2d Cir. 2008). The Second Circuit stated: "[t]hat the Government finds that task [proving removability through the use of the record of conviction] difficult in some cases is no reason for immigration courts to renounce the restrictions that the courts have said the law requires." *Id.* at 148.

law through unofficial channels, namely, ex parte communication.[299] The agency's sudden, abrupt departure from over a century of case law seemed to be tailored to the narrow interests of OIL, without considering the views of the many others whom the decision impacted.[300]

Another reason for courts to give deference to *Silva-Trevino* is because the decision was authoritative: it "represent[s] the official position of the expert agency."[301] The decision was rendered by the head of the DOJ,[302] thus distinguishing it from decisions such as the tariff letters in *Mead*, which were written by low-level agency officials who did not have the same authority over agency policy.[303] However, unlike *Mead*, the *Silva-Trevino* decision set forth a uniform policy to alter the behavior of regulated individuals; it was not one of thousands issued per year by low-level agency officials.[304] Not only did the Attorney General have the authority to make policy, but he clearly intended to exercise this authority to establish a new framework for determining whether an offense involves moral turpitude.[305] Scholars, including Justice Kagan,

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[299] *See* Reconsideration Memo, *supra* note 66, at 10.

[300] *See* Bressman, *Beyond Accountability*, *supra* note 107, at 539; *see also* AILF Letter, *supra* note 219; ABA Letter, *supra* note 211; ABA RESOLUTION, *supra* note 228; NAIJ Statement, *supra* note 212; Reconsideration Memo, *supra* note 66.

[301] Christensen v. Harris Cnty., 529 U.S. 576, 589-90 n.* (2000) (Scalia, J., concurring in part and concurring in judgment).

[302] In their article *Chevron's Nondelegation Doctrine*, Barron and Kagan illustrate their argument that only authoritative decisions should receive *Chevron* deference by using as an example the Attorney General deciding an immigration law issue. *See* Barron & Kagan, *supra* note 135, at 262-63 (citing INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999)) (recognizing that this argument is inconsistent with *Aguirre-Aguirre*, in which the Court held that the BIA has power to give meaning to immigration statutory terms because the Attorney General has vested the BIA with such power).

[303] *See* United States v. Mead Corp., 533 U.S. 218, 233-34 (2001).

[304] *See id.* ("Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting."). Professor Merrill, interpreting the *Mead* Court's force of law holding, explains that "a delegation to an agency to act with the force of law will usually generate *uniform* rules throughout the agency's jurisdiction." Merrill, *Meta-Rules and Meta-Standards*, *supra* note 136, at 817. He argues that a "regulatory system unconcerned with whether like cases are treated alike is an unlikely candidate for the appellation 'law.'" *Id.*

[305] *See In re* Silva-Trevino, 24 I. & N. Dec. 687, 689 (Att'y Gen. 2008) ("This opinion establishes an administrative framework for determining whether an alien has been convicted of a crime involving moral turpitude."); *cf. Mead*, 533 U.S. at 233 ("It is difficult, in fact, to see in the agency practice itself any indication that Customs ever set out with a lawmaking pretense in mind when it undertook to make classifications like these."). Professor Koch discusses what he sees as two core questions that the *Mead* Court answered: first, did Congress delegate authority to make policy to the agency, and second, did the agency intend to exercise its policy-making function. *See* Charles H. Koch, Jr., *Judicial Review of Agency Policymaking*, 44 WM. & MARY L. REV.

have argued that the authority of the decision maker alone is sufficient to command *Chevron* deference;[306] their arguments find support in Justice Scalia's dissenting opinion in *Mead*.[307]

Justice Kagan and Professor Barron argue that courts should grant *Chevron* deference only if the head of the agency made the decision, as this approach promotes "accountability and discipline in decision making."[308] *Silva-Trevino*, however, is a case that disproves this theory. Accountability is not served by awarding *Chevron* deference to the head of the agency when he acts on behalf of an administration that already has been voted out of office.[309] A "midnight adjudication" such as *Silva-Trevino* presents a great risk of abuse of power by an outgoing administration;[310] the Attorney General purposefully could have chosen *not* to commence notice-and-comment rulemaking, which would have lasted long enough to spill over into the next administration and allow opposing views to dictate the results.[311] As Professor Jack Beerman has stated, "As the end of a term

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375, 398 (2002). The Court answered the first question in the affirmative, and the second in the negative. *See id.* Unlike the agency in *Mead*, the Attorney General, deciding *Silva-Trevino*, intended to exercise his policy-making function. *See Silva-Trevino*, 24 I. & N. Dec. at 688 (Att'y Gen. 2008) ("The Board of Immigration Appeals and the Federal courts have long struggled in administering and applying the Act's moral turpitude provisions . . . . My review of this case presents an opportunity to establish a uniform framework for ensuring that the Act's moral turpitude provisions are fairly and accurately applied.").

[306] *See* Barron & Kagan, *supra* note 135, at 229.

[307] *See Mead*, 533 U.S. at 258 (Scalia, J., dissenting); *see also* Christensen v. Harris Cnty., 529 U.S. 576, 589-90 n.* (2000) (Scalia, J., concurring in part and concurring in judgment).

[308] Barron & Kagan, *supra* note 135, at 204.

[309] *See* Nina Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 566-67 (2003). Professor Mendelson reasons that rulemaking occurring late in an administration can promote accountability because the electorate can participate in the notice-and-comment rulemaking process. *See id.* at 636. She argues that such "midnight rulemaking" raises the issue's visibility, which arguably creates more public debate than the traditional notice-and-comment rulemaking process, in which primarily well-organized interest groups participate. *See id.* at 635-36. She argues, however, that "[o]ther forms of policy entrenchment may lack significant potential to create dialogue, and, moreover, because of their lack of procedural discipline and their narrow focus, coupled with the lack of electoral accountability, they may present a greater risk of abuse." *Id.* at 658.

[310] *See id.* (reasoning that a great risk of abuse of power is presented when outgoing administrations do not use formal procedures, since the lack of electoral accountability is coupled with the lack of dialogue on the new policy).

[311] *See* Masur, *supra* note 295, at 1069 (discussing why outgoing administrations do not have time to initiate notice-and-comment rulemaking between the election results and the new administration, which is why "the prototypical 'eleventh hour' executive actions are those that the President can undertake unilaterally and instantaneously").

nears, the political costs of taking action may decrease, which may free an administration to take action that it could not have taken earlier in its term . . . [n]ear the end of a term, political costs and benefits may be less important to the administration."[312] Thus, Attorney General Mukasey could "assume full and visible responsibility"[313] for the *Silva-Trevino* ruling; yet he suffered no repercussions, since he knew at the time of publication that his days as Attorney General were numbered.[314]

The Attorney General's decision also lacked discipline, as there was insufficient deliberation preceeding *Silva-Trevino*'s publication.[315] As discussed in Part III.A, the Attorney General concluded that his decision would not lead to the relitigation of past crimes; this error led him to inadequately weigh concerns such as administrative efficiency.[316] This flaw in reasoning was not the only error of law contained in the opinion.[317] Perhaps the Attorney General did not have time to

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[312] Jack M. Beerman, *Presidential Power in Transitions*, 83 B.U. L. REV. 947, 958 (2003).

[313] *See* Barron & Kagan, *supra* note 135, at 256.

[314] *See* Beerman, *supra* note 312, at 958 ("Near the end of a term, political costs and benefits may be less important to the administration.").

[315] *See* Barron & Kagan, *supra* note 135, at 204.

[316] *See supra* notes 208-11 and accompanying text.

[317] For example, the Attorney General discussed a "patchwork" of circuit court decisions on the use of the categorical approach; in the name of the uniform application of immigration law, he wished to create one approach to the CIMT analysis with his decision in *Silva-Trevino*. *See In re* Silva-Trevino, 24 I. & N. Dec. 687, 694 (Att'y Gen. 2008). Most of the cases cited by the Attorney General demonstrated circuit splits over when an immigration adjudicator could look at the record of conviction and when a statute was actually divisible. *See* Jean-Louis v. Att'y Gen., 582 F.3d 462, 474 n.16 (3d Cir. 2009) ("Although courts employ different labels to describe the categorical and modified categorical approaches, the fundamental methodology is the same."). In only one outlier case, *Ali*, had a court permitted an adjudicator to look behind the record of conviction. *See* Ali v. Mukasey, 521 F.3d 737, 743 (7th Cir. 2008) (holding that an immigration judge can consider evidence outside of the record of conviction to determine whether an offense is a crime involving moral turpitude); *Silva-Trevino*, 24 I. & N. Dec. at 693-94; *see also* Reconsideration Memo, *supra* note 66, at 19 n.12 (questioning the validity of the *Ali* decision because it was a panel decision that conflicted with prior panel decisions and noting the flaws in the *Ali* court's reasoning). The amici who challenged the *Silva-Trevino* decision stated:

> The decisions of federal courts are uniform but for the outlier of the Seventh Circuit in *Ali*, which is the only cited decision that invites courts to look outside the record of conviction to determine if a person has been convicted of a crime involving moral turpitude. By adopting this outlier as the basis of its: "uniform" approach, the Attorney General essentially guts the analysis adopted by the other federal circuits and creates the disuniformity it purportedly seeks to avoid.

Reconsideration Memo, *supra* note 66, at 13.

In addition, the Attorney General reasoned that "moral turpitude" is never an element of a noncitizen's prior offense; while it is "simple" for a sentencing court

adequately deliberate because the *Silva-Trevino* decision was rushed out during the final days of the Bush administration,[318] in attempts to entrench the new policy before the opposing party took office.[319] Perhaps the Attorney General's decision lacked meaningful review because he did not believe that his sense of professional responsibility and importance were at stake if he indiscriminately signed off on the decision.[320] Perhaps the decision lacked accuracy and thoroughness due to the Attorney General's failure to "invite and consider the comments of all the world, including those of directly affected persons who are able, often uniquely, to supply pertinent information and analysis."[321] Regardless of the cause, the Attorney General's opinion in *Silva-Trevino*, while authoritative, was not disciplined.

Why should courts care about the discipline used by an agency to make a decision? The leading normative theory for *Chevron* deference is that agencies have greater policy expertise than courts.[322] Courts are generalists; agencies are specialists.[323] "Specialists usually have a better grasp of

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employing the categorical approach to search for the necessary elements in the statute of conviction for the prior offense, an immigration court never will find "moral turpitude" listed in the elements of the statute. *Silva-Trevino*, 24 I. & N. Dec. at 700-01. However, the Attorney General glossed over the precursor to the immigration judge conducting the categorical approach: the judge first looks to case law to determine which elements necessarily involve moral turpitude. *See Jean-Louis*, 582 F.3d at 477-78. Then the judge searches for evidence of those elements in the record of conviction if the statute is divisible. The judge never looks for the words "moral turpitude" in the elements of the offense or the record of conviction.

[318] *Cf.* Richard Murphy, *The* Brand X *Constitution*, 2007 B.Y.U. L. REV. 1247, 1300 (2007) (citing Letter from James Madison to James Monroe, President of the United States (Dec. 27, 1817), *in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 217, 221 (Philadelphia, J.B. Lippincott & Co. 1867)) ("[A] great deal of legislation does not receive serious, broad-based scrutiny from members of Congress. James Madison made this point nearly two hundred years ago, explaining that 'midnight precedents'—the result of last-minute, pell-mell rush that attends the close of legislative sessions—deserves no one's respect.").

[319] *See* Beerman, *supra* note 312, at 956-59 (describing reasons why agencies may choose to wait until the end of the President's term to take important administrative action).

[320] *See* Barron & Kagan, *supra* note 135, at 252.

[321] Anthony, *Interpretive Rules*, *supra* note 180, at 1373; *see also* AILF Letter, *supra* note 219; ABA Letter, *supra* note 211; ABA RESOLUTION, *supra* note 228; NAIJ Statement, *supra* note 212; Reconsideration Memo, *supra* note 66.

[322] *See, e.g.*, Sunstein, Chevron *Step Zero*, *supra* note 5, at 197; Elhauge, *supra* note 93, at 2135. Professor Ronald J. Krotoszynski, however, argues that while *Chevron* referenced agency expertise as a "background consideration supporting a rule of deference," the result was compelled by an implied delegation of law-making power to the agency. Krotoszynski, *supra* note 135, at 739.

[323] *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 973 (1992) [hereinafter Merrill, *Judicial Deference to Executive Precedent*].

technical terms or the practical consequences of a decision, and thus their views should be given deference by generalists."[324] Yet agency decisions do not always receive such deference. As Professor Murphy has explained, "[a]n agency's comparative interpretive advantages can only matter where an agency actually makes use of them—an interpretation that an agency bases on astrology, for instance, has little claim to anyone's respect."[325] Thus, "courts might justifiably engage in independent review where there are grounds for concluding that an agency has not done its interpretive 'homework.'"[326] In the *Silva-Trevino* decision-making process, the Attorney General merely putting his name on the decision cannot make up for the failure to do his "interpretive 'homework.'"[327]

Justice Scalia would have liked the *Mead* majority to base its decision on the authoritativeness of the decision maker, yet this was the dissent, not the majority opinion.[328] The majority in *Mead* emphasized *how* the agency made its decision, not *who* made the decision.[329] Of the possible indicators for whether an agency decision has the "force of law," the *Mead* opinion "suggest[s] that chief among them is the degree of procedural formality involved in the action."[330] As discussed in this section, the agency's decision-making process in *Silva-Trevino* was lacking in procedural formalities that would ensure the "fairness and deliberation that should underlie a pronouncement of such force."[331] Had the Attorney General used formal procedures, such procedural formality could have guarded against

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[324] *Id.*

[325] *Id.* at 1052.

[326] *Id.* For example, in *Negusie v. Holder*, 129 S. Ct. 1159 (2009), the Court refused *Chevron* deference to the BIA's interpretation of the statutory term "persecutor of others," which precluded a grant of asylum or withholding of removal, because the BIA had not exercised its interpretive authority, but rather relied on a case interpreting the term in an entirely different statutory context. *See id.* at 1166-67. The Court remanded to the BIA for an initial determination of the statutory term in question.

[327] *See* Murphy, *Judicial Deference*, *supra* note 292, at 1052.

[328] *See* United States v. Mead Corp., 533 U.S. 218, 257 (2001) (Scalia, J., dissenting).

[329] *See id.* at 230 (majority opinion) ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.").

[330] Barron & Kagan, *supra* note 135, at 210-11; *see also* Richard Murphy, *The* Brand X *Constitution*, *supra* note 318, at 1290 ("[A] dominant theme of *Mead* remains the Court's effort to cabin the scope of *Chevron* deference with procedure."); Merrill, *Meta-Rules and Meta-Standards*, *supra* note 136, at 814 ("One factor clearly deemed relevant by the majority is whether the statute 'provides for a relatively formal procedure.'").

[331] *Mead*, 533 U.S. at 230.

what amounted to an "'authoritative' production of unfair, inconsistent[,] or arbitrary law."[332]

IV. PROPOSED SOLUTIONS

This section discusses some different approaches to solve the problem unleashed by Attorney General Mukasey when he published the *Silva-Trevino* decision. Each approach, however, is not a perfect fix; the proposed solutions and problems with each solution are discussed below.

A. Courts Can Refuse Chevron *Deference*

The primary solution proposed in this article is for courts to refuse deference to the agency's decision in *Silva-Trevino*. Courts would have an opportunity to review this issue if a noncitizen, ordered removed pursuant to the new moral turpitude test, challenges his removal order in a circuit court of appeals.[333] Courts can refuse deference under *Chevron* step zero; however, this requires wading through the murky waters of *Mead* and answering questions that courts may prefer to leave to law review articles.[334] The first circuit court to consider whether to give *Silva-Trevino* deference, the Third Circuit in 2009 in *Jean-Louis v. Att'y Gen.*,[335] did not consider the impact of the Attorney General's procedures, as this challenge was not raised by the petitioner.[336] However, the court reasoned, "the lack of transparency, coupled with the absence of input by interested stakeholders, only serves to dissuade us further from deferring to the Attorney General's novel approach."[337]

A solution of lesser resistance is for courts to refuse to defer to *Silva-Trevino* under *Chevron* step one, by reasoning that the word "convicted" in the relevant statutes indicates a

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[332] Bressman, *How* Mead *Has Muddled*, *supra* note 103, at 1449.

[333] *See* 8 U.S.C. § 1252(b).

[334] *See, e.g.*, Bressman, *How* Mead *Has Muddled*, *supra* note 103, at 1446 ("Because courts are insecure about *Mead*, many grant lower-level *Skidmore* deference in addition to or in lieu of *Chevron* deference. Thus, courts engage in *Mead*-induced *Chevron* avoidance."); *cf.* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1019 (2005) (Scalia, J., dissenting) ("It is indeed a wonderful new world that the Court creates, one full of promises for administrative-law professors in need of tenure articles and, of course, for litigators.").

[335] 582 F.3d 462 (3d Cir. 2010).

[336] *See id.* at 417 n.11.

[337] *Id.*

clear Congressional preference for the categorical approach.[338] This was the Third Circuit's approach in *Jean-Louis*; the court held that the Attorney General's "novel framework for determining whether a petitioner has been convicted of a crime involving moral turpitude"[339] should not command *Chevron* deference because the statute was clear.[340] However, there is arguably some ambiguity when considering all of the relevant removal statutes.[341] This ambiguity may be sufficient for courts to move to *Chevron* step two, under which deference to *Silva-*

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[338] *See* Dulal-Whiteway v. Dep't of Homeland Sec., 501 F.3d 116, 124-25 (2d Cir. 2007), *abrogated by* Nijhawan v. Holder, 129 S. Ct. 2294 (2009); *In re* Velazquez-Herrera, 24 I. & N. Dec. 503, 513 (B.I.A. 2008).

[339] Jean-Louis v. Att'y Gen., 582 F.3d 462, 464 (3d Cir. 2009).

[340] The Third Circuit in *Jean-Louis* decided that the Immigration and Nationality Act was clear and that the ambiguity described by the Attorney General in *Silva-Trevino* was "an ambiguity of his own making, not grounded in the text of the statute, and certainly not grounded in the BIA's own rulings or the jurisprudence of courts of appeals going back for over a century." *Id.* at 473; *see also id.* at 477 (reasoning that the Attorney General's division of the term "'crime' and 'involving moral turpitude'" into a noun and subordinate clause "distorts its intended meaning"). The court cited longstanding case law that "the term 'convicted' forecloses individualized inquiry in an alien's specific conduct and does not permit examination of extra-record evidence." *Id.* at 473-74 (citing *Velazquez-Herrera*, 24 I. & N. Dec. at 513). The court reasoned, "Congress has prescribed a single definition of 'convicted,' applicable to all removable offenses," so it was inconsistent with the statute to employ the categorical approach for removable offenses such as aggravated felonies, yet use the new approach for crimes involving moral turpitude. *Id.* at 474-75.

[341] While Congress stated that only those "convicted" of a crime involving moral turpitude could be deported, the Immigration and Nationality Act renders inadmissible a noncitizen "convicted of, *or who admits having committed or who admits committing acts which constitute the essential elements* of a crime involving moral turpitude." *See* 8 U.S.C. §§ 1227(a)(2)(A)(i), (ii); § 1182(a)(2)(A)(i)(I) (2006) (emphasis added). For all of these noncitizens attempting to overcome the ground of inadmissibility for a CIMT, the statutory language includes both convictions *and* admission to the essential elements of a CIMT; this language can create enough ambiguity for courts to give *Chevron* deference to the Attorney General's decision in *Silva-Trevino*. The amici argued that BIA and federal court decisions concluded that Congress intended, even when a noncitizen admits to the essential elements of a CIMT, to prevent judges from trying facts and underlying conduct. *See* Reconsideration Memo, *supra* note 66, at 26 (citing Howes v. Tozer, 3 F.2d 849, 852 (1st Cir. 1925); United States *ex rel.* Castro v. Williams, 203 F. 155, 156-67 (S.D.N.Y. 1913)); *see also id.* at 22 (citing *In re* Seda, 17 I. & N. Dec. 550, 554 (B.I.A. 1980); *In re* Winter, 12 I. & N. Dec. 638, 642 (B.I.A. 1968)). However, the statutory term "admits" does appear to be ambiguous, unlike the term "convicted." *Cf. Velazquez-Herrera*, 24 I. & N. Dec. at 513 (holding that "where a ground of deportability is premised on the existence of a 'conviction' for a particular type of crime, the focus of the immigration authorities must be on the crime of which the alien was *convicted*, to the exclusion of any other criminal or morally reprehensible acts he may have *committed*" (alteration in original)). As such, the agency can change its mind with respect to its meaning. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005). That new meaning, even if it conflicts with federal circuit court precedent, may command *Chevron* deference. *See id.*

Trevino is likely, as courts rarely reject an agency's interpretation when deciding whether it is permissible.[342]

B. Skidmore *Review of* Silva-Trevino

If *Silva-Trevino* fails *Chevron* step zero, as proposed in this article, courts will analyze the decision under the *Skidmore* factors. Many scholars have discussed *Skidmore* deference.[343] Professor Kristin Hickman and Matthew Krueger cite two conceptions of the *Skidmore* test: the independent judgment model, under which courts substitute their views for that of the agency;[344] and the sliding-scale model, under which the degree to which courts award deference to an agency's decision varies according to the contextual factors suggested by the *Skidmore* Court:[345] the thoroughness evident in the agency's consideration, its consistency with earlier pronouncements, and any other factors that give it "power to persuade."[346] Apart from the contextual factors, courts measure the validity of the agency's reasoning under the *Skidmore* sliding-scale model.[347] In an empirical study of courts' decisions during the five years following *Mead*, which revived the *Skidmore* doctrine, Hickman and Krueger found that courts prefer the sliding-scale model of *Skidmore* review.[348] Hickman and Krueger also concluded that

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[342] *See* Merrill, *Judicial Deference to Executive Precedent*, *supra* note 323, at 977 ("If [a court] resolves the question [of statutory interpretation] at [*Chevron*] step two, then it applies a standard of maximum deference. In effect, *Chevron* transformed a regime that allowed courts to give agencies deference along a sliding scale into a regime with an on/off switch."); *see also* Chevron v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984) (requiring courts to defer to the agency's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute").

[343] *See generally* Diver, *supra* note 81; Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235 (2007); Merrill, *Judicial Deference to Executive Precedent*, *supra* note 323.

[344] *See* Hickman & Krueger, *supra* note 343, at 1252-53 (citing Diver, *supra* note 81, at 565). Professor Diver comments on the various meanings of deference, writing that "[a]t one extreme, deference might mean nothing more than 'respectful or courteous regard.'" Diver, *supra* note 81, at 565. Under this meaning of deference, courts do not give any special weight to an agency's decision; rather, courts weigh the agency's position on an issue as it would any other litigant's arguments. *See id.* at 565. He writes, "[o]f course, the 'weight' assigned to any advocate's position is presumably dependent upon the 'thoroughness evident in its consideration' and the 'validity of its reasoning.'" *Id.* at 565 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[345] *See* Hickman & Krueger, *supra* note 343, at 1255-56 (citing 5 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 20:16, at 400 (2d ed. 1984), and Merrill, *Judicial Deference to Executive Precedent*, *supra* note 323, at 972).

[346] *See Skidmore*, 323 U.S. at 140.

[347] *See id.*; Hickman & Krueger, *supra* note 343, at 1273, 1285.

[348] *See* Hickman & Krueger, *supra* note 343, at 1259-71.

courts were highly deferential to agencies, notwithstanding that *Skidmore* encourages lighter deference than *Chevron*.[349]

Does *Silva-Trevino* withstand *Skidmore* review? Using an independent judgment model, courts will regard *Silva-Trevino* as merely a novel litigation position proposed by the agency.[350] Since *Silva-Trevino* contradicts well-entrenched case law,[351] courts probably will resort to their own precedent decisions,[352] all of which mandate the traditional categorical approach.[353] Courts also may find that *Silva-Trevino*, as a litigation position, is not persuasive because the decision contains several errors of law, including resting on the faulty presumption that abandoning the traditional categorical approach would not lead to a relitigation of past crimes.[354]

Using a sliding-scale model of *Skidmore* review, courts will evaluate contextual factors: the thoroughness evident in the agency's consideration, its consistency with earlier pronouncements, and any other factors that give it "power to persuade."[355] The most prominent contextual factor is consistency: *Silva-Trevino* is entirely inconsistent with almost a century of immigration case law.[356] Since 1914, courts and the agency have

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[349] *See id.* at 1271.

[350] *Cf.* Jean-Louis v. Att'y Gen., 582 F.3d 462, 464 (3d Cir. 2009) (describing *Silva-Trevino* as a "novel framework for determining whether a petitioner has been convicted of a crime involving moral turpitude").

[351] *See, e.g.*, Dulal-Whiteway v. U.S. Dep't of Homeland Sec., 501 F.3d 116, 124 (2d Cir. 2007), *abrogated by* Nijhawan v. Holder, 129 S. Ct. 2294 (2009); *In re* Velazquez-Herrera, 24 I. & N. Dec. 503, 513 (B.I.A. 2008); United States *ex rel.* Mylius v. Uhl, 210 F. 860, 863 (2d Cir. 1914).

[352] Hickman and Krueger cite *Clackamas Gastroenterology Associates v. Wells*, 538 U.S. 440 (2003), as an example of the independent judgment model of *Skidmore* review. *See* Hickman & Krueger, *supra* note 343, at 1254. In *Clackamas*, the Court adopted a reading of the statute based on its own precedents interpreting the statute; that the agency's approach was consistent with the Court's own precedents was an afterthought. *See Clackamas*, 538 U.S. at 448-51; *see also* Guardado-Garcia v. Holder, 615 F.3d 900, 902 (8th Cir. 2010) (refusing, without significant discussion, to apply the *Silva-Trevino* approach because it conflicted with the court's precedent); Godinez-Arroyo v. Mukasey, 540 F.3d 848, 851 (8th Cir. 2008) (reasoning that a Board of Immigration Appeals decision merits *Skidmore* deference because it is consistent with the Board's prior decisions, the court's published opinions, and opinions of other circuit courts).

[353] *See, e.g.*, Sandoval-Lua v. Gonzales, 499 F.3d 1121, 1127 (9th Cir. 2007); Omari v. Gonzales, 419 F.3d 303, 307 (5th Cir. 2005); Bazan-Reyes v. INS, 256 F.3d 600, 606 (7th Cir. 2001).

[354] *See supra* notes 216, 317.

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

[356] *See id.*; *Mylius*, 201 F. at 863; *cf.* Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 487-94 (2004) (analyzing EPA's informal interpretation of the Clean Air Act's Prevention of Significant Deterioration program under *Skidmore* and granting deference to the EPA's interpretation because it was longstanding, consistently maintained and consistent with the statute's language and history).

refused to look behind the record of conviction to determine removability for a criminal conviction,[357] yet *Silva-Trevino* permits such factual exploration.[358] Courts applying *Skidmore* review have rejected such agency interpretations that were inconsistent with a prior interpretation,[359] especially when, as in *Silva-Trevino*, the decision "stands virtually alone."[360]

However, "the fact of an agency's inconsistency, standing alone, tells the court little."[361] Courts often permit agencies to change policies; flexibility is essential for an agency to effectuate its expertise.[362] Yet agency flexibility must be balanced against the potential for arbitrary decision making.[363] Courts have granted *Skidmore* deference to inconsistent agency decisions, so long as the decision was thorough.[364] One measure of thoroughness is public participation in the decision-making process,[365] since outside parties may raise issues not previously

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[357] *See, e.g.*, Dulal-Whiteway v. Dep't of Homeland Sec., 501 F.3d 116, 124 (2d Cir. 2007), *abrogated by* Nijhawan v. Holder, 129 S. Ct. 2294 (2009); *In re* Velazquez-Herrera, 24 I. & N. Dec. 503, 513 (B.I.A. 2008); *Mylius*, 201 F. at 863.

[358] *See In re* Silva-Trevino, 24 I. & N. Dec. 687, 690 (Att'y Gen. 2008).

[359] *See, e.g.*, EEOC v. Arabian American Oil Co., 499 U.S. 244, 257 (1991); General Electric Co. v. Gilbert, 429 U.S. 125, 142-45 (1976).

[360] *See Gilbert*, 429 U.S. at 145. As discussed *supra* note 317, prior to *Silva-Trevino*, only one court had permitted the agency to engage in an exploration of the facts to determine removability for a criminal conviction. *See* Ali v. Mukasey, 521 F.3d 737, 741 (7th Cir. 2008).

[361] Hickman & Krueger, *supra* note 343, at 1294.

[362] *See id.* at 1287; *see also* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005).

[363] *See* Hickman & Krueger, *supra* note 343, at 1294.

[364] *See* Warner-Lambert Co. v. United States, 425 F.3d 1381, 1385-86 (Fed. Cir. 2005) (deferring to a Customs ruling letter, notwithstanding its inconsistency with prior interpretations, when "Customs wrote a six-page ruling which carefully and convincingly explained the reasons for the agency's reclassification decision"); Horn v. Thoratec Corp., 376 F.3d 163, 179 (3d Cir. 2004) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 42 (1983)) (reasoning that an agency can change its mind and receive deference so long as the agency can justify its change with "reasoned analysis").

[365] In a 2009 case, *Wyeth v. Levine*, the Supreme Court applied the *Skidmore* analysis to an FDA statement in a preamble to 2006 regulations that the regulations preempted state law failure-to-warn claims for prescription drugs. *See Wyeth*, 129 S. Ct. 1187, 1200-03 (2009). The Court refused *Skidmore* deference, reasoning that the agency's 2006 rule was finalized without offering states or other interested parties notice or opportunity for comment, the preamble was at odds with Congress' purpose, and it reversed the agency's own long-standing position without providing a reasoned explanation. *See id.* at 1201-02; *see also* Rubie's Costume Co. v. United States, 337 F.3d 1350, 1356-58 (Fed. Cir. 2003) (granting *Skidmore* deference to a Customs ruling letter that was inconsistent with prior agency position, partially because the agency allowed notice and comment on the change, which led the court to conclude that Customs gave thorough consideration to the decision); Heartland By-Products, Inc. v. United States, 264 F.3d 1126, 1135 (Fed. Cir. 2001) (reasoning that a Customs ruling that was inconsistent with prior rulings was due *Skidmore* deference partly because the agency allowed notice and comment on the change).

contemplated by an agency.[366] Because *Silva-Trevino* presented an inconsistent agency policy that arose through procedures lacking any public participation[367] and upset the settled expectations of thousands of noncitizens,[368] courts are likely to give the decision less weight.[369]

Does the *Silva-Trevino* decision demonstrate "thoroughness evident in its consideration?"[370] The agency's thoroughness speaks to the potential for arbitrary decision making.[371] In addition, courts evaluate thoroughness as a separate *Skidmore* contextual factor.[372] In *Silva-Trevino*, the Attorney General authored a lengthy decision, anticipating and addressing opposing arguments.[373] However, the Attorney General's decision, while lengthy, was not thorough. Because he did not anticipate that the decision's likely outcome would be a re-litigation of past crimes, the new moral turpitude test has several consequences that he did not address.[374]

Finally, under *Skidmore* review, courts must ask whether the reasoning in *Silva-Trevino* is valid.[375] As stated

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[366] For example, in *Heartland By-Products*, the Federal Circuit Court of Appeals gave *Skidmore* deference to a Customs ruling letter that was inconsistent with a prior ruling letter. *See Heartland By-Products*, 264 F.3d at 1135-36. While the agency's inconsistency counseled against *Skidmore* deference, the court reasoned that the first ruling letter was not subject to notice and comment, while the ruling letter at issue was subject to such procedures. *See id.* at 1136. The first ruling letter also did not raise an issue that was critical to the agency's reclassification; outside parties brought this issue to the agency's attention subsequent to the issuance of the first ruling letter. *See id.* at 1129-30, 1136.

[367] *See generally supra* Part III.

[368] *See* Reconsideration Memo, *supra* note 66, at 49-55.

[369] *Cf.* S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 760-61 (10th Cir. 2005) (refusing *Skidmore* deference to the Bureau of Land Management's informal interpretation of a statute, notwithstanding its validity and thoroughness, partly because the agency had shifted its position on the issue at least three times since 1976, thus upsetting settled expectations for holders of property rights).

[370] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[371] *See* Hickman & Krueger, *supra* note 343, at 1282-83 (discussing cases in which courts deferred to inconsistent but well-explained agency positions).

[372] *See Skidmore*, 323 U.S. at 140; Hickman & Krueger, *supra* note 343, at 1258.

[373] *See In re* Silva-Trevino, 24 I. & N. Dec. 687, 688-704 (Att'y Gen. 2008).

[374] *See supra* notes 217-24 and accompanying text. In *Wilderness Society v. U.S. Fish & Wildlife Service*, 353 F.3d 1051 (9th Cir. 2003) (en banc), the Ninth Circuit refused *Skidmore* deference to a U.S. Fish & Wildlife Service permitting decision because the agency decision "devote[d] only a few sentences" to a key question, whether the operation was a commercial enterprise and therefore precluded by statute in a wilderness area. *Id.* at 1069. The court reasoned that the agency's analysis was not thorough and therefore did not "reflect the product of specialized agency expertise." *Id.*

[375] *See Skidmore*, 323 U.S. at 140.

above, there were several errors of law in the decision[376] that may lead a reviewing court to conclude that the agency's decision is not valid.[377] However, courts' application of the validity factor often resembles the permissibility inquiry at *Chevron* step two, which is highly deferential to the agency.[378] Nonetheless, *Skidmore* deference is lighter than *Chevron* deference.[379] As discussed above, each *Skidmore* factor counsels against deference to *Silva-Trevino*. Thus, the application of *Skidmore*'s multi-factor approach to the *Silva-Trevino* decision likely will lead courts to refuse deference to the decision.[380]

If *Silva-Trevino* fails *Skidmore* review, there will be a return to the status quo. Should there be a harder look at the use of the categorical approach in immigration cases? The Supreme Court recently held that "the statute [INA] foresees the use of fundamentally fair procedures . . . . But we do not agree that fairness requires the evidentiary limitations [of the categorical approach]."[381] Some courts have questioned the approach as unduly formulaic, as the categorical approach requires the immigration judge to put on blinders as to what "really happened."[382] There are many prudential reasons to

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[376] *See supra* notes 216, 317. The Third Circuit in *Jean-Louis* reasoned that "[t]he Attorney General's argument [in *Silva-Trevino*] is premised on a fundamental misreading of the relevant [statutory] language." Jean-Louis v. Attorney General, 582 F.3d 462, 477 (3d Cir. 2009). The court attacked the Attorney General's holding that "crime" and "involving moral turpitude" are distinct grammatical units, which led the Attorney General to conclude that the clause "involving moral turpitude" modifies "crime," thus permitting a factual inquiry. *See id.*; *see also* Nijhawan v. Holder, 129 S. Ct. 2294, 2302 (2009) (permitting a factual inquiry into whether an offense involves a loss to the victim exceeding $10,000 because of the wording of the relevant aggravated felony category, 8 U.S.C. § 1101(a)(43)(M)(i), which defines "aggravated felony" as a "fraud offense in which the loss to the victim exceeds $10,000"). The Third Circuit reasoned that the Attorney General "overlooks a crucial fact: crime involving moral turpitude is a term of art, predating even the immigration statute itself. . . . As such, its division into a noun and subordinate clause, as the Attorney General seeks to do, distorts its intended meaning." *Jean-Louis*, 582 F.3d at 477 (citations omitted). The court concluded that "[b]ecause the Attorney General's position is premised on a clearly erroneous interpretation of 'crime involving moral turpitude,' no deference is owed to his view." *Id.*

[377] *See* Barber v. Thomas, 130 S. Ct. 2499, 2517 (2010) (Kennedy, J., Stevens, J., & Ginsberg, J., dissenting) (reasoning that an agency's decision that relies on a legal error should not be afforded *Skidmore* deference).

[378] *See* Hickman & Krueger, *supra* note 343, at 1273.

[379] *See id.* at 1276, 1277-80 (citing studies concluding that *Skidmore* deference is "measurably less deferential than Chevron, regardless of the Skidmore model employed").

[380] *See Skidmore*, 323 U.S. at 140.

[381] *Nijhawan*, 129 S. Ct. at 2303 (2009); *see also In re* Toro, 17 I. & N. Dec. 340, 343 (B.I.A. 1980) (holding that the Due Process clause of the Fifth Amendment requires removal proceedings to be fundamentally fair).

[382] *See, e.g.*, Montero-Ubri v. INS, 229 F.3d 319, 321 (1st Cir. 2000) ("The push in the law toward categorical approaches to classifying crimes as either involving moral

apply the categorical approach, above all because it spares immigration judges a retrial of the criminal case.[383] However, the agency may wish to reconsider whether efficiency trumps all in the criminal removal context. For these reasons, perhaps the solution of courts refusing *Chevron* deference to the Attorney General's decision is not the only answer.

C. The Agency Can Start Over, Ensuring More Process

The agency can have a say in the overhaul of the categorical approach and still command *Chevron* deference by reconsidering the issue through the use of procedures that ensure more public input. One option is for the agency to commence notice-and-comment rulemaking on the new moral turpitude test. Another option is for the agency to *sua sponte* reconsider *Silva-Trevino*,[384] this time inviting briefing from interested parties.[385]

The rulemaking option was the solution that Attorney General Holder used when vacating *In re Compean* (*Compean I*),[386] a January 7, 2009, decision by the outgoing Attorney General Mukasey. In *Compean I*, Attorney General Mukasey had decided that there was no right to effective assistance of counsel in removal cases; he reversed years of immigration precedent decisions that allowed noncitizens to reopen their cases based on ineffective assistance of counsel.[387] In *Compean I*, however, Attorney General Mukasey invited amicus briefing before his decision was final, thus guaranteeing input from the public on the drastic change in law.[388] When there was significant public backlash against the decision, Attorney

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turpitude or not is largely based on the policy of not retrying prior criminal convictions in later deportation hearings . . . . No such interest is served by precluding consideration of basic facts stated on the official court records of the charging and conviction documents. The categorical approach does not require that blinders be worn."); *see also* United States v. Miller, 478 F.3d 48, 52 (1st Cir. 2007) (reasoning, in the sentencing context, that the "*Taylor* analysis is categorical, but an inquiring court has the right to draw reasonable inferences from the evidence . . . . The court is not required either to wear blinders or to leave common sense out of the equation.").

[383] *See, e.g.*, NAIJ Statement, *supra* note 212.

[384] *See* 8 C.F.R. § 1003.2(a) (2003).

[385] *See* AILF Letter, *supra* note 219, at 4 (requesting that Attorney General Holder withdraw *Silva-Trevino* and set a briefing schedule to allow interested parties to submit briefs on the implications of a change in the categorical approach); Reconsideration Memo, *supra* note 66, at 7.

[386] *See* 24 I. & N. Dec. 710 (Att'y Gen. 2009).

[387] *Id.* at 712-13.

[388] *See id.* at 713-14.

General Holder vacated the opinion in June 2009.[389] In *Compean II*, Attorney General Holder stated: "I do not believe that the process used in *Compean* resulted in a thorough consideration of the issues involved, particularly for a decision that implemented a new, complex framework in place of a well-established and longstanding practice . . . ."[390] Attorney General Holder decided to commence notice-and-comment rulemaking on the issue of ineffective assistance of counsel in removal proceedings.[391] Attorney General Holder can respond to the *Silva-Trevino* case with a similar tactic, by vacating the opinion and proposing regulations.

However, there are several reasons why Attorney General Holder may choose not to address *Silva-Trevino* in the same way as *Compean I*. For one, the right to effective assistance of counsel in removal proceedings is a more politically-safe battle to fight. Noncitizens who have fallen prey to bad attorneys are perceived as victims; noncitizens who have been convicted of crimes rarely are viewed as victims.[392] The right to effective assistance of counsel is a more straightforward issue than the categorical approach; thus the public may not understand the impact of *Silva-Trevino*.[393] Attorney General Holder also may not want the publicity of overruling *Silva-Trevino*, which can be viewed as a triumph of common sense (deport the child molester when a judge knows those were the facts) over creative lawyering (because the record of conviction does not show those facts, the child molester avoids deportation). Finally, as notice-and-comment rulemaking is costly to the agency,[394] Attorney General Holder may not wish to spend the agency's time on the new moral turpitude test, especially because the agency is currently in the process of writing regulations on the issue of ineffective assistance of counsel in removal proceedings.

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[389] *In re* Compean, 25 I. & N. Dec. 1 (Att'y Gen. 2009) (*Compean II*).

[390] *Id.* at 2.

[391] *Id.*

[392] *See generally*, *Criminal Alien Program*, ICE.GOV, http://www.ice.gov/doclib/news/library/factsheets/pdf/cap.pdf (last visited February 21, 2011) (describing ICE's Criminal Alien Program (CAP), which is "responsible for identifying, processing and removing criminal aliens incarcerated in federal, state and local prisons and jails throughout the United States, preventing their release into the general public by securing a final order of removal prior to the termination of their sentences, when possible").

[393] *Cf.* Nijhawan v. Holder, 129 S. Ct. 2294, 2299 (2009) (reasoning that "the categorical method is not always easy to apply").

[394] *See* Magill, *supra* note 103, at 1397; Stephenson, *supra* note 105, at 546.

Should the agency commence notice-and-comment rulemaking on the categorical approach, there is no guarantee that the end product will be any different than the Attorney General's decision in *Silva-Trevino*. Scholars are skeptical of the notice-and-comment rulemaking process for its fanfare at the expense of real deliberation.[395] Professor Donald Elliott has stated,

> No administrator in Washington turns to full-scale notice-and-comment rulemaking when she is genuinely interested in obtaining input from interested parties. Notice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues.[396]

A cheaper, more efficient option is for Attorney General Holder to reconsider *Silva-Trevino*, inviting interested parties to brief issues. This technique has been used by the BIA and Attorneys General in the past when the agency was considering a major change in policy through adjudication.[397] As with rulemaking, immigration advocates and judges would have an opportunity for input and thus could detail the benefits of using the categorical approach in removal proceedings.[398]

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[395] *See* Barron & Kagan, *supra* note 135, at 231-32; *see also id.* at 232 ("[N]otice-and-comment rulemaking today tends to promote a conception of the regulatory process as a forum for competition among interest groups, rather than a means to further the public interest.").

[396] Elliott, *supra* note 150, at 1492-93. Often, the venues in which the discussion takes place are informal conversations between agency staff and interested parties outside the agency, which allow for crucial input by the public before the agency publishes the notice of proposed rulemaking. Brian Galle and Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1956-60 (2008) (discussing transparency in agency rulemaking, which occurs during the rule development, and stating, "[b]y the time an agency issues a [notice of proposed rulemaking], it has already invested much time and effort in developing the proposed rule and often does not change it in fundamental ways in response to comments").

[397] *See, e.g.*, *Compean I*, 24 I. & N. Dec. 710, 713-14 (Att'y Gen. 2009) (noting the Attorney General's invitation to interested groups to brief changes on ineffective assistance of counsel policy); Reconsideration Memo, *supra* note 66, at 8-9 (citing *In re* Soriano, 21 I. & N. Dec. 516 (B.I.A. 1996)) (discussing Attorney General Reno's invitation for briefing from interested parties on the retroactivity of changes to relief under former 8 U.S.C. § 1182(c) and noting that the decision addresses the points raised in the *amicus* briefs); *see also* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 762-63 (1969) (plurality opinion) (quoting *Excelsior Underwear*, 156 N.L.R.B. at 1238) (discussing how the NLRB had "invited certain interested parties" to file briefs and participate in oral arguments prior to its ruling in *Excelsior Underwear*, which set forth a new policy requiring employers to provide unions with lists of names of employees before elections).

[398] *See, e.g.*, ABA RESOLUTION, *supra* note 228; NAIJ Statement, *supra* note 212.

However, there is no guarantee that the agency will take the side of immigrants' rights advocates (and immigration judges) and maintain the categorical approach. Nonetheless, ensuring more process—either through rulemaking or adjudication with invitation for briefing—allows the agency to think about this major overhaul to the law before imposing it on affected parties.[399] If the agency cannot give a reasoned response to a concern raised by commentators, a court can later reject the agency's interpretation as arbitrary and capricious.[400]

Attorney General Holder may avoid any reconsideration of *Silva-Trevino*, perceiving that courts will not defer to the decision, as courts may interpret the word "conviction" to clearly indicate a Congressional preference for the categorical approach.[401] Or, the Attorney General may simply wait to see what courts will do with the decision.[402] However, "one year and half after the issuance of *Silva-Trevino*—and thousands of petitions for review later—no circuit court has endorsed its

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[399] *See* Anthony, *Interpretive Rules*, *supra* note 180, at 1373; Bressman, *Procedures as Politics*, *supra* note 162, at 1781.

[400] *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419-20 (1971). Scholars argue that the best way for an agency to anticipate potential problems with its decision is to open up the process to challengers before the decision is final; formal procedures facilitate this crucial input from the public. *See* Bressman, *Procedures as Politics*, *supra* note 162, at 1781.

[401] *See, e.g.*, Dulal-Whiteway v. Dep't of Homeland Sec., 501 F.3d 116, 125 (2d Cir. 2007), *abrogated by* Nijhawan v. Holder, 129 S. Ct. 2294 (2009); *In re* Velazquez-Herrera, 24 I. & N. Dec. 503, 513 (B.I.A. 2008); *but see supra* note 341 (discussing ambiguity of the INA).

[402] Only one circuit court, the Third Circuit, has reviewed the Attorney General's decision in *Silva-Trevino* and explicitly rejected the new test for determining whether an offense involves moral turpitude. *See* Jean-Louis v. Attorney General, 582 F.3d 462, 478-80 (3d Cir. 2009). The Eighth Circuit recently held, without significant discussion, that it refused to apply *Silva-Trevino* because it conflicted with the court's precedent. *See* Guardado-Garcia v. Holder, 615 F.3d 900, 902 (8th Cir. 2010). The Seventh Circuit, without discussion, held that it would defer to *Silva-Trevino* and remanded for the agency to apply the *Silva-Trevino* test in the first instance. *See* Mata-Guerrero v. Holder, 627 F.3d 256, 261 (7th Cir. 2010). The Ninth Circuit declined to consider a challenge to the retroactive application of the *Silva-Trevino* framework; the court remanded the case because the petitioner's hearing did not comport with due process. *See* Castruita-Gomez, 2010 U.S. App. LEXIS 18612 at *3-4. The Ninth Circuit declined to consider another challenge to the *Silva-Trevino* framework; the court granted the government's motion to remand the case to the BIA "in order to more fully articulate its analysis in a manner consistent with the multi-step approach set forth in *Matter of Silva-Trevino*." Order, Zamudio-Ramirez v. Holder, No. 09-71083 (Apr. 13, 2010). In both Ninth Circuit cases, immigrants' rights organizations filed *amicus* briefs highlighting the various problems with the Attorney General's decision. *See* Castruita-Gomez *Amicus* Brief, *supra* note 78; Zamudio-Ramirez *Amicus* Brief, *supra* note 78.

radical framework."[403] Courts may be signaling that the agency's failure to employ procedures that ensure public input means courts have little faith in the *Silva-Trevino* decision.[404]

V. CONCLUSION

In his last-minute decision in *Silva-Trevino*, Attorney General Mukasey created a drastic change in immigration law by overhauling the categorical approach, which had been used by immigration judges for over a century to determine whether a noncitizen had been convicted of a CIMT. The Attorney General made such a change through a process that allowed no input from parties affected by the change, including the individual whose case became the new precedent. Courts examining this last minute overhaul should find that these procedures guaranteed neither transparency nor careful consideration, which are essential elements of law making. For this reason, courts should refuse deference at *Chevron* step zero, pursuant to the Supreme Court's decision in *Mead*. This would likely lead to a court overturning the policy under the *Skidmore* standard.

A different route to curing the procedural defects is for the agency to correct the problem itself. This would entail Attorney General Holder reconsidering the decision through either the notice-and-comment rulemaking process or allowing interested parties to brief the issues; either choice by the agency would allow public input on this significant change in immigration law.

As Attorney General Holder stated during his confirmation hearings, "I firmly believe that transparency is a

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[403] Castruita-Gomez *Amicus* Brief, *supra* note 78, at 15-17 (discussing cases in which circuit courts have applied the traditional categorical approach notwithstanding the *Silva-Trevino* decision); *but see Mata-Guerrero*, 627 F.3d at 261 (holding, without discussion, that it would give *Chevron* deference to *Silva-Trevino* and remanding for the agency to apply the *Silva-Trevino* test in the first instance). The BIA recently concluded that because no circuit court had repudiated the procedural framework in *Silva-Trevino*, it was obliged to follow all three steps of the new moral turpitude test; the BIA remanded the case to the immigration judge to examine evidence outside of the record of conviction to determine whether the offense involved moral turpitude. *See In re* Guevara Alfaro, 25 I. & N. Dec. 417, 421-24 (B.I.A. 2011); *see also In re* Ahortalejo-Guzman, 25 I. & N. Dec. 465 (B.I.A. 2011) (affirming *Silva-Trevino* and holding that it was inappropriate for an immigration judge to consult documents outside of the record of conviction to determine the nature of the offense when the statute of conviction was not divisible).

[404] *See Jean-Louis*, 582 F.3d at 470-71 n.11 ("[T]he lack of transparency, coupled with the absence of input by interested stakeholders, only serves to dissuade us further from deferring to the Attorney General's novel approach.").

key to good government. Openness allows the public to have faith that its government obeys the laws. Public scrutiny also provides an important check against unpersuasive legal reasoning—reasoning that is biased toward a particular conclusion."[405] The Attorney General should keep his promise, ensuring transparency and careful consideration in agency action—elements noticeably missing from his predecessor's decision in *Silva-Trevino*.

[405] AILF Letter, *supra* note 219, at 3 (quoting Confirmation Hearings for Attorney General Eric H. Holder, *available at* http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/FeingoldToHolder.pdf (Question and Answer 2) (responding to question from Senator Feingold that addressed problems of "secret law" under the Bush administration)).