BORDERLINE AMBIGUITY: MAJOR QUESTIONS AND IMMIGRATION LAW

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ABSTRACT

Interpretive doctrines rarely spawn whole cottage industries, but the major questions doctrine is an exception. Given the ferment that the doctrine has inspired among scholars, an examination of the doctrine's relevance to immigration law is overdue. This Article provides that assessment.

The major questions doctrine works best as a shorthand label for the traditional tools of statutory interpretation that the Supreme Court has recently invoked in *Loper Bright Enterprises v. Raimondo*. Those tools, which this Article calls the "congruence canon," include statutory text, structure, history, and implementation. Trouble starts for the major questions doctrine when its convenience as an interpretive label obscures the relevance of these traditional tools. The Supreme Court's June 2023 decision in *Sackett v. EPA* restricting wetlands protection is an ominous sign that application of the doctrine is going astray.

In immigration, the congruence canon can clarify analysis of current issues, including the legality of President Biden's new border rule and advance parole program; the Deferred Action for Childhood Arrivals (DACA) initiative; and a recent substantial expansion of authorized work for holders of student (F-1) visas. Assessment of each of these important policies benefits from a rigorous look at text, structure, history, and implementation.

Examination of statutory structure reveals problems with the Biden border and advance parole initiatives, despite their commendable policy innovations. In contrast, past practice validates DACA and F-1 visas' practical training expansion. The congruence canon is a productive approach because it prioritizes engagement with interpretive method and rejects interpretive labels' insidious convenience.

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INTRODUCTION

The major questions doctrine, which the Supreme Court has described as requiring an express grant of authority from Congress when an agency acts on an issue of great "economic or political significance,"[1] has thus far kept a relatively low profile in immigration law.[2] However, given the doctrine's increasing salience in other areas of administrative law, its footprint in immigration law will surely increase in coming years. Current issues in immigration law, including the legality of President Biden's new border rule and advance parole program; the Deferred Action for Childhood Arrivals (DACA) program; and a recent substantial expansion of authorized work for holders of student (F-1) visas raise questions related to the major questions doctrine.[3] In addition, immigration law illustrates flaws in the *Chevron* doctrine, which the Supreme Court has recently

1. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2372–74 (2023) (discussing the major questions doctrine and holding that Congress did not clearly provide the Secretary of Education with power to promulgate a comprehensive student loan forgiveness program); *see also id.* at 50–54 (Barrett, J., concurring) (providing a more extensive explanation of the major questions doctrine as rooted in common-sense intuition governing the principal and agent that the principal (here, Congress) will use specific language if they wish the agent or agency to undertake a substantial and controversial new program); *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (explaining that courts should practice "common sense" regarding how "Congress is likely to delegate a policy decision of . . . economic and political magnitude," such as the power asserted by the Food and Drug Administration in the present case to regulate tobacco as a drug). Commentary on the major questions doctrine has been extensive. *See* Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 YALE L.J. F. 693, 695–704 (2022) (discussing the development of the doctrine and debate about its nature and purposes). *See generally* Mila Sohoni, *The Supreme Court 2021 Term: Comment: Three Hail Marys: The Major Questions Quartet*, 136 HARV. L. REV. 262, 262 (2022) (criticizing the application of the major questions doctrine in recent Supreme Court decisions involving climate change and COVID-19). *Cf.* Kristin E. Hickman, *The Roberts Court's Structural Incrementalism*, 136 HARV. L. REV. F. 75, 81–87 (2022) [hereinafter Hickman, *The Roberts Court's Structural Incrementalism*] (suggesting that the path of the major questions doctrine has been evolutionary and incremental, rather than revolutionary).

2. KATE R. BOWERS, CONG. RSCH. SERV., IFI2077, THE MAJOR QUESTIONS DOCTRINE 1–2 (2022).

3. *See* Circumvention of Lawful Pathways, 88 Fed. Reg. 31314 (May 16, 2023) (to be codified at 8 C.F.R. pts. 208, 1003, 1208) [hereinafter *CLP*] (providing the preamble to and text of the border rule); Implementation of a Parole Process for Cubans, 88 Fed. Reg. 1266, 1267–68 (Jan. 9, 2023) [hereinafter *Cuban Parole Process*] (describing the advance parole program); Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53152 (Aug. 30, 2022) (to be codified at 8 C.F.R. pts. 106, 236, 274) [hereinafter *DACA Final Rule*]; Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM and Cap-Gap Relief for All Eligible F-1 Students, 81 Fed. Reg. 13040, 13045 (Mar. 11, 2016) (to be codified at 8 C.F.R. pts. 214, 274) (outlining the expanded F-1 work permit rule). President Biden reinforced the CLP rule in 2024 in a Proclamation that suspended entry of noncitizens across the southern border, with exception for, *inter alia*, persons who used the scheduling method established in the CLP rule. *See* The White House, *A Proclamation on Securing the Border* (June 4, 2024), https://www.whitehouse.gov/briefing-room/presidential-actions/2024/06/04/a-proclamation-on-securing-the-border/. See *also* East Bay Sanctuary Covenant v. Biden, 2023 U.S. Dist. Lexis 128360 (N.D. Cal. 2023) (*EBSC IV*) (granting vacatur of the 2023 border rule), *stay granted*, No. 23-16032 (9th Cir. Aug. 3, 2023); *see also* Wash. All. of Tech. Workers v. United States Dep't of Homeland Sec., 50 F.4th 164. 167 (D.C. Cir. 2022), *reh'g. denied*, 58 F.4th 506 (D.C. Cir. 2023), *cert. denied*, 144 S. Ct. 78 (2023) [*Washtech I*] (upholding the expanded work permit rule); *cert. denied*, No. 22-1071 (Oct. 2, 2023); *cf.* Wash. All. of Tech. Workers v. United States Dep't of Homeland Sec., 58 F.4th 506, 510 (D.C. Cir. 2023) (Rao, J., dissenting from denial of rehearing en banc) (suggesting that the rule was invalid under the major questions doctrine).

overruled.[4] Crafting a version of the major questions doctrine and judicial deference that works for immigration law is vital. This Article seeks to provide that new account.

The Article's central claim is that in immigration law, as in other areas of administrative law, interpretive rubrics such as *Chevron* and the major questions doctrine are labels for a more traditional interpretive method that assesses how well a challenged agency action fits with statutory text, structure, history, and implementation.[5] That traditional approach, which the Article calls the "congruence canon," requires painstaking judicial craft.[6] While an interpretive label may seem like a convenient shortcut, it can be a costly detour from the study of statutory text and structure, and the other factors important to the traditional approach. A label, despite or perhaps precisely because of its convenience, can skew assessment of an agency action. It can hobble an agency's exercise of statutory authority or yield undue deference.[7] In immigration law, courts should strive to avoid these risks.

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4. Broadly speaking, the *Chevron* doctrine counseled judicial deference to agency decisions when, (1) a statute is ambiguous, and (2) the agency interpretation is reasonable. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984); overruled by Loper Bright Enters. v. Raimondo, 2024 U.S. Lexis 2882 (June 28, 2024); *see also* THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE 65–83 (2022) (discussing the relationship between the *Chevron* "doctrine," with its two formulaic steps, to a more traditional interpretive method stressing statutory text and history). Scholars have assessed the relevance of the *Chevron* doctrine in immigration law. *See generally* Jill E. Family, *Immigration Law Allies and Administrative Law Adversaries*, 32 GEO. IMMIGR. L.J. 99 (2017) (noting the complex interplay between deference under the *Chevron* doctrine, libertarians wary of intrusive government, and the immigration advocacy community, which can be hurt by an enforcement-minded agency approach or aided by protective measures); Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1230–32 (2021) (asserting that deference regarding immigration decisions is more appropriate for rulemaking than for administrative adjudication).

5. Implementation focuses on the executive branch's past practice. Justice Stevens's opinion for the Court in *Chevron* discussed the role of past practice and other "traditional tools of statutory construction." *See Chevron*, 467 U.S. at 843; MERRILL, *supra* note 4, at 66 (contending that the *Chevron* decision, when read as a whole, is a "relatively conventional exercise in judicial review"); Brett M. Kavanaugh, *Keynote Address: Remarks at Notre Dame Law School*, 98 NOTRE DAME L. REV. 1849, 1850–51 (2023) (discussing the importance of *Chevron*'s footnote nine); *see also Nebraska*, 143 S. Ct. at 2368–70 (assessing the Department of Education's loan forgiveness plan under the statutory grant of power to the Secretary of Education to "modify" existing loans); *id.* at 2376 (Barrett, J., concurring) (noting that the Court analyzed the loan forgiveness plan with "ordinary tools of statutory interpretation" and that the major questions doctrine "reinforces" the holding that the plan exceeded executive authority but "is not necessary" to that outcome); *see also* MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 225–31 (1994) (interpreting the term, "modify," in the Federal Communications Act to carry a similar narrow meaning, in conjunction with the interpretation of related provisions in the statute); *cf.* Hickman, *The Roberts Court's Structural Incrementalism*, *supra* note 1, at 88 (noting the continued role of "traditional tools of statutory interpretation").

6. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947); *see also* Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in FELIX FRANKFURTER: THE JUDGE 30, 52 (Wallace Mendelson ed., 1964) (noting that when Frankfurter construed a statutory provision, "he saw it, not in isolation, but as a part of the historic unfolding of federal statute law . . . each statute must be read in the light of the policy expressed in others").

7. The Supreme Court's recent decision in Sacket v. EPA, 143 S. Ct. 1322 (2023), is an example of the former risk. *See id.* at 1362–65 (Kavanaugh, J., concurring) (asserting, in a case on authority to protect wetlands, that the Court both failed to fully acknowledge the importance of the

Interpretive labels produce what this Article calls "categorization costs."[8] Those costs include two effects of interpretive labels: manipulability and confirmation bias. Manipulability is a problem because a formula, like the major questions doctrine or the *Chevron* doctrine, hinges on a single element: a court finding that a statute is ambiguous.[9] Confirmation bias entails framing new information or evidence in light of a preconceived hypothesis.[10] The *Sackett v. EPA*[11] Court's misreading of text, hasty assessment of structure, and disregard of statutory history and implementation embodied at least one of these two components.[12] *Sackett* may herald future flawed decisions that stem from confirmation bias, not from the traditional tools of statutory interpretation.

The particular import of agency decisions adds to the uncertainty exacerbated by categorization costs and makes a commitment to judicial craft all the more important. As the Supreme Court has recently observed, a measure of discretion over immigration policy is part of the backdrop for the Immigration and Nationality Act (INA).[13] However, an agency must accept some bounds to remain faithful to the principal–agent relationship between Congress and the executive branch. Shifting agency policies complicate congressional oversight and frustrate the continuity that foreign policy requires.

To counteract these risks, the congruence canon relies on a sequential process to reduce categorization costs and other concerns.[14] This approach considers the traditional elements of statutory interpretation: statutory text, structure, history, and implementation.[15] As a capstone, the congruence canon also asks if a particular measure is adequately tailored to Congress's plan. Often, the text of the particular provision at issue will not decide the matter, and the other, more contextual factors will be determinative.[16]

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statutory subsection treating wetlands as "adjacent" to navigable waters as covered by the Clean Water Act and defined the term unduly narrowly, to mean only areas that had surface contact with bodies of water); *id.* at 1360–61 (Kagan, J., concurring) (agreeing with Justice Kavanaugh's analysis).

8. *See infra* Section I.B.

9. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2151–52 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) [hereinafter Kavanaugh, *Fixing Statutory Interpretation*] (noting uncertainty in the application of the major questions doctrine); Brett M. Kavanaugh, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1910–12 (2017) [hereinafter Kavanaugh, *Two Challenges for the Judge as Umpire*]. *See generally* DANIEL KAHNEMAN, OLIVIER SIBONY, & CASS R. SUNSTEIN, NOISE: A FLAW IN HUMAN JUDGMENT (2021) (discussing marked variation in defining and applying concepts and finding facts both within and between groups, and within particular decisionmakers over time).

10. KAHNEMAN, SIBONY, & SUNSTEIN, *supra* note 9, at 172.

11. 143 S. Ct. 1322 (2023).

12. *Id.* at 1369 (Kavanaugh, J., concurring) (asserting that the Court's approach involved "rewriting" the statute).

13. *See* United States v. Texas, 143 S. Ct. 1964, 1973 (2023) [*Texas B*].

14. *See generally* Frankfurter, *supra* note 6, at 535–46 (discussing the approach to statutory interpretation).

15. *Id.*

16. *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 665–66 (2022) [hereinafter *NFIB*] (citing a lack of tailoring in the Biden administration's

However, a sequential approach in which each step is independent from the others promotes sound decision-making.[17]

Independent assessment of each component reduces confirmation bias by preserving the influence of the five components: statutory text, structure, history, implementation, and the degree of tailoring. While the individual components may be up for debate in each case, that debate will focus on the statute at issue, not words in isolation. Taken together, these components add ballast to an assessment of statutory language, hedging against the risk that a textual reading will be arbitrary or idiosyncratic.

For example, reliance on an agency's statutory implementation—often referred to as "past practice"—enhances predictability and protects reliance interests.[18] Administrative past practice usually emerges from collaboration with Congress. Moreover, a pattern of past practice often involves presidential administrations of different political parties.[19] Deferring to this pattern favors policies that have withstood challenges from a range of ideological vantage points. Furthermore, the commitment to judicial craft entailed by the congruence canon mutes the charges of judicial self-aggrandizement that have proliferated with the Supreme Court's increasing references to the major questions doctrine.[20]

Using the congruence canon as a lens for statutory interpretation provides a useful perspective on current issues in substantive immigration law. President Biden's new border rule—while commendable as an attempt to manage border inflows—conflicts with the text, structure, and statutory history of the INA and lacks tailoring that could make it a better fit. The advance parole program that the Biden administration has started for nationals of Cuba, Haiti, Nicaragua, and Venezuela (CHNV)—while a useful policy as a supplement to the border rule or on its own—also fails to fit the INA. In contrast, both DACA and the recent expansion of work permits for F-1 visa-holders fit the statute. These insights might not be available under other approaches that look less rigorously at the relevant statutory materials.

This Article proceeds in six parts. Part I describes labels and categorization costs in statutory interpretation, focusing on the evolution of the *Chevron* doctrine and major questions doctrine. It argues that the *Chevron* doctrine and the major questions doctrine are each an interpretive umbrella

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vaccine mandate and holding that the mandate exceeded the Department of Labor's statutory authority).

17. *See* KAHNEMAN, SIBONY, & SUNSTEIN, *supra* note 9, at 306–24 (discussing the importance of structured decision-making in reducing "noise," defined as excess variability between and among decisions on similar or identical facts). Justice Kavanaugh's concurrence in *Sackett* modeled this quality effectively. *See Sackett*, 143 S. Ct. at 1362–69.

18. *See* Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823 (2015).

19. Biden v. Texas, 142 S. Ct. 2528, 2543 (2022) [*Texas A*]; *id.* at 2548 (Kavanaugh, J., concurring).

20. *See* Sohoni, *supra* note 1, at 262–65.

focusing on the elements of the congruence canon: statutory text, structure, history, implementation, and the degree of tailoring. Part II discusses recent major questions cases, such as *Biden v. Nebraska*,[21] that have catalyzed debate, arguing that most of these cases use traditional tools of statutory interpretation but that categorization costs are starting to accrue, particularly in *Sackett*. Part III discusses the congruence canon in immigration law, starting with *INS v. Cardoza-Fonseca*,[22] which also rejected a mechanical application of *Chevron*. Parts IV, V, and VI apply the congruence canon to contemporary issues, including President Biden's Circumventing Lawful Pathways (CLP) rule, DACA, advance parole, and the Optional Practical Training (OPT) program on practical training for student visa-holders.

I. *CHEVRON*, CATEGORIZATION COSTS, AND THE PERSISTENCE OF TRADITIONAL TOOLS OF STATUTORY INTERPRETATION

The Supreme Court's celebrated decision in *Chevron U.S.A. v. Natural Resources Defense Council*[23] ushered in a formulaic approach to judicial deference towards administrative agencies, but at a price. *Chevron*'s deference formula masked a much richer discussion of statutory interpretation in Justice Stevens's opinion for the Court.[24] This Section discusses the risks of such formulas and the role of traditional statutory interpretation through much of the *Chevron* era, including—in addition to text—statutory structure, history, and implementation.

A. The Chevron Opinion: New Formula or Old Approach?

In *Chevron*, Justice Stevens's majority opinion provided a seemingly straightforward formula that emerged from a complex interpretive framework.[25] The formula, which Justice Stevens voiced as a two-step rule, asserted that courts should defer to agency decisions only if: (1) the statute

21. 143 S. Ct. 2355 (2023).

22. 480 U.S. 421 (1987).

23. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 839 (1984); *cf.* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 858–59 (2001) (warning that excessive adherence to the *Chevron* doctrine would slight other sources of interpretive authority); Peter L. Strauss, *"Deference" is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1153–56 (2012) (arguing for the continued role of previous Supreme Court decision, *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), that tied judicial deference to consistency of agency interpretation and other functional factors); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1109–11 (2008) (discussing the continued influence of *Skidmore*); Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. REG. 1, 44–47 (1998) (in a study of federal circuit courts covering decisions in 1995 and 1996—slightly over a decade after *Chevron*—finding a low incidence of traditional statutory interpretation and some correlation with judges' political background). *See generally* Kisor v. Wilkie, 139 S. Ct. 2400, 2418 (2019) (explaining that courts should extend greater deference to longstanding agency interpretations of regulations).

24. MERRILL, *supra* note 4, at 66–67.

25. *Id.* at 65–71.

is ambiguous and (2) the agency's interpretation is reasonable.[26] However, despite the rule-like language that Justice Stevens used, other aspects of the opinion and its subsequent development reflected a broader structural inquiry.[27] In footnote nine, Justice Stevens explained that to determine whether a statute was unambiguous, courts should apply "traditional tools of statutory construction."[28] These traditional tools—including inquiry into statutory text, structure, history, and implementation[29]—would be useful in resolving the issue in *Chevron*: whether the Environmental Protection Agency (EPA) could use a "bubble" approach to measure emissions on a plant-wide basis.

B. Pay Me Now or Pay Me Later: Courts, Cognition, and Categorization Costs

Despite Justice Stevens's effort to marshal materials and data, such as agency practice, that often figure into statutory interpretation, many scholars and jurists have focused more on the two-step *Chevron* formula.[30] That formularized focus is a flaw in judge-made categories and in human judgment. It reflects a pervasive judicial urge to produce heuristics or cognitive shortcuts that explain the decision and guide future decisions. Moreover, this kind of reasoning results in categorization costs. Categorization costs comprise the tradeoffs in time, effort, and opportunities entailed in creating and applying doctrinal labels. Due to those tradeoffs, categories can create inaccuracy, instability, and bias. For example, as this subsection explains, the definition of statutory ambiguity under *Chevron* is subject to judicial manipulation.[31]

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26. *Chevron*, 467 U.S. at 842–43. Professor Merrill has suggested, based on review of the Justices' own contemporaneous notes about the case, that Justice Stevens added the two-step formula after he had drafted the rest of the opinion, as a reference point for colleagues such as Justice Blackmun who were daunted by the detailed technical discussion of environmental regulation elsewhere in the opinion. *See* MERRILL, *supra* note 4, at 63–65, 76–78.

27. *See* MERRILL, *supra* note 4, at 65–71 (discussing Justice Stevens's abundant use of statutory history and past agency practice).

28. *See Chevron*, 467 U.S. at 843 n.9.

29. *See id.* at 846–47 (discussing the 1974 standards saying an increase in emissions from certain smelting units could be offset by reduction in emissions elsewhere in the plant); *id.* at 853–54 (describing the 1979 rules that the plant-wide (as opposed to portions of the plant) approach would be acceptable where a state implementation plan governed overall air quality).

30. *See* MERRILL, *supra* note 4, at 121–26 (discussing cases following the *Chevron* doctrine); *cf.* Aaron-Andrew P. Bruhl, *Eager to Follow: Methodological Precedent in Statutory Interpretation*, 99 N.C. L. REV. 101, 119–20 (2020) (discussing the precedential impact of *Chevron*, including questions about the degree to which subsequent courts followed or applied the *Chevron* doctrine); Eskridge & Baer, *supra* note 23, at 1090–91 (arguing that courts have frequently departed from the *Chevron* doctrine); Abbe R. Gluck, *What 30 Years of* Chevron *Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 613–20 (2014) (arguing that *Chevron* has had significant, albeit not universal precedential impact, compared with other canons of interpretation, which courts treat as components of a toolkit that courts can dip into or ignore as the need arises); *cf.* Kisor v. Wilkie, 139 S. Ct. 2400, 2443–45 (Gorsuch, J., concurring) (arguing against the Court's view that certain doctrines prescribing judicial deference to agencies have precedential value and questioning whether precedential status would be useful).

31. *See* Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 9, at 2151–52.

A familiar legal doctrine such as the *Chevron* two-step test operates as a heuristic—a kind of shorthand that drives decisions.[32] In human cognition, such shortcuts have their virtues, but also create risks. A shorthand approach, including a label that humans attach to a behavior, condition, or situation, can reduce the time required to make a decision.[33] However, heuristics can also distort decision-making in problematic ways. Heuristics can prompt undue emphasis on certain factors that reduce accuracy, such as ease of visualization or superficial similarity to other conditions.[34] Labels can also promote confirmation bias.[35] Under the sway of confirmation bias, humans form a hypothesis before conducting a full examination of facts and relevant analytic principles.[36] The decision-makers then construe all subsequent facts as supporting their initial theory.[37] Moreover,

32. KAHNEMAN, SIBONY, & SUNSTEIN, *supra* note 9, at 161–75; *see also* Barbara Millet, Andrew P. Carter, Kenneth Broad, Alberto Cairo, Scotney D. Evans, & Sharanya J. Majumdar, *Hurricane Risk Communication: Visualization and Behavioral Science Concepts*, 12 WEATHER, CLIMATE, & SOC'Y 193, 196–97 (2020) (discussing the impact of mental models that human beings form to address complex phenomena); Federico Vegetti & Daniela Širinić, *Left-Right Categorization and Perceptions of Party Ideologies*, 41 POL. BEHAV. 257, 259–62 (2019) (discussing the impact of two phenomena: heuristics that provide flawed cognitive shortcuts for making inferences and categorization decisions that are sometimes necessary but also distort judgment and perception).

33. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 161 (2011).

34. *See id.* at 146–65 (discussing the representativeness heuristic, which spurs judgments of similarity based on aspects of a condition that have superficial shared aspects with other conditions, when those other conditions are actually distinct); Deepika Mohan, Baruch Fischhoff, Derek C. Angus, Matthew R. Rosengart, David J. Wallace, Donald M. Yealy, Coreen Farris, Chung-Chou H. Chang, Samantha Kerti, & Amber E. Barnato, *Serious Games May Improve Physician Heuristics in Trauma Triage*, 115 PROC. NAT'L ACAD. SCI. 9204, 9207 (2018) (discussing "structured feedback" from experiential learning in simulations that tested the relation between trauma and representative occurrence—such as a gunshot wound—that readily signals danger, along with the relation between trauma and unrepresentative occurrence—such as a fall—that on the surface seems mundane; physicians tend to underestimate trauma from the latter source); KAHNEMAN, *supra* note 33, at 328–31 (discussing the vividness heuristic); *see also* ROBERT SKIDELSKY, WHAT'S WRONG WITH ECONOMICS?: A PRIMER FOR THE PERPLEXED 84–87 (2020) (discussing heuristics and cognitive biases).

35. Steven Stosny, *The Madness of Labels*, PSYCHOLOGY TODAY (Jan. 5, 2024), https://www.psychologytoday.com/us/blog/anger-in-the-age-of-entitlement/202312/the-madness-of-labels.

36. Andreas Kappes, Ann H. Harvey, Terry Lohrenz, P. Read Montague, & Tali Sharot, *Confirmation Bias in the Utilization of Others' Opinion Strength*, 23 NATURE NEUROSCIENCE 130, 130 (2020).

37. *See* KAHNEMAN, SIBONY, & SUNSTEIN, *supra* note 9, at 172 (recounting that confirmation bias "leads us, when we have a prejudgment, to disregard conflicting evidence"); Simone Galperti, *Persuasion: The Art of Changing Worldviews*, 109 AM. ECON. REV. 996, 1016 (2019) (reporting that, according to empirical studies, "[e]xperimental subjects show 'a clear tendency to resist evidence' inconsistent with their hypotheses") (citation omitted); Tiffany S. Doherty & Aaron E. Carroll, *Believing in Overcoming Cognitive Biases*, 22 AM. MED. ASS'N J. ETHICS 773, 773 (2020) (defining confirmation bias as the "selective gathering and interpretation of evidence consistent with current beliefs and the neglect of evidence that contradicts them."). Skilled professionals are susceptible to confirmation bias. *See, e.g.*, Michael A. Bruno, Eric A. Walker, & Hani H. Abujudeh, *Understanding and Confronting Our Mistakes: The Epidemiology of Error in Radiology and Strategies for Error Reduction*, 35 RADIOGRAPHICS 1668, 1671–72 (2015) (describing the common error by trained radiologists called "satisfaction of search," in which a doctor studying an X-ray fails to spot an abnormality requiring treatment "because of a failure to continue to search" after spotting an initial anomaly that is less serious; the doctor wrongly assumes that any further abnormalities will merely reinforce the preliminary diagnosis, although those additional anomalies in many cases might materially alter the doctor's overall findings); Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyers' Intuitions Prolong Litigation*, 86 S. CAL. L. REV. 571, 583–94 (2013) (detailing experiments that confirmed lawyers' and judges' flawed intuitions about tactical and strategic decisions that are common in legal practice).

most human judgments, including judgments about application of a particular label, are highly path-dependent; they hinge on the nature of facts that first came to a decision-maker's attention. The order of presentation can make a huge difference, since human judgment attaches greater importance to facts that the decision-maker has received first and funnels subsequent facts through the construct that the initial facts have created.[38] Finally, many decisions about labels contain high levels of "noise," defined as variability in results based on similar or identical inputs.[39]

Like other heuristics, categories such as ambiguity can generate manipulability and confirmation bias under *Chevron*. There is no consensus on the amount of doubt that yields ambiguity and no easy way to measure the level of ambiguity in a particular statute. Judicial perceptions will vary widely.[40] In addition, judges—like all human beings—have personal views about morality and policy, as well as law. Each judge faces a temptation to assess ambiguity in light of their own extra-legal preferences. Confirmation bias emerges because, in interpretive decisions as elsewhere, first impressions often yield overconfidence.[41] An interpretive label such as *Chevron* or the major questions doctrine exacerbates the problem of overconfidence, as a judge relies on superficial similarities and hunches to apply the label. At that point, judges—like most other decision-makers—massage neutral or contrary evidence to fit their initial supposition.

C. The Congruence Canon as a Remedy for Chevron's Ills

To address the risks of manipulability and confirmation bias in *Chevron* itself and in subsequent cases, the Court used the congruence canon[42]—an interpretive umbrella over *Chevron*'s domain that shelters courts from categorization costs.[43] It asks whether a given agency interpretation or decision harmonizes with the materials listed above.[44]

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38. KAHNEMAN, SIBONY, & SUNSTEIN, *supra* note 9, at 94–99.

39. Variations in juvenile court decisions correlate strongly with the results of the latest game played by the judge's favorite football team: a football loss prompts harsher decisions. *Id.* at 17. Along these lines, variability plagues immigration judges' decisions about cases with similar facts. The authors of one study described arbitrary differences in results among different judges in the same district and between different districts as amounting to "refugee roulette." *See* Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 328, 332–33 (2007).

40. *See* Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 9, at 2151–52; Kavanaugh, *Two Challenges for the Judge as Umpire*, *supra* note 9, at 1910–12; *see also* Bruhl, *supra* note 30, at 112 (noting that the "triggering condition" of statutory ambiguity is often itself "vague and possibly ambiguous"); Ryan D. Doerfler, *How Clear is "Clear"?*, 109 VA. L. REV. 651, 651–53 (2023) (discussing the challenge to deriving a uniform and consistently applied notion of statutory clarity, while suggesting that this challenge is endemic to the task of interpretation); *cf.* MERRILL, *supra* note 4, at 105 (addressing Justice Kavanaugh's critique of ambiguity and acknowledging that the finding required for Step 1 of the *Chevron* doctrine "may be a prime example of a standard that is especially susceptible to judicial manipulation").

41. KAHNEMAN, SIBONY, & SUNSTEIN, *supra* note 9, at 172.

42. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

43. *See supra* notes 5–6 and accompanying text.

44. *See supra* notes 5–6 and accompanying text.

Approaching statutory text, structure, history, and implementation sequentially helps keep the decision-maker honest.[45] Indeed, where an interpretive decision can include input from two or more participants, it would be useful to assign an initial review of each step to a different participant.[46] Of course, this structured approach will not banish categorization costs. A multi-member tribunal is still subject to the twinned risks of manipulability and overconfidence because each member will have materials on each step and can peek at the steps for which other members have primary responsibility. Nevertheless, structuring the interpretive task in this deliberate way will have a salutary impact in avoiding hasty and outcome-determinative decision-making.

Evidence from the politically fraught area of voting rights litigation suggests that a structured approach stressing sequenced and independent evaluation will promote judicial consistency. In voting rights litigation, judges use a sequenced approach that pairs an objective inquiry into concrete and specific factors, such as political strength of the minority, minority cohesiveness, and bloc voting by the majority, with a more subjective and amorphous totality of the circumstances test.[47] There is substantially more uniformity among judges from disparate ideological backgrounds on the objective inquiry, compared with the more amorphous test.[48]

Indeed, administrative law itself takes the utility of sequential, independent decision-making as a ground truth. Consider the architecture of notice and comment under the Administrative Procedure Act (APA).[49] Agencies should engage with stakeholder comments on proposed rules. Policymakers should view the receipt of comments as an opportunity to rethink their proposal with fresh perspective.[50] Sometimes that process will result in changes to the final rule. Sometimes it will produce more cogent and complete explanations of provisions that remain unchanged. In either case, the process is intended to enhance deliberation and reflection.[51]

In sum, the public bears the cost of judicial efforts to impose a doctrinal label onto varied combinations of fact and law. Doctrinal labels, such

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45. *See* KAHNEMAN, SIBONY, & SUNSTEIN, *supra* note 9, at 306–24; Victoria Hemming, Anca M. Hanea, Terry Walshe, & Mark A. Burgman, *Weighting and Aggregating Expert Ecological Judgments*, 30 ECOLOGICAL APPLICATIONS 1, 1 (2020). Structure of this kind has long been a recommendation for personnel decisions. *See* J.R. Keller, *Posting and Slotting: How Hiring Processes Shape the Quality of Hire and Compensation in Internal Labor Markets*, 63 ADMIN. SCI. Q. 848, 853–54 (2018).

46. *See* KAHNEMAN, SIBONY, & SUNSTEIN, *supra* note 9, at 308–09.

47. Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493, 1518–20 (2008); *see also* Thornburg v. Gingles, 478 U.S. 30, 48–51 (1986) (describing criteria); Allen v. Milligan, 143 S. Ct. 1487, 1502–03 (2023) (discussing the application of the *Gingles* factors).

48. Cox & Miles, *supra* note 47, at 1518–20.

49. *See* 5 U.S.C. § 553.

50. *See* Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1659–62 (2023) (reporting on extensive interviews with policymakers, who described the benefits of comments from stakeholders on proposed rules).

51. *See* Kristin E. Hickman & Mark R. Thomson, *Textualism and the Administrative Procedure Act*, 98 NOTRE DAME L. REV. 2071, 2094–2102 (2023) (discussing the importance of receiving and responding to comments in the promulgation of interim final rules).

as ambiguity under *Chevron*, are susceptible to manipulation. An independent, sequential approach to statutory text, structure, history, and implementation can alleviate those flaws.

1. The Interplay of Text and Structure

The congruence canon pays close attention to the interaction between statutory text and structure. The text of the provision at issue is central, but often statutory structure is a prime determinant of meaning.[52] Courts proceed on the assumption that the parts of a statute should yield a harmonious whole.[53] In addressing structure, courts will therefore consider other parts of a statute, including nearby subsections or sentences within a paragraph, or other sections that are further afield.[54] Generally, courts assume that words, phrases, and paragraphs in a statute have specific meaning; viewing Congress's handiwork as superfluous is considered inconsistent with the seriousness that legislation requires.[55]

Following this logic, courts believe that differences between sections of a statute respond to different aspects of a problem.[56] Suppose two provisions of a statute deal with overlapping but slightly different questions. The first provision specifies a feature, condition, or exception that is absent in the second provision. Courts will generally infer that Congress intentionally omitted that feature, condition, or exception in the second provision.[57]

To see how the Court integrated a key element of congruency—statutory structure—into the *Chevron* framework, consider *MCI Telecommunications Corp. v. AT&T*.[58] In *MCI*, the Court examined the Federal Communications Commission's (FCC) power under the Communications Act to modify certain requirements related to documentation of telecommunications firms' price rates for long-distance calls.[59] In an opinion by Justice

52. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167 (2012).

53. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

54. *See, e.g.*, Republic of Sudan v. Harrison, 139 S. Ct. 1048, 1057–59 (2019).

55. NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 136 (2019); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 143–45, 155 (2010) (noting tension between attention to text and structure and interpretive canons that serve substantive goals, since the use of the latter does not hinge on affirmative evidence that Congress's concrete plan includes those goals); *cf.* Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 83–87 (2017) (discussing the complexities in interpreting statutory text and structure, even given guidance provided by the canons on this issue, since different aspects of text and structure may trigger disparate guidance).

56. *See generally* Easterbrook, *supra* note 55, at 5.

57. *See, e.g.*, *Harrison*, 139 S. Ct. at 1057–59 (2019) (in construing the provision governing service of process on a foreign minister of a state abroad it is implausible to infer that Congress's plan for the provision at issue *sub silentio* included service on an agent and noting that, while the section at issue does not contain this feature, another section of the statute expressly permits service on an agent located in the United States).

58. 512 U.S. 218 (1994).

59. 47 U.S.C. § 203(b)(2). This issue was significant when most telephones were landline devices and companies billed customers for individual "long-distance" calls—i.e., calls outside of the caller's area code.

Scalia, the Court held that the power to modify these requirements did not include the power to cancel, in a blanket fashion, all firms' duty to file notices of call rates (tariffs) while continuing to require the dominant firm, AT&T, to do so.[60] Justice Scalia cited dictionary definitions of the term "modify" and concluded that the term referred to minor changes, not the major change of cancelling the entire tariff-filing requirement for 40% of the phone-call market.[61] This textual argument may have been unsuccessful if Justice Scalia had not pointed to more contextual factors that filled the gap.

To that end, Justice Scalia noted structural issues with the FCC's assertion of broad power in *MCI*. For example, Justice Scalia noted that the statute expressly barred agency changes on a relatively minor item: the notice that telecommunications firms had to provide regarding changes in rates.[62] Justice Scalia wryly observed that it would have been peculiar for Congress to expressly bar changes in a detail like notice while *sub silentio* granting the agency blanket power to cancel the duty to file rate schedules in the same subsection.[63] According to Justice Scalia, the FCC's assertion of power created a mismatch between Congress's painstaking micromanagement of details such as notice and its purported indifference to core questions like the duty to file tariffs in the first place.[64] To invoke the label that the Court in later cases put on this comparative judgment, the duty to file a tariff was major, while precise notice of a specific tariff was far less important.[65] A Congress that required careful attention to the latter would be unlikely to relinquish control of the former. Notably, Justice Scalia's comparison did not rely on a generalization about Congress.[66] Justice Scalia's touchstones were the text and structure of the Communications Act.[67]

Justice Scalia nested his observation about major questions in a close analysis of the statute. In this sense, Justice Scalia's approach contrasts

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60. Justice Scalia made quick work of *Chevron*, finding that the statute was not ambiguous on this point. *MCI*, 512 U.S. at 229.

61. *Id.* at 225. *But see id.* at 240–42 (Stevens, J., dissenting) (arguing that dictionary definitions of the term at issue, modify, could also support the FCC's argument about the scope of its authority). *Cf.* MERRILL, *supra* note 4, at 204–05 (suggesting that dictionary definitions of modify did not clearly preclude the FCC's reading, but that other elements of statutory context supported Justice Scalia's view); Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded* 9–10 (Wash. Univ. St. Louis Legal Studies Rsch. Paper Series, Paper No. 22-10-02, 2023) (appraising Justice Scalia's reason as rooted in the structure and purpose of the Federal Communications Act).

62. *MCI*, 512 U.S. at 229 (citing 47 U.S.C. § 203(b)(2)).

63. *Id.* at 229–30.

64. *Id.*

65. *Id.* at 229 (describing the notice provision in figurative terms as a provision that with some effort "strains out the gnat," prompting the inference that if Congress was concerned about tiny bugs, it would not implicitly grant greater leeway to the agency on larger issues).

66. *Id.*

67. Buttressing his structural analysis with an appreciation for Congress's overall plan, Justice Scalia explained that the fixed rate schedules were integral to other aspects of the statute. *Id.* at 230–31 (discussing how the statutory plan ensured fair prices, including provisions on overcharges); *see also* MERRILL, *supra* note 4, at 205 (describing Justice Scalia's reasoning); *see also* Levin, *supra* note 61, at 10 (describing Justice Scalia's reasoning).

with Justice Barrett's suggestion that the major questions doctrine rests on a more general account of interactions between principals and agents.[68] Without Justice Scalia's careful statutory analysis, the major questions doctrine increases categorization costs and impedes sound interpretation.

2. Minding Statutory History and Implementation

In assessing congruence under *Chevron* footnote nine's "traditional tools of statutory construction," courts have gone beyond statutory text and structure to assess statutory history.[69] Generally, when the overall trend in legislation suggests that Congress wishes to treat a particular economic activity as a special case, the Court will be skeptical that a generic grant of power to an agency covers regulation of that activity.[70] Instead, the Court will view the overall trend as clearly demarcating that activity as off limits to the agency, absent a specific indication that Congress wished the agency to act.[71] For example, in *FDA v. Brown & Williamson Tobacco Corp.*,[72] the Supreme Court, in an opinion by Justice O'Connor, cited statutory history in holding that the Food and Drug Administration (FDA) lacked the power to regulate cigarettes as a drug.[73] Justice O'Connor reached this decision by considering Congress's longtime solicitude for tobacco cultivation and manufacture of tobacco products, and its enactment of special measures such as disclosure requirements regarding tobacco's health risks.[74] According to Justice O'Connor, Congress's special attention to tobacco and cigarettes would have been unnecessary if the statutory history reflected that Congress's intention from the start had been to delegate regulation of tobacco products to the FDA under the Food, Drug, and Cosmetic Act (FDCA).[75]

For decades, statutory implementation through agency practice buttressed the conclusion that the FDA presumed it lacked jurisdiction to

68. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2376–84 (Barrett, J., concurring); *see also* Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. (forthcoming 2024) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4381708) (framing the major questions doctrine as a linguistic canon that matches ordinary speech and judgment). Justice Barrett made the case in her *Nebraska* concurrence that this more general view of the major questions doctrine was distinct from substantive clear statement rules, such as the presumption against undue federal interference with traditional areas of state control. *Nebraska*, 143 S. Ct. at 2377–79 (Barrett, J., concurring). In articulating this view of the doctrine as fitting ordinary speech and intuitions about principals and agents, Justice Barrett avoided the need for a more elaborate justification that textualists usually require of substantive clear statement rules. *Id.* Those rules are troubling for textualists because they often involve rejection of the most plausible reading of a statute's text. *Id.* However, unmoored from the close statutory analysis that Justice Scalia performed in *MCI*, the major questions doctrine has the same flaws as a substantive clear statement rule, as the Court's opinion in *Sackett v. EPA*, 143 S. Ct. 1322, 1361 (2023), showed.

69. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

70. *Id.* at 133 (explaining that "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand").

71. *Id.*

72. 529 U.S. 120 (2000).

73. *Id.* at 138–40.

74. *Id.*

75. *Id.*

regulate tobacco.[76] The FDA's sudden pivot towards cigarette regulation therefore seemed inconsistent with this longtime practice.[77] Justice O'Connor also indicated that "common sense" would weigh against recognizing an implicit delegation of power by Congress on a "policy decision of . . . economic and political magnitude[,]" such as the regulation of cigarettes.[78] However, Justice O'Connor's observation rested on the lack of fit between the FDA's proposed rule and the FDCA's particular history and implementation.[79]

3. Ordinary Tools and Preserving Agency Power

This concrete assessment of fit can sometimes validate an agency's power and rebut arguments made by parties challenging agency authority. Consider *Whitman v. American Trucking Associations*,[80] in which the Supreme Court analyzed whether the EPA could consider cost in setting national ambient air quality standards (NAAQS).[81] Industry groups concerned about regulatory burdens argued that the EPA had to consider cost in setting these standards. In response, the agency argued that it had to set standards without regard to costs.[82] According to the EPA, considering cost would undermine the statute by subjecting clean air to the vagaries of economic analysis.[83] Finding that the EPA was required to set standards

76. *Id.* at 137. Justice O'Connor cited congressional testimony by multiple FDA officials over a period of decades noting that amendments to the FDCA that would have expressly granted the agency the power to regulate tobacco products would probably have led to an outright ban on the sale of cigarettes. *Id.* For Justice O'Connor, this testimony was at least tacit evidence that FDA officials had long believed that current provisions of the FDCA did not grant them this authority.

77. *See* Jonathan H. Adler, West Virgina v. EPA*: Some Answers About Major Questions*, 2022 CATO SUP. CT. REV. 37, 56–57 (2022) (discussing the importance of past practice).

78. *Brown & Williamson*, 529 U.S. at 133 (citing MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 231 (1984).

79. *See* Sohoni, *supra* note 1, at 270 (asserting that Justice O'Connor's comment about economic and political consequences did not stand alone, but rather flowed from her opinion's extensive and detailed discussion of statutory and administrative context); Kristin E. Hickman, *The (Perhaps) Unintended Consequences of* King v. Burwell, 2015 PEPPERDINE L. REV. 56, 63–64 (2015) (describing Justice O'Connor's language as an acknowledgment of the detailed discussion elsewhere in the opinion, rather than as an independent factor in the Court's analysis). Justice O'Connor cited *Chevron* and situated her discussion of context within Step 1 of the *Chevron* doctrine, which directs courts to determine whether a statute has spoken clearly to the matter at hand, thus precluding agency action to the contrary. *Brown & Williamson*, 529 U.S. at 132–33 (referring to *Chevron* Step 1). However, in *Brown & Williamson*, along with *MCI*, the careful analysis of congruence with text, structure, statutory history, and past practice did the real work. This methodical approach sidestepped the categorization costs of manipulability, inconsistency, and bias that can accompany using Step 1 of the *Chevron* doctrine as a rule turning solely on dictionary definitions of statutory terms. Dictionaries are a valuable tool, but many words have multiple meanings, making examination of other interpretive tools advisable. Moreover, any dictionary definition is itself composed of words, which sometimes require additional forays into meaning. Contestable and manipulable distinctions are possible at every turn, suggesting that the methodical assessment of other materials in cases such as *Brown & Williamson* and *MCI* is necessary for statutory interpretation.

80. 531 U.S. 457 (2001).

81. *Id.* at 462.

82. *Id.* at 463.

83. *Id.* at 465.

without regard to cost, the Court focused on structural features of the Clean Air Act (CAA) that echoed Justice Scalia's analysis in *MCI*.[84]

Writing for the Court in *Whitman*, Justice Scalia observed that the two principal sections of the CAA governing air quality mentioned numerous factors but did not refer to costs.[85] Moreover, Congress expressly referred to costs in more specific contexts, suggesting that it knew how to require consideration of costs and therefore made a conscious choice not to require that consideration for air quality standards.[86] The challengers to the EPA's standards argued that generic language in the statute, such as the mandate to maintain an "adequate margin of safety" in air quality, implicitly incorporated a requirement to consider costs.[87] In response, Justice Scalia made a judgment, famously remarking that, "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not . . . hide elephants in mouseholes."[88] The tools of ordinary statutory interpretation include making comparative judgments such as this one against the backdrop of a specific statutory framework. While Justice Scalia did not refer to *Chevron* in this part of his analysis, the concrete comparative judgment here echoes the assessments in *Brown & Williamson* and *MCI*.

II. THE NEW MAJOR QUESTIONS CASES: TRADITIONAL TOOLS AND WARNING SIGNS

In several recent cases, the Supreme Court has not cited *Chevron* and instead has framed assessment of agency rules regarding major questions as either an interpretive presumption or a clear statement rule.[89] In other words, while the familiar two-part *Chevron* test makes deference to the agency the default if a statute is ambiguous, recent decisions treat statutory ambiguity about major questions as a signal that the agency is exceeding its power. However, reliance on traditional tools of statutory interpretation in most of these recent decisions creates continued uncertainty about the precise role of the major questions doctrine. If reliance on traditional tools

84. *Id.* at 466–68.

85. *Id.* (citing 42 U.S.C. § 7408; 42 U.S.C. § 7409).

86. *Id.* at 467–68 (citing to 42 U.S.C. § 7545(k)(1) (mandating consideration of costs in setting formulas for gasoline)); *id.* (citing to 42 U.S.C. § 7547(a)(3) (requiring consideration of costs in setting emissions standards for engines used in non-road vehicles such as aircraft, train locomotives, marine vessels, and heavy equipment)).

87. *Id.* at 471 (citing 42 U.S.C. § 7409(b)(1)).

88. *Id.* at 468.

89. *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2372–74 (2023) (discussing the major questions doctrine as the default when text is ambiguous); *id.* at 2376–84 (Barrett, J., concurring) (describing the major questions doctrine as a common-sense inference about legislative behavior). Justice Gorsuch has articulated the doctrine as a means to combat excessive delegations of legislative power to administrative agencies. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2617–18 (2022) (Gorsuch, J., concurring); *see also* Ilya Somin, *Nondelegation Limits on COVID Emergency Powers: Lessons from the Eviction Moratorium and Title 42 Cases*, 15 N.Y.U. J. L. & LIBERTY 658, 674–82 (2022) (applying the nondelegation doctrine to COVID-19 measures and immigration restrictions). This Article focuses on the doctrine as an approach to statutory interpretation, leaving the nondelegation issue for another day.

resolves these cases, the major questions doctrine may be a convenient label, not a driver of decisions.

As in *MCI* and *Brown & Williamson*, the text of the provision may be equivocal or ambiguous, and context still does much of the work.[90] Structure, history, implementation, and the degree of tailoring in the agency action take center stage. Justice Kavanaugh, who joined the majority in all but one of the current cases, has continued to praise *Chevron*'s reference to "traditional tools of statutory construction."[91] Moreover, apart from *Sackett*, a decision on wetlands protection in which Justice Kavanaugh declined to join the Court's opinion,[92] each of the recent decisions observe the congruence canon. The Court's method in *Sackett* may signal a detour from these traditional signposts. Alternatively, *Sackett* may be an outlier since the other cases—despite some of the Justices' rhetorical framing—comport with Justice Stevens's prescription.

A. Statutory Text and Major Questions

Because the Court's most recent decisions largely ignore *Chevron*, they eschew step one of the *Chevron* test, treatment of ambiguous statutory language as inviting agency action, and step two, determination of whether the action is reasonable. The Court's formulation of the major questions doctrine instead reverses the *Chevron* presumption, treating ambiguous statutory language as insufficient support for an agency's claimed delegation of power that the agency has claimed.[93] While this change has inspired the most scholarly criticism of the major questions doctrine, the Court's shift in practice has been less dramatic.[94] The change in the Court's practice has been insubstantial because a number of cases that purportedly rely on *Chevron* actually found a clear congressional mandate opposing the agency in other aspects of congruence, such as statutory structure, history, and implementation, which are *Chevron*'s traditional tools of interpretation.[95] Moreover, in some of the new cases, which continue to rely on those traditional tools, the textual argument against the agency's action is surprisingly robust.[96] In other words, mere textual ambiguity has never been the touchstone of Supreme Court decisions purporting to apply *Chevron*

90. *See supra* notes 61–82 and accompanying text.

91. Kavanaugh, *Keynote Address*, *supra* note 5, at 1850–51; Sackett v. EPA, 143 S. Ct. 1322, 1369 (2023) (Kavanaugh, J., concurring) (criticizing Justice Alito's opinion for the Court as applying a default rule akin to the major questions doctrine despite the statute's clarity on wetlands coverage).

92. *Sackett*, 143 S. Ct. at 1369.

93. *See* Levin, *supra* note 61, at 1; Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1012 (2023); Sohoni, *supra* note 1, at 263–64.

94. *Compare* Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. (forthcoming 2024) (criticizing decisions as radical departure), *with* Hickman, *The Roberts Court's Structural Incrementalism*, *supra* note 1, at 76–78 (arguing that in practice, change has been modest).

95. *See* MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 225 (1994) (discussing aspects of statutory structure that counseled against the agency's position).

96. Biden v. Nebraska, 143 S. Ct. 2355, 2368–69 (2023).

and generally has not driven more recent decisions purporting to apply the major questions doctrine.

This subsection explores the interaction of statutory text and the major questions doctrine in three recent decisions. The first part of this subsection argues that the student loan case, *Nebraska*, relied principally on clear statutory text disfavoring the Biden administration's rule granting blanket student debt relief. The second part argues that lack of tailoring was central to the Court's decision in *National Federation of Independent Businesses v. U.S. Department of Labor* (*NFIB*),[97] holding that the Occupational Safety and Health Administration's (OSHA) vaccine mandate exceeded its statutory authority. The third part argues that the Court's decision in *Sackett* misconstrued statutory text, structure, history, and implementation in articulating an unduly restrictive test for protection of wetlands. *Sackett* is thus a warning sign that future Supreme Court decisions on administrative law may unduly discount the traditional tools of statutory interpretation.

1. Statutory Text, Debt, and COVID-19

For a case with a surprisingly strong textual foundation, consider *Nebraska*, in which the Supreme Court invalidated a policy from the Secretary of Education that directly cancelled hundreds of billions of dollars in student debt.[98] As Chief Justice Roberts explained in his opinion for the Court, the Secretary of Education relied on a provision in the Higher Education Relief Opportunities for Students (HEROES) Act that allowed the Secretary to modify any student loan in the event of a war or other national emergency.[99] The Secretary classified the COVID-19 pandemic as an emergency triggering this modification power, but Chief Justice Roberts read the statutory power far more narrowly.[100]

Chief Justice Roberts's narrow reading of the statutory term, "modify," acquired force from context.[101] It echoed Justice Scalia's similar reading almost thirty years earlier in *MCI*.[102] *MCI* provided an accessible and narrow meaning of the term "modify" in a case concerning the scope of executive-branch discretion—exactly the issue that the Court addressed in *Nebraska*.[103] In light of *MCI*, it seems reasonable to view "modify" as a term of art connoting minor changes. Indeed, Chief Justice Roberts noted that Black's Law Dictionary takes a similar view.[104] Further supporting the

97. 142 S. Ct. 661 (2022).
98. *Nebraska*, 143 S. Ct. at 2375.
99. *Id.* at 2364.
100. *Id.* at 2364, 2373–74.
101. *Id.* at 2368.
102. *Id.* at 2369–70 (citing MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 225 (1994) (recounting that the term, modify, does not validate "basic and fundamental changes in the scheme" enacted by Congress). *But see* MERRILL, *supra* note 4, at 204–05 (expressing some doubt about this textual point).
103. *MCI*, 512 U.S. at 225.
104. *See Nebraska*, 143 S. Ct. at 2368–69 (citing Black's Law Dictionary 1203 (11th ed. 2019)) (defining modify as "[t]o make somewhat different; to make small changes to" (alteration in original)).

status of "modify" as a term of art, case law generally takes a narrow view of an agent's power to modify a contract or loan's terms.[105] Since the Secretary acts as Congress's agent, this narrow understanding seems appropriate for the HEROES Act as well.

Similarly, in *Alabama Association of Realtors v. Department of Health and Human Services*,[106] the Court considered a nationwide eviction moratorium that the Center for Disease Control (CDC) imposed during the COVID-19 pandemic. The CDC claimed authority under an established public health statute that ceded power to issue "regulations . . . necessary to prevent the introduction, transmission, or spread of communicable diseases" to the agency.[107] According to the CDC, COVID-19 had frayed personal finances, thus exponentially raising the risk of wholesale evictions.[108] The resulting dislocation and proliferation of unhoused or ill-housed persons could have promoted the spread of the COVID-19 virus.

However, according to the Court, while the first sentence of this statutory subsection on public health appeared to convey broad power, the second sentence cabined that power.[109] The second sentence provided specific examples of the activities integral to the regulations mentioned in the first sentence.[110] Those specific examples all addressed the mechanics of ordinary public hygiene and infection control, including "inspection, fumigation, disinfection, sanitation, pest extermination, [and] destruction of animals or articles found to be . . . infected."[111] The second sentence concluded with a more general reference to "other measures . . . [that] may be necessary."[112] Under established principles of statutory interpretation, general phrases such as *other measures* take the meaning of more specific terms surrounding them.[113] The Court explained that the familiar protocols

105. AEA Middle Mkt. Debt Funding LLC v. Marblegate Asset Mgmt., LLC, 185 N.Y.S.3d 73, 129 (N.Y. App. Div. 2023) (discussing the term, "modify," in the context of credit agreements and suggesting that modification usually does not involve wholesale cancellation of the agreement; also finding limits on the agent's authority); Scientific Holding Co. v. Plessey, Inc., 510 F.2d 15, 19–20 (2d Cir. 1974) (discussing the modifications between the entity and the investor that were moderate, involving moving up the time by one month after which the investor could take over business and imposing interest of 10% annually on the investment, to be counted as a loss that would contribute to triggering investor takeover power); *see also* Dudley v. Perkins, 139 N.E. 570, 572 (N.Y. 1923) (holding that, unless otherwise noted, the special agent has only limited power to modify a contract for sale of goods or commodities such as potatoes); Pennsylvania Casualty Co. v. Bacon, 133 F. 907, 909 (2d Cir. 1904) (limiting the power of the agent to modify the terms of a life insurance policy regarding when the policy came into effect); *see also* Northern Assurance Co. v. Grand View Bldg. Ass'n, 183 U.S. 308, 327 (1902) (limiting the use of parol evidence in an effort to modify a contract).

106. 141 S. Ct. 2485 (2021).

107. 42 U.S.C. § 264(a).

108. *See* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292, at 1–2 (Ctrs. for Disease Control & Prevention 2020).

109. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2491 (2021) (Breyer, J., dissenting) (discussing the majority's interpretation of 42 U.S.C. § 264(a)).

110. *Id.* at 2487.

111. *Id.*

112. *Id.*

113. *See* SCALIA & GARNER, *supra* note 52, at 199 (discussing the linguistic or "semantic" canon, *ejusdem generis*, guiding the interpretation of words and phrases in statutes and other legal

that the subsection enumerated "directly relate to preventing the interstate spread of disease by identifying, isolating, and destroying the disease itself."[114] The CDC measure, which addressed indirect harms such as housing dislocation, failed to fit the more direct and established protocols identified in the statute; in other words, the lack of congruency doomed the measure.[115]

2. Statutory Text as a Weak Link: Tailoring to the Rescue

In some of the cases, the textual analysis needed a substantial assist from other prongs of the congruence canon, such as tailoring, although the Court did not fully acknowledge that debt. Consider *NFIB*, in which the Court held that the vaccine mandate issued during the COVID-19 pandemic by OSHA exceeded its power under the Occupational Safety and Health (OSH) Act.[116] While, as we shall see, other aspects of OSHA's emergency temporary standard were legally problematic, the text of the statute did not clearly bar the agency's action.[117]

Indeed, a nonfrivolous argument would suggest that the OSH Act authorized the vaccine standard. Under this provision, the agency can implement an emergency temporary standard if the Secretary of Labor "determines . . . that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards."[118] Furthermore, the Secretary must determine that "such emergency standard is necessary to protect employees from danger."[119] Given the dire consequences accompanying an unvaccinated person's exposure to the COVID-19 virus, at least when others are not masked or tested, it seems logical to read the "toxic or physically harmful" language in this provision as including measures such as the vaccine standard.[120]

Here, the absence of tailoring in the mandate drove the Court's decision. In a per curiam opinion, the Court seemed to suggest only that the statutory language failed to clearly authorize measures of the vaccine

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instruments); *see also id.* (giving the example that a court interpreting a will with the bequest of "my furniture, clothes, cooking utensils, housewares, motor vehicles, and all other property" will view "other property" as covering only personal property, not real estate).

114. *See Ala. Ass'n*, 141 S. Ct. at 2488.

115. *Id.* at 2489.

116. NFIB v. Dep't of Lab., 142 S. Ct. 661, 666 (2022).

117. *Id*. at 665 (concluding only that the statute did not "plainly authorize[]" the agency's emergency standard).

118. 29 U.S.C. § 655(c)(1).

119. *Id.*

120. *NFIB*, 142 S. Ct. at 672 (Breyer, J., dissenting) (asserting that "[t]he virus that causes COVID-19 is a 'new hazard' [and] . . . a 'physically harmful' 'agent'" that manifestly causes a "grave danger"); *see also* Sohoni, *supra* note 1, at 282 n.154 (asserting that from a "purely textualist" standpoint, stressing statutory language, OSHA should have prevailed in the vaccine standard case on the threshold issue of authority to impose a mandate in "some workplaces," while the CDC rightly lost the eviction moratorium case).

mandate's scope.[121] This concession suggested that the agency had some authority to regulate workplace exposure to COVID-19, as long as that regulation was appropriately targeted, or tailored. Assessment of the vaccine standard's lack of tailoring did most of the analytical work in this decision, even if the Court did not fully acknowledge that component. While the Court could have addressed that lack of tailoring at step two of the test in *Chevron*, it did not. Alternatively, the Court could have found that the vaccine standard was arbitrary and capricious under its previous decision in *Motor Vehicle Manufacturers Ass'n v. State Farm*[122] and hence violated the APA, but again, it did not.[123] The failure to take either of these well-traveled paths was a warning sign that categorization costs under the major questions doctrine were poised to accrue.

3. Misreading Statutory Text: The Strange Case of *Sackett*

Categorization costs came home to roost in *Sackett*. In *Sackett*, the Court addressed the scope of the EPA's authority to regulate wetlands, which are distinct ecosystems such as the Everglades that are flooded or saturated for significant parts of each calendar year.[124] Under the Clean Water Act (CWA), the EPA's ambit includes "navigable waters," which the statute defines in the amorphous phrase "waters of the United States."[125] After some back and forth with the Supreme Court and variability based on the presidential administration in power, the EPA settled in the period before *Sackett* on a capacious definition of wetlands that included any area with a "significant nexus" with a navigable waterway.[126] The Court rejected this standard, instead going too far in the other direction and imperiling wetlands protection.[127]

Government hubris may have played a role in this dynamic. The EPA and other agencies with responsibilities in this domain, including the Army Corps of Engineers, acknowledged that they took a broad view of the significant nexus definition, which could include areas that appeared dry and at some distance from any visible body of water.[128] On occasion, this broad view meant that ordinary homeowners, like the petitioners in *Sackett*, received citations for routine building projects from the government and

121. *NFIB*, 142 S. Ct. at 665–66 (criticizing the breadth of the mandate, while conceding that a narrower standard that protected employees in "particularly crowded or cramped environments" might pass muster); *see also* Biden v. Missouri, 142 S. Ct. 647, 652–54 (2022) (upholding the mandate covering staff of facilities that received Medicare and Medicaid funding).

122. 463 U.S. 29 (1983).

123. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

124. Sackett v. EPA, 143 S. Ct. 1322, 1333 (2023). Although they have a special character, wetlands are often located in the vicinity of larger bodies of water. *Wetland*, NAT'L GEOGRAPHIC: EDUC., https://education.nationalgeographic.org/resource/wetland/ (last visited Mar. 16, 2024). As distinct ecosystems, wetlands are home to discrete forms of plant and animal life that are essential to the larger environment. *Id.*

125. 33 U.S.C. § 1362(7).

126. *Sackett*, 143 S. Ct. at 1334–35.

127. *Id.* at 1341.

128. *Id.* at 1335.

notices warning that criminal and civil penalties could result if the homeowners failed to remediate the offending conditions.[129]

While the Court decided unanimously that the government's approach was too broad, Justice Alito used a clear statement approach to narrow the scope of regulation further still. Since Congress, in a provision limiting state issuance of permits to discharge waste, had amended the CWA to state that certain "waters of the United States" included "wetlands adjacent thereto," Justice Alito had to concede that some wetlands were subject to regulation under the statute.[130] However, Justice Alito narrowly construed the term "adjacent" to mean "adjoining."[131] Thus, the term covered only wetlands with a "continuous surface connection" to bodies of water that were clearly navigable in their own right, such as rivers and lakes.[132]

Justice Alito acknowledged that, according to widely used dictionaries, the term adjacent could have a broader meaning, allowing more federal action to protect wetlands.[133] However, invoking concern about excessive federal interference with state control of land use and with the decisions of private property owners, Justice Alito applied a clear statement rule that tracked the Court's recent formulations of the major questions doctrine. Justice Alito then asserted that Congress's use of the term adjacent was ambiguous, particularly given the term's appearance in a provision regarding state-issued permits that Justice Alito derided as merely ancillary to the main point of the statutory framework. As a result, absent further congressional guidance on the language of the statute, Justice Alito insisted that adjacent meant adjoining or touching.[134]

Justice Kagan and Justice Kavanaugh each wrote concurrences joined by Justice Sotomayor and Justice Jackson.[135] Their concurrences argued that the Court's definition of "waters of the United States" was needlessly restrictive since the statutory use of the term adjacent clearly referred also to any wetlands merely separated from a body of water by a natural or man-made barrier.[136] Justice Kavanaugh argued persuasively that adjacent had a clear ordinary meaning that included neighboring bodies of water that lack a surface connection due to an intervening dike, berm, or other barrier.[137] Justice Kavanaugh explained there was no room for application of a clear statement rule triggered by statutory ambiguity

129. *Id.* at 1335–36.
130. *Id.* at 1339 (citing 33 U.S.C. § 1344(g)(1)).
131. *Id.* at 1339–40.
132. *Id.* at 1341 (citation omitted).
133. *Id.* at 1339–40 (citing, *inter alia*, the Oxford American Dictionary & Thesaurus 16 (2d ed. 2009), which lists both adjoining (meaning physically touching) and neighboring (meaning nearby) as synonyms of adjacent).
134. *Id.* at 1340–42.
135. *Id.* at 1359, 1362.
136. *Id.* at 1362 (Kavanaugh, J., concurring); *id*. at 1364 (citing Black's Law Dictionary definition that adjacent means "lying near or close to, neighboring, or not widely separated").
137. *Id.* at 1363.

because of the term's clear ordinary meaning.[138] In essence, Justice Kavanaugh lamented that the Court had rewritten the CWA, which jeopardized wetlands that fell within Congress's protective framework.[139]

Together with the conflicts between the *Sackett* Court's position and statutory structure, history, and established implementation,[140] this clash with the CWA's clear text shows an approach to statutory interpretation that has gone badly astray. The earlier major questions cases observed the congruence canon, but *Sackett* reveals a label with its own imperatives. Future administrative law cases and immigration decisions should avoid these categorization costs.

4. Statutory Implementation and Structure

Except for *Sackett*, the recent major questions cases have also showed attentiveness to statutory structure and implementation. For example, the Court's decision in *West Virginia v. EPA*[141] has cued a chorus of scholarly criticism.[142] Nevertheless, the Court's structural analysis echoes the sound points made in earlier decisions such as *MCI* and *Brown & Williamson*.

The *West Virginia* decision, by Chief Justice Roberts, held that the EPA lacked authority under the CAA to enact the Clean Power Plan rule.[143] To address emission of greenhouse gases (GHG) such as carbon dioxide (CO_2) by coal-fired power plants, the Clean Power Plan required substantial generation-shifting.[144] Generation-shifting is a pivot from high-carbon fuels such as coal to lower-carbon natural gas and non-carbon wind and solar power generation.[145] A company could comply with the rule by various means, including participation in a "cap-and-trade" program, through which the company could buy emissions credits from other firms that had already successfully lowered carbon emissions.[146]

In the *West Virginia* decision, past practice identified 42 U.S.C. § 7411, the provision that the EPA had relied on in the Clean Power Plan rule, as a modest gap-filler.[147] Historically, however, 42

138. *Id.* at 1367.
139. *Id.* at 1369.
140. *Id.* at 1364–69.
141. 142 S. Ct. 2587 (2022).
142. *See* Deacon & Litman, *supra* note 93, at 1014; Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 521 (2023); Levin, *supra* note 61, at 4; Sohoni, *supra* note 1, at 267; Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 1–2; Walters, *supra* note 94, at 6–7; *cf.* Adler, *supra* note 77, at 54–55 (suggesting that in *West Virginia*, Chief Justice Roberts's opinion for the Court failed to leverage all available textual arguments against the EPA's broad interpretation of the Clean Air Act).
143. West Virginia. v. EPA, 142 S. Ct. 2587, 2616 (2022).
144. *Id.* at 2603.
145. *Id.*
146. *Id.* Scholars who favor strong action against climate change have long been aware of the awkward fit between the CAA and regulation of GHG. *See* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 32–42 (2014) (describing challenges in accommodating current statutory authorities to reduction of GHG).
147. *West Virginia*, 142 S. Ct. at 2601.

U.S.C. § 7411 had not been an engine of transformative regulatory shifts.[148] Rather, through decades of CAA implementation, the EPA had construed § 7411's key phrase, "best system of emissions reduction" (BSER), to mandate a menu of technical fixes for particular sources of power generation (e.g., scrubbers to reduce mercury emissions).[149]

To illustrate the modest ambitions of past practice under § 7411, consider the Clean Air Mercury Rule (CAMR), which is a rule cited by champions of a broad reading.[150] Reductions in mercury emissions resulting from technical fixes such as scrubbers to "existing coal-fired generation capacity" were central to the CAMR.[151] However, the CAMR did not mandate or encourage a wholesale change in the nature of power generation.[152] Indeed, reflecting agency caution, the preamble to the rule expressly disclaimed reliance on methods that would have been far less impactful, such as reducing emissions by changing the type of coal that a given power plant had burned.[153] It is reasonable to infer that the EPA did not sub silentio encourage pivoting away from coal entirely because it disclaimed reliance on "coal switching" in the CAMR. Thus, past practice supported the more limited reading of § 7411 that the *West Virginia* Court adopted.

Past practice was also vital in the other significant major questions decisions that the Court issued during the Biden administration, with the exception of *Sackett*.[154] Statutory structure supports the result in *West*

148. *Id.* at 2610–11.

149. *Id.*

150. Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28606, 28607 (Env't Prot. Agency May 18, 2005) (codified at 40 C.F.R. pts. 60, 72, 75) [hereinafter *Standards of Performance*]; *see also West Virginia*, 142 S. Ct. at 2610.

151. *Standards of Performance*, *supra* note 150, at 28619.

152. *Id.*

153. *Id.* at 28613 (advising the public that the rule would produce only "minimal coal switching"). Professor Richard Revesz, an important administrative law scholar who became head of the White House Office of Information and Regulatory Affairs after *West Virgina* was decided, argued that the CAMR was an administrative precedent for the Clean Power Plan rule that the *West Virginia* Court invalidated. *See* Richard L. Revesz, Bostock *and the End of the Climate Change Double Standard*, 46 COLUM. J. ENV'T L. 1, 23–24 (2020); Brief of Amicus Curiae Richard L. Revesz in Support of Federal, Non-Governmental Organization and Trade Association, Power Company, and State and Municipal Respondents at 21–24, West Virginia v. EPA, 142 S. Ct. 2587 (2022) (Nos. 20-1530, 20-1531, 20-1778, & 20-1780) [hereinafter *Revesz Amicus Brief*]. However, Professor Revesz's analyses of past practice under § 7411 do not fully address the import of the EPA's own disclaimer of substantial effects. Professor Revesz also cited the cap-and-trade program in the EPA's Transport Plan. *See Revesz Amicus Brief*, *supra* note 153, at 25–26. However, the Transport Plan and related regulations were authorized under 42 U.S.C. § 7410. *See* EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 500–01 (2014). These examples are thus not precedents regarding the agency's authority under the different standard in § 7411.

154. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2363 (2023) (invalidating the Secretary of Education's program for canceling student debt, based in part on the modest measures that the Secretary of Education had taken regarding student debt since the passage of the HEROES Act in 2003); NFIB v. Dep't of Lab., 142 S. Ct. 661, 666 (2022) (observing in striking down the vaccine mandate that the agency, in its "half century of existence, has never before adopted a broad public health regulation of this kind"); *cf.* Sackett v. EPA, 143 S. Ct. 1322, 1365 (2023) (Kavanaugh, J., concurring) (criticizing the Court for failing to acknowledge the consistent practice from the administration of President Ford through President Biden setting the standard allowing for some physical separation of protected wetlands from established bodies of water by means of a natural berm, manmade dike, or similar barriers).

Virginia but undercuts the Court's reasoning in *Sackett*.[155] In *West Virginia*, sound structural arguments were available, although Chief Justice Roberts should have engaged in a more detailed analysis.[156] In *Sackett*, the Court failed to acknowledge structural cues and flagged concerns that may figure into future cases.[157] *Sackett* also demonstrated its indifference to the congruence canon by discounting statutory history.[158] It remains to be seen whether *Sackett* is a harbinger of trouble ahead or a blip on the interpretive radar screen.

III. THE INA AND THE CONGRUENCE CANON

Immigration decisions follow the congruence canon, responding to presidential and agency decisions from two distinct points of origin.[159] Immigration law can be either regulatory or protective because it addresses the status and conduct of noncitizens.[160] The regulatory approach highlights enforcement of the INA, limiting entry and ramping up deportations

155. *See West Virginia*, 142 S. Ct. at 2609–11.

156. Consider § 7411(h), which describes how the EPA should respond if it is not "feasible" for technological or cost reasons to "prescribe or enforce a standard of performance," including the BSER that regulators had previously mandated. In that event, under § 7411(h), the EPA must implement the "best *technological* system of continuous emission reduction." *Id*. (emphasis added). This subsection's logic reinforces Chief Justice Roberts's argument that a BSER centers on technological approaches, such as scrubbers, to reduce emissions from a single source. The subsection would make no sense if a BSER could in the first instance mandate an emissions-credit trading regime. Lack of feasibility under § 7411(h) is not a meaningful criterion for a trading regime, which requires only that respective parties to the regime operate sources with disparate levels of emissions, giving each something to trade. Parties with low-emissions sources can sell credits to parties with high-emissions sources who need those credits. If Congress's plan contemplated an emissions trading regime under § 7411, the approach to infeasibility taken in § 7411(h) would be entirely meaningless, violating the anti-surplusage canon. *See* Lisa Heinzerling & Rena I. Steinzor, *A Perfect Storm: Mercury and the Bush Administration*, 34 ENV'T. L. REP. 10297, 10309 (2004); Nathan Richardson, *Trading Unmoored: The Uncertain Legal Foundation for Emissions Trading Under § 111 of the Clean Air Act*, 120 PENN. ST. L. REV. 181, 223 (2015); *cf.* Adler, *supra* note 77, at 54–55 (maintaining that Chief Justice Roberts's statutory analysis omitted important points made in the literature). To cement his discussion of § 7411's limits, Chief Justice Roberts should have added a detailed explanation along these lines. The failure to include it simply provided ammunition to critics of the *West Virginia* decision who argued that the Court was relying not on the statute, but merely on its own ideological preferences. *See, e.g.*, Deacon & Litman, *supra* note 93 (critiquing *West Virginia* as based on politics, not law); *see also* Adler, *supra* note 77, at 61–62 (noting that, unlike a focus on concrete statutory materials, a judicial assessment hinging on whether a question is major invites "politically contingent inquiries" that in some cases may reach the same outcome, but nonetheless depart from the strengths of judicial institutions).

157. *Compare Sackett*, 143 S. Ct. at 1340 (deriding a state permitting provision that contains the term, "adjacent," as "obscure" and "ancillary"), *with id.* at 1363–64 (Kavanaugh, J., concurring) (viewing a state permitting provision as the key to resolving the question before the Court).

158. *See id.* at 1367 (Kavanaugh, J., concurring) (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 137 (1985) in a discussion of how amendments to CWA largely supported the Army Corps of Engineers' broad position on wetlands protection and criticizing the Court for not addressing this statutory history).

159. *Immigration Law Resources: Judicial and Administrative Cases*, MICH. STATE UNIV. COLL. OF L. (Jan. 1, 2024, 7:01 AM), https://law-msu.libguides.com/c.php?g=899512&p=6471836.

160. *See* Memorandum from Kerry E. Doyle, Principal Legal Advisor, U.S. Immigr. & Customs Enf't on Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion to All OPLA Attorneys (Apr. 3, 2022).

(known as removals under the statute).[161] Given the focus on limiting entry, the regulatory approach aims to defuse pull factors that encourage immigration outside the visa system.[162] Instances of regulatory discretion include Trump Administration measures like the travel ban, sometimes known as the Muslim Ban; the Remain in Mexico policy that removed asylum seekers to Mexico while they awaited full United States hearings on their claims; and the Title 42 ban linked to COVID-19 concerns started by President Trump and continued by President Biden.[163] Some uses of regulatory discretion, such as those that limit or bar eligibility for asylum, may clash with the INA's text, structure, and history, especially its detailed provisions on asylum claims.[164]

In contrast, protective discretion aids noncitizens who are seeking relief from removal, like asylum, or whose removal would be a lower enforcement priority due to time in the United States or family ties there.[165] The protective approach seeks to minimize bias and arbitrariness in the removal process.[166] However, followers of the regulatory approach object

161. This was the focus of many of President Trump's initiatives, including the Remain in Mexico or Migrant Protection Protocols (MPP) program. *See* Acting Sec'y of Homeland Security Kirstjen M. Nielsen, *Migrant Protection Protocols*, U.S. DEP'T OF HOMELAND SEC. (Jan. 24, 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols [hereinafter Nielsen, Migrant Protection Protocols Memorandum]. Certain aspects of immigration law are distinctive, including Congress's plenary control over the field. *See* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 262 (1984) (describing and critiquing judicial deference in immigration law); Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO STATE L.J. 13 (2019) (discussing the flaws in the travel ban decision, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018)); Carrie Rosenbaum, *Anti-Democratic Immigration Law*, 97 DENV. L. REV. 797 (2020) (suggesting that deference in immigration law results from biases of the colonial "settler state" mindset); *see also* Kevin R. Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 61–62 (2015) (arguing that the recent Supreme Court decisions reduced judicial deference); David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 44 (2015) (outlining the most persuasive arguments for deference); *cf.* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833 (1993) (noting that for the first century of United States history individual states were the primary regulators of immigration).

162. *See* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1966–68 (2020).

163. *See* Biden v. Texas, 142 S. Ct. 2528, 2534–35 (2022) (holding that the INA did not categorically prohibit the Biden administration from ending the MPP); *Hawaii*, 138 S. Ct. at 2422–23 (upholding the travel ban from certain majority-Muslim countries); Huisha-Huisha v. Mayorkas, 27 F.4th 718, 722 (D.C. Cir. 2022) (holding that Title 42 had to include provisions for certain humanitarian protections for noncitizens fleeing persecution or torture).

164. *See* East Bay Sanctuary Covenant v. Biden, 2023 U.S. Dist. Lexis 128360 (N.D. Cal. July 25, 2023) (*EBSC IV*) (granting vacatur of the Biden border rule, which includes both a regulatory and a protective component). *See generally* ANDREW I. SCHOENHOLTZ, JAYA RAMJI-NOGALES, & PHILIP G. SCHRAG, THE END OF ASYLUM 59–70 (2021) (analyzing the uses of regulatory discretion by the Trump administration that weakened asylum protections).

165. *See* United States v. Texas, 143 S. Ct. 1964, 1976 (2023) (holding that states lacked standing to challenge the Biden administration's guidance on prosecutorial discretion in removal cases).

166. *See* Shalini Bhargava Ray, *Abdication Through Enforcement*, 96 IND. L.J. 1325, 1352–54 (2021) (arguing that setting priorities is necessary for enforcement that is both effective and compassionate).

that reducing the risk of removal reinforces the pull factors that drive immigration outside the visa system.[167]

A. Text and the Interaction of Ordinary and Specialized Meaning in Immigration Law

The congruence canon and an agency action lacking congruency with statutory text figured into a key immigration case shortly after *Chevron*—*Cardoza-Fonseca*.[168] Justice Stevens, who authored the Court's opinion in *Chevron*, opined that a focus on text and other "traditional tools of statutory construction" could show that the agency's position clearly conflicted with the INA.[169] In *Cardoza-Fonseca*, Justice Stevens's reading of text addressed both ordinary and specialized meanings of the statutory phrase "well-founded fear of persecution."[170] This phrase is central to the test for gaining asylum which is proof of a "well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group."[171]

The issue in *Cardoza-Fonseca* was whether an applicant for asylum had to show that persecution was supported by a preponderance of the evidence (meaning "more likely than not"), or whether a lesser showing would suffice.[172] The government argued that the preponderance standard should apply to the well-founded fear test, just as it applied to a related test for a different remedy called withholding of deportation.[173] Withholding of deportation required that applicants show that their "life or freedom *would* be threatened" if the government returned them to their home

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167. *See* Memorandum from Kirstjen M. Nielsen, Sec'y, U.S. Dep't of Homeland Sec. 3 (June 22, 2018) (arguing that continuing the DACA program would encourage further irregular immigration). Two major immigration scholars, Cristina Rodriguez and Adam Cox, have adopted a different approach that rejects the traditional tools of statutory interpretation and instead posits that the executive branch has plenary discretion. *See* ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW 227 (2020); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015); Cristina M. Rodríguez, *Reading* Regents *and the Political Significance of Law*, 2020 SUP. CT. REV. 1, 18 (2020); Cristina M. Rodríguez, *Foreword: Regime Change*, 135 HARV. L. REV. 1, 100–03 (2021); *see also* Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1776–78 (2023) (suggesting that the Supreme Court's recent decisions on the scope of agency rules and COVID-19 responses are driven by concerns about excessive delegation of legislative power to the executive branch). This positing of executive-branch plenary discretion fails to account for the Constitution's limits on executive power. It also unduly discounts the importance of executive-legislative collaboration and stability in patterns of agency practice. *See* Peter Margulies, *Immigration Law's Boundary Problem: Determining the Scope of Executive Discretion*, 74 HASTINGS L.J. 679, 697–700 (2023).

168. *See generally* Immigr. & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421 (1987). S*ee also* MERRILL, *supra* note 4, at 87–93 (discussing Justice Stevens's view that *Chevron* did not counsel deference to agency on pure question of law, which the Court had to resolve, compared with the view expressed by Justice Scalia that *Chevron* applied but that statute clearly opposed the agency's position).

169. *Cardoza-Fonseca*, 480 U.S. at 447–48.

170. *Id.* at 431–34 (citations omitted).

171. 8 U.S.C. § 1101(a)(42).

172. *Cardoza-Fonseca*, 480 U.S. at 425–26.

173. *Id.* at 443.

country.[174] In construing the latter provision, the Court relied on Congress's use of the word "would," which the Court viewed as connoting likelihood, not mere possibility.[175] In contrast, Justice Stevens asserted in *Cardoza-Fonseca* that "well-founded fear" entailed some showing that was less than that required by the preponderance standard. Indeed, Justice Stevens concluded that this interpretation was ordinary and obvious.[176]

Justice Stevens's explanation of this conclusion acknowledged important elements of context, including the difficult choice faced by a person risking persecution or, more generally, any person deciding how to respond to risk.[177] Justice Stevens did not cite Judge Learned Hand's classic formula to determine the duty of care in tort law: the product of the probability and gravity of risk.[178] However, Judge Hand's formula, which suggests that the risk of a catastrophe would raise the level of care that a reasonable person would take, even given a relatively low probability that the catastrophe would actually occur, was clearly a precursor to Justice Stevens's logic.[179] The context of asylum is an apt case for the use of Judge Hand's formula. Asylum seekers with well-founded fears are motivated by significant risks of grave outcomes such as arrest, torture, or death.[180] Confronted with such severe and possibly irremediable consequences, a reasonable person might act to avoid the risk, even if the likelihood of avoidance was less than 50%.[181] Viewed in this light, the context of asylum law includes predictive judgments about the severity and probability of harm. That context informed Justice Stevens's view of text that might otherwise have seemed ambiguous, and he declined to defer to the agency's interpretation.[182]

Interestingly, because asylum is such a compelling example of this sort of high-stakes decision, Justice Stevens also alluded to "well-founded fear" as a term of art that allied statutory language with statutory history and past practice.[183] Justice Stevens quoted Atle Grahl-Madsen, renowned

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174. 8 U.S.C. § 1231(b)(3)(A) (emphasis added); Immigr. & Naturalization Serv. v. Stevic, 467 U.S. 407, 439–30 (1984) (holding that withholding of deportation required proof by a preponderance of the evidence of the risk of persecution).

175. *See Stevic*, 467 U.S. at 422 (noting that Congress did not choose language that might have meant something less than a likelihood, such as "could" or "might").

176. *Cardoza-Fonseca*, 480 U.S. at 431 (citations omitted). *But see* Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2092 (1990) (suggesting that the meaning of "well-founded fear" was ambiguous).

177. *Cardoza-Fonseca*, 480 U.S. at 431.

178. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

179. *See id.* (Judge Hand also suggested that the cost of precautions was relevant to the analysis).

180. *See Cardoza-Fonseca*, 480 U.S. at 431.

181. *Id.* (explaining, against the backdrop of such grave harm, that "[o]ne can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place").

182. *Id.* at 448.

183. *See also* United States v. Hansen, 599 U.S. 762, 775–78 (2023) (discussing how specialized meaning can emerge from statutory history and implementation); Peter Margulies, *Textualism's Immigration Problem: Stabilizing Interpretive Rules on Noncitizens' Rights and Remedie*s, 50 HOFSTRA L. REV. 259, 275–76 (2022) (discussing the importance of "ordinary meaning" and "care" that courts should take in departing from it).

expert in international refugee law.[184] In a somewhat stylized example, Grahl-Madsen had hypothesized a situation in which "it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp."[185] A 10% chance is less than the 50.1% chance required for proof by a preponderance.[186] Nevertheless, in this situation, an adult male, who decided to flee the country and seek refuge elsewhere, would clearly be acting on the basis of a well-founded fear. More risk-prone individuals might gamble that the authorities would leave them alone. However, the decision of a person who was more risk-averse and fled the country to escape this predicament would be readily understandable.[187]

To reach this conclusion, Justice Stevens used contextual understanding that wedded common sense and a more specialized perspective on the development of asylum law as an international discipline. Informed by this context, Justice Stevens found that otherwise ambiguous text clearly ruled out the government's reading.[188] While Justice Stevens originated the *Chevron* two-step formula, the Justice's commitment to the congruence canon was fundamental to the Court's approach in *Cardoza-Fonseca*.[189] However, if text were the only touchstone, some ambiguity might remain. As discussed later in Part III, congruence with statutory history was crucial to Justice Stevens's analysis.

B. Structure in Immigration Law

While the refugee's predicament provided crucial context in *Cardoza-Fonseca* and resulted in heightened refugee protections, statutory structure can also provide context that either protects or regulates noncitizens. When a statute prescribes a detailed framework, it supports the inference that Congress's plan precludes agency creation of an alternative structure without those details in place.[190] A contrary inference would suggest that legislation is an idle exercise featuring legislators who waste time with superfluous activity. In immigration law, this structural point affects the scope of both protective and regulatory discretion. This Subsection of the Article addresses protective discretion.

The best illustration of how structural concerns limit protective discretion is the Deferred Action for Parents of Americans (DAPA) program, announced by the Obama administration in late 2014, which courts

184. *Cardoza-Fonseca*, 480 U.S. at 431.
185. *Id.* (citing ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 180 (1966)).
186. *See id.* at 440.
187. *Id.* at 438–40.
188. *Id.* at 448.
189. *Id.* at 446–49.
190. *See* MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 229 (1994).

immediately enjoined.[191] DAPA addressed a very large group: adults who entered or remained in the United States without a lawful immigration status and have children who are birthright citizens under United States law.[192] Over four million noncitizens without legal immigration status would have been eligible.[193] Recipients would have received two very significant, renewable benefits—a reprieve from removal and eligibility for a work permit.[194]

The INA provides detailed categories of noncitizens who can receive immigrant visas based on family relationships or skilled employment.[195] To deter adults from immigrating to the United States outside the regular visa system, the statute narrows the avenues to legal status for noncitizen parents of birthright-citizen children; a citizen must be at least twenty-one-years-old to sponsor a parent.[196] Congress's plan also includes formidable obstacles to lawful permanent residence for noncitizens, like potential DAPA recipients, who enter the United States without possession of a valid visa, inspection by immigration officials, or assertion of an asylum claim, and then remain in the country without a lawful status.[197] A potential DAPA recipient with a one-year-old birthright-citizen child could wait at least thirty years for a visa and spend a decade outside the country separated from their family.[198] Moreover, eligibility criteria for the

191. Texas v. United States, 809 F.3d 134, 146–48 (5th Cir. 2015) (*Texas 5th Cir.*); Memorandum from Karl R. Thompson, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, on The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, to the Sec'y of Homeland Sec. and the Counsel to the President (Nov. 19, 2014) [hereinafter OLC Memo].

192. *Texas 5th Cir.*, 809 F.3d at 147–48.

193. *Id.* at 148.

194. *Id.* at 148–49.

195. *See, e.g.*, 8 U.S.C. § 1151(b)(2)(A)(i) (2012) (providing visas for immediate relatives of United States citizens).

196. 8 U.S.C. § 1151(b)(2)(A)(i) (2012). Congress inserted this age floor to deter noncitizens from entering the United States without a visa or an asylum claim for the purpose of acquiring an immigrant visa through a future United States citizen child. *See* Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183, 1186–87 (2015) (discussing the evolution of the provision).

197. *See* 8 U.S.C. § 1255(a) (requiring a noncitizen who entered without inspection to leave the country before receiving an immigrant visa); 8 U.S.C. § 1182(a)(9)(B)(i)(I), (II) (barring admission for three years of any noncitizen who leaves the country after having been unlawfully present for more than 180 days, and barring admission for ten years of any noncitizen who leaves the country after having been unlawfully present for one year or more); Sanchez v. Mayorkas, 593 U.S. 409, 414 (2021) (discussing the limits on the ability to gain LPR status for noncitizens who entered without inspection and remained in the United States unlawfully for more than 180 days).

198. *See* OLC Memo, *supra* note 191, at 29 n.14 (acknowledging the obstacles to receipt of an immigrant visa by potential DAPA recipients). DAPA recipients who had not entered the United States without inspection but instead had overstayed by remaining in the country after expiration of a valid nonimmigrant visa—such as a visa for a student or tourist—would have to wait twenty years in the situation described in the text, because of the INA's requirement that a United States citizen be at least twenty-one years old to sponsor an immediate relative for an immigrant visa. 8 U.S.C. § 1151(b)(2)(A)(i) (2012).

one form of express statutory relief available to this group are exceptionally rigorous.[199]

Congress has also tightly controlled the exercise of protective discretion to aid noncitizens without a legal status. Congress set 120 days as the maximum period of "extended voluntary departure" (EVD) that immigration officials could allow for a removable noncitizen to wrap up affairs in the United States once the noncitizen has agreed to leave.[200] In major 1996 legislation, Congress limited parole—release in lieu of detention—for persons seeking to enter the country, allowing it "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit."[201]

As this detailed framework reveals, in conjunction with the broad asylum provisions that the Supreme Court construed in *Cardoza-Fonseca*, the INA includes both protective and regulatory measures. However, the structural cues reinforcing regulation rendered a vast discretionary exercise of protection, such as DAPA, suspect. A later subsection of this Article on past practice will address the more targeted DACA program. Discussion of structural cues and DAPA is useful background for the congruence canon's analysis of DACA's legality.

C. The INA and Statutory History

Before examining DACA, this Section will discuss how the Supreme Court has used statutory history to elucidate protective provisions of the INA, such as the Refugee Act of 1980. Congruence can provide context to language that might otherwise be ambiguous in ordinary parlance. Here, again, the Court's decision in *Cardoza-Fonseca* is instructive.

Recall that Justice Stevens, writing for the Court in *Cardoza-Fonseca*, concluded that the phrase "well-founded persecution" in the INA's asylum definition established a *reasonable possibility* standard of proof that was less demanding than the preponderance of the evidence standard

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199. 8 U.S.C. § 1229b(b)(1)(A), (D) (2008) (requiring ten years of physical presence in the United States and a showing of "exceptional and extremely unusual hardship" that the applicant's removal would cause to the applicant's United States citizen or LPR spouse, parent, or child); *see also Texas 5th Cir.*, 809 F.3d at 180 (describing this provision, which is referred to as "cancellation of removal" under the INA). My point here is not to defend this framework as a policy matter, but simply to convey the key elements of Congress's plan.

200. *See* 8 U.S.C. § 1229c(a)(2)(A) (2006); *see also* Margulies, *Boundaries of Executive Discretion*, *supra* note 196, at 1209–10 (discussing EVD). This limit has a history; it was the culmination of dialogue between immigration officials and Congress in which influential legislators urged immigration officials to limit protective discretion in this realm. *See* United States ex rel. Parco v. Morris, 426 F. Supp. 976, 980–81 (E.D. Pa. 1977) (describing the warning by Representative Peter Rodino of New Jersey, a liberal Democrat who then chaired the House Judiciary Committee, that officials using EVD were "circumventing Congressional intent by using the extended voluntary departure device to permit deportable aliens to remain in the United States when they had no actual intention of ever departing voluntarily"); Margulies, *Immigration Law's Boundary Problem*, *supra* note 167, at 734–35.

201. 8 U.S.C. § 1182(d)(5)(A); *see also id.* § 1182(d)(5)(B) (requiring a showing of "compelling reasons in the public interest with respect to [the] particular alien" whom the executive branch wishes to parole into the United States); *see also* Margulies, *Boundaries of Executive Discretion*, *supra* note 196, at 1209–10 (setting out the background on narrowed parole criteria).

applicable to a different remedy called withholding of deportation.[202] In addition to conducting a textual analysis, Justice Stevens examined the statutory history of the asylum definition in the Refugee Act of 1980 to reach this conclusion. Citing administrative cases and legislative history, including testimony from a lawyer from the State Department, David A. Martin, who ultimately became a distinguished law professor and Principal Deputy General Counsel of the Department of Homeland Security, Justice Stevens focused on the standard for obtaining a remedy, conditional entry, that preceded enactment of the asylum definition.

As Justice Stevens recounted, the conditional entry standard had been in place for well over a decade prior to passage of the Refugee Act.[203] Administrative decisions by the Board of Immigration Appeals held that the conditional entry provision, which turned on proof that a noncitizen could not return to their home country due to "persecution or fear of persecution on account of race, religion, or political opinion," was substantially broader than the standard for withholding of deportation.[204] The latter standard already used the narrower "'would be' subject to persecution" language of the withholding provision distinguished from asylum in *Cardoza-Fonseca*.[205] According to the Court, legislative history and Martin's testimony established that Congress's shift to well-founded fear in the 1980 statute did not connote a change in the statutory standard.[206] Moreover, Justice Stevens explained, Congress had pivoted to the well-founded fear formulation to fulfill its goal of bringing the United States into compliance with the United Nations Refugee Protocol—which the United States had ratified—and the Refugee Convention, which the Protocol incorporates by reference.[207]

Completing the analysis, Justice Stevens stated that the Refugee Convention used the same broad standard applied in cases under the United States' old conditional entry provision.[208] This relationship between the old United States conditional entry standard, the newly enacted well-founded fear standard, and the Refugee Convention standard solidified the Court's view that the asylum standard was broader than the standard for withholding. Textual context was an important building block in Justice Stevens's assessment. However, despite Justice Stevens's views, the textual evidence at hand was not obvious, even given the special

202. Immigr. & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987). Professor Martin was acutely aware of the need to reconcile asylum law's breadth with regulatory cues that pervade the INA and the political landscape. *See* David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1268–69 (1990) (arguing that an unmanageable volume of asylum claims, including a substantial number that lack merit, "gravely threatens the overall structure of deliberate control over immigration—control that is also highly valued by the public, and by politicians and judges").

203. *Cardoza-Fonseca*, 480 U.S. at 432–33.

204. *Id.*

205. *Id.* (citing Matter of Adamska, 12 I&N Dec. 201, 202 (B.I.A. 1967)).

206. *Id.* at 435–36.

207. *Id.* at 434–37.

208. *Id.* at 437–38.

context of refugee law.[209] Thus, congruence with statutory history was essential in resolving textual ambiguity.

D. Statutory Implementation under the INA

Under the congruence canon, past practice—what this Article calls statutory implementation—is a particularly helpful guide to resolving textual ambiguity. As with statutory structure and history, implementation can support either regulatory discretion that aids enforcement or protective discretion that alleviates the challenges that noncitizens face. In either the regulatory or protective dimensions, statutory implementation can either broaden the discretion that certain parts of the INA convey or narrow that aperture.

1. Past Practice and Preserving Discretion

Interestingly, in contrast with other administrative law decisions, past practice has recently buttressed discretion in immigration. Recent general administrative law decisions citing the major questions doctrine have tended to narrow the scope of discretion.[210] However, two recent immigration cases that used similar reasoning have preserved agency flexibility.[211] The role of statutory implementation in construing the DACA program is blurrier but supports some room for exercise of protective discretion.[212]

The backdrop of prosecutorial discretion and parole of people who crossed the United States border outside of regular channels drove two important decisions in recent years: *Biden v. Texas* (*Texas A*)[213] and *United States v. Texas* (*Texas B*).[214] In *Texas A*, the Court held that the INA did not prohibit Secretary of Homeland Security Alejandro Mayorkas to terminate the Trump administrations restrictive program—the Migrant Protection Protocols (MPP) or Remain in Mexico—under which officials had removed asylum seekers to Mexico to await full United States asylum hearings.[215] The Court rejected the claim by Texas and other state that the

209. *Id.* at 431 (discussing the phrase "well-founded fear").

210. *See generally* Biden v. Nebraska, 143 S. Ct. 2355 (2023); *supra* notes 99–106 and accompanying text.

211. *See generally* Biden v. Texas, 142 S. Ct. 2528 (2022); United States v. Texas, 143 S. Ct. 1964 (2023).

212. *See infra* notes 273–310 and accompanying text.

213. 142 S. Ct. 2528 (2022).

214. 143 S. Ct. 1964 (2023); *see* Town of Castle Rock v. Gonzales, 545 U.S. 748, 761 (2005) (asserting that the history of prosecutorial discretion is a "backdrop" for interpretation); *In re* Aiken Cnty., 725 F.3d 255, 262 (D.C. Cir. 2013) (Circuit Judge Kavanaugh argued that "[t]he Presidential power of prosecutorial discretion is rooted in Article II" of the United States Constitution).

215. *Texas A*, 142 S. Ct. at 2541, 2544. The authority for initiating MPP was 8 U.S.C. § 1225(b)(2)(C), a provision that had been relatively obscure before the Trump administration's start of the MPP program. *Id.* at 2542 (providing statutory history regarding enactment of this provision, which authorized return of certain noncitizens to "contiguous" territory—generally Mexico—to await United States removal hearings); Margulies, *Immigration Law's Boundary Problem*, *supra* note 167, at 743–52 (analyzing MPP termination litigation). The Trump administration—and to some degree, the Obama administration before it—also prosecuted some asylum seekers for illegal entry into the United States. *See* Evan J. Criddle, *The Case Against Prosecuting Refugees*, 115 NW.

INA required either detention of people who had crossed the border in the United States, continuation of MPP, or some combination of the two as the mandatory default approach for addressing border surges.[216]

Longstanding statutory implementation was central to the outcome in *Texas A*.[217] According to Chief Justice Roberts, who wrote for the Court, the novelty of Texas's position worked against it.[218] Chief Justice Roberts noted that every President since enactment of the INA provisions at issue viewed the statutory authority for MPP as discretionary, not mandatory.[219] Explaining the executive branch's limited past use of statutory authority underlying MPP, Chief Justice Roberts noted the challenges that broader use of MPP would pose for the United States' relations with Mexico, which would have to consent to removal of non-Mexican nationals to its territory and would then exact a price in negotiations with the United States.[220]

Statutory implementation also put the state challengers' other proposed default—detention—in perspective. Although all presidents have used detention to some degree, limited congressional funding had consistently limited the availability of the detention option, which required facility construction, maintenance, and staffing.[221] Because of the complexities and limits of both the MPP and detention options, all presidents who faced a crunch at the border turned to a third option: parole, which the INA authorizes in particular circumstances in place of continued custody of people who had crossed the border outside of regular channels.[222] This past statutory implementation signaled the existence of broadened discretion to either terminate MPP or use its underlying authority sparingly.[223]

In *Texas B*, the Court invoked statutory implementation to reject a challenge, by Texas and other states, to guidelines issued by Secretary Mayorkas regarding prosecutorial discretion (PD).[224] The guidelines prioritized the removal of certain noncitizens, including lawful permanent

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U. L. REV. 717, 723–24, 39, 41 (2020) (discussing the history of prosecutorial policies on illegal entry and arguing that criminal prosecution of asylum seekers conflicts with premises of international refugee protection and United States' implementation of those protections). The MPP program, along with the practice of "metering" during the Trump administration, which turned back asylum seekers before they had a chance to cross the United States' border, exposed noncitizens to substantial danger in Mexico. *See* Ang'lica Cházaro, *Due Process Deportations*, 98 N.Y.U. L. REV. 407, 427–28 (2023) (discussing dangers in Mexico).

216. *Texas A*, 142 S. Ct. at 2541–42.

217. *Id.* at 2528.

218. *Id.* at 2543.

219. *Id.*

220. *Id.*; *see also id.* at 2549 (Kavanaugh, J., concurring) (discussing foreign policy reasons for sparing use of INA authority for MPP).

221. *Texas A*, 142 S. Ct. at 2543 (majority opinion).

222. *Id.* (citing 8 U.S.C. § 1182(d)(5)(A)); *id.* at 2548 (Kavanaugh, J., concurring) (observing that "every Administration beginning in the late 1990s [when Congress enacted the provisions at issue in the case] has relied heavily on the parole option").

223. *Id.* at 2543–44 (majority opinion).

224. Memorandum from Alejandro N. Mayorkas, Sec'y, U.S. Dep't of Homeland Sec., on Guidelines for the Enforcement of Civil Immigration Law, to Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't (Sept. 30, 2021) [hereinafter PD Guidelines].

residents (LPRs) who had committed criminal offenses when those offenses endangered national security or public safety.[225] The PD guidelines also attached priority to removal of noncitizens who were apprehended at the border or had recently entered the United States and made their way to the U.S. interior without inspection by U.S. border officers.[226] In addition, the PD guidelines indicated that the amount of time a noncitizen had spent in the United States and their ties to family in the United States were positive equities that weighed against the initiation of removal proceedings.[227] While the Court held that states lacked standing to challenge the PD guidelines, there was a discernible substantive bent focused on the past practice of prosecutorial discretion.[228]

At the outset, Justice Kavanaugh noted the deep-rooted practice of prosecutorial discretion, which he viewed as having its origins in Article II of the Constitution.[229] Continuing the analysis of both Chief Justice Roberts's opinion for the Court and his own concurrence in *Texas A*, Justice Kavanaugh cited the need for each administration to set enforcement priorities due to resource constraints caused by Congress's limited funding.[230] Justice Kavanaugh's discussion of statutory implementation resonated with the substantive discussion of that financial factor in *Texas A*.

As further evidence of substantive links, consider Justice Kavanaugh's carve-out of certain scenarios where challengers might have standing—including a situation where Congress had specifically

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225. *Id.* at 3–4.
226. *Id.* at 4.
227. *Id.* at 3.
228. United States v. Texas, 143 S. Ct. 1964, 1973 (2023).
229. *Id.* at 1971 (discussing the historical background of prosecutorial discretion); *id.* (commenting on the link between such discretion and provisions on executive power in Article II of the Constitution). Scholars have addressed the scope of prosecutorial discretion, with some arguing that it has even broader scope than the parameters set by Justice Kavanaugh in *Texas B*, while others take a narrower view. *Compare* SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 54–59, 105–07 (Ediberto Román ed., 2015) (taking a broad view); Shalini Bhargava Ray, *Abdication Through Enforcement*, 96 IND. L.J. 1325, 1352–54 (2021) (arguing that due to finite resources, the failure to craft priorities amounts to failure to exercise responsibility for effective enforcement); Jill E. Family, *Immigration Law Allies and Administrative Law Adversaries*, 32 GEO. IMMIG. L.J. 99 (2017); Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1035–36 (2013) (positing executive power over enforcement under Article II), *with* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 674–75 (2014) (suggesting constitutional limits on power over enforcement); Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213 (2015) (suggesting limiting principles for prosecutorial discretion); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 791 (2013) (drawing a distinction between prosecutorial discretion and affirmative programs that provide several benefits, including eligibility for a work permit).
230. *Texas B*, 143 S. Ct. at 1972. Justice Kavanaugh also remarked on the role of enforcement priorities in the United States' foreign policy, given other states' sensitivity to the United States' treatment of their nationals. *Id.* at 1971–72 (citing Arizona v. United States, 567 U.S. 387, 396 (2012); Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471, 490–91 (1999)). In addition, courts had to recognize that second-guessing executive enforcement priorities would pose problems for the judicial branch, given the lack of "meaningful standards" for assessing such administrative choices. *Id.* at 1972.

authorized judicial review of prosecutorial discretion.[231] Justice Kavanaugh's reservation of decision regarding such an express congressional authorization strongly suggested that he did not view the current statute as furnishing such a level of specificity.[232] Requiring a clear statement to overcome the inference prompted by past practice recalls the Court's reasoning on the merits in major questions cases.[233] In the major questions cases, that inference limited executive discretion. In contrast, in *Texas B*, that logic recognized broad executive discretion. The difference in outcomes arose from the difference in the interpretive materials relevant to the case.

2. DACA and Past Practice

Past practice, both under immigration law and in the exercise of foreign relations, also provides a predicate for the DACA program.[234] As promulgated under the Obama administration and made a regulation by the Biden administration, DACA provided a renewable reprieve from removal and eligibility for a work permit to a targeted group: noncitizens who had arrived in the United States within a particular temporal window as children in their parents' custody.[235] Certain states, as part of their efforts to check protective discretion, challenged DACA in court, as they

231. *Id.* at 1973 (citing Town of Castle Rock v. Gonzales, 545 U.S. 748, 761 (2005)).

232. *Cf.* Anil Kalhan, *Immigration Enforcement, Strategic Entrenchment, and the Dead Hand of the Trump Presidency*, 2021 U. ILL. L. REV. ONLINE 46, 54–56 (2021) (discussing the interpretation of statutory text regarding prosecutorial discretion and mandatory detention).

233. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2362–64, 2372 (2023) (finding that past practice regarding student debt relief was modest, compared with the sweeping plan that the Court rejected as exceeding executive power).

234. *See DACA Final Rule*, *supra* note 3, at 53152, 53240. Justice Thomas and several distinguished scholars have argued that DACA, like DAPA, is inconsistent with the INA's structure. *See* Dep't of Homeland Sec. v. Regents Univ. Cal., 140 S. Ct. 1891, 1925–26 (2020) (Thomas, J., dissenting); *see also* Josh Blackman, *The Legality of DACA After* West Virginia v. EPA, THE VOLOKH CONSPIRACY (July 6, 2022, 1:47 AM), https://reason.com/volokh/2022/07/06/the-legality-of-daca-after-west-virginia-v-epa/ (arguing that DACA is infirm under the major questions doctrine); Delahunty & Yoo, *supra* note 229, at 856 (arguing against DACA's legality). *But see* Peter Margulies, *The DACA Case: Agencies' "Square Corners" and Reliance Interests in Immigration Law*, 2019 CATO SUP. CT. REV. 127, 140–44 (2020) (discussing how DACA fits within past practice).

235. *See* Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, for David V. Aguilar, Acting Comm'r, U.S. Customs and Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship and Immig. Servs., and John Morton, Dir., U.S. Immig. And Customs Enf't, from Janet Napolitano, Secretary of Homeland Security (June 15, 2012). During the Trump administration, the Supreme Court, in an opinion by Chief Justice Roberts, held that immigration officials' attempt to rescind the DACA program was arbitrary and capricious under the APA. *See Regents*, 140 S. Ct. at 1912 (holding that the Department of Homeland Security had not provided a reasoned explanation of rescission of the DACA program); *see* Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1773–85 (2021) (arguing that *Regents* promoted deliberation by requiring an agency to either admit the political basis for its decisions or engage in a more thorough policy inquiry); Margulies, *The DACA Case*, *supra* note 234, at 149–51 (discussing *Regents's* regard for reliance interests of DACA recipients); *see also* Blake Emerson, *The Binary Executive*, 132 YALE L.J. F. 756, 762–63 (2022) (arguing that *Regents* reflected an unusually rigorous review of agency action that in that sense paralleled major questions cases). *But see* Rodríguez, *Reading* Regents, *supra* note 167, at 18 (critiquing *Regents* as impairing executive discretion through burdensome procedural requirements); Rodríguez, *Regime Change*, *supra* note 167, at 100–03 (2021) (same); *cf. DACA Final Rule*, *supra* note 3, at 53152 (promulgating, in the Biden administration, a final rule authorizing DACA).

challenged DAPA during the Obama administration.[236] Past practice supports this program, although it is more episodic than the tradition of prosecutorial discretion that the Court invoked in its 2023 *Texas B* decision. The examples described here concern presidential action to protect "intending Americans"—foreign nationals who either sought protection from the United States from the risk of harm abroad or claimed to be United States citizens themselves.

i. Examples from the Founding Era and Beyond

The early examples of statutory implementation, which occurred prior to or in the early stages of United States immigration legislation, entail use of presidential power to protect imperiled intending Americans. Outside of immigration law, these examples fit within Justice Robert Jackson's second *Youngstown* category of congressional acquiescence, in which presidential actions against the backdrop of legislative silence become authority for future actions along similar lines.[237] Thomas Jefferson and James Madison cited nascent human rights theories in assisting noncitizen mutineers and maritime deserters hunted by the British navy, including those physically present in the United States or asserting citizenship.[238] In the 1850s, former President Franklin Pierce ordered the rescue from

236. Texas v. United States, 549 F. Supp. 3d 572 (S.D. Tex. 2021) (*Texas C*) (holding that DACA as promulgated by Homeland Security Secretary Janet Napolitano in 2012 exceeded executive power, and staying the decision pending issuance of a final rule); Texas v. United States, 50 F.4th 498 (5th Cir. 2022) (*Texas D*) (finding that prior to the enactment of the final rule, DACA exceeded executive authority; remanding to the district court on the effect of the rule); Texas v. United States, No. 1:18-CV-00068, 2023 U.S. Dist. Lexis 162598 (S.D. Tex. Sept. 13, 2023) (*Texas E*) (holding, without a detailed analysis of the Biden administration rule authorizing DACA, that the rule exceeded executive power under the INA). In *Texas E*, U.S. District Court Judge Andrew Hanen relied on the Biden administration's stated view that its rule did not offer a justification for DACA beyond the pre-rule rationale that it had previously provided. *Texas E*, U.S. Dist. Lexis 162598 at 45–49. Judge Hanen's view reflected understandable frustration with part of the legal justification that the rule's preamble advanced. However, Judge Hanen's opinion did not address a more tailored justification for DACA, rooted in its interaction with other United States immigration enforcement, that the preamble also includes. *See* Margulies, *Immigration Law's Boundary Problem*, *supra* note 167, at 739–42 (overviewing the Biden administration's DACA rule); *cf. DACA Final Rule*, *supra* note 3, at 53170 (discussing the interaction between DACA and other aspects of United States immigration enforcement).

237. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (positing three categories of presidential power that trigger descending levels of judicial deference: first, executive action with congressional approval; second, action met by congressional silence or acquiescence; and, third, actions that Congress opposes, which must be justified by the President's Article II power); *id.* at 610–11 (Frankfurter, J., concurring) (explaining that a pattern of legislative acquiescence can furnish a "gloss" on presidential power beyond the Constitution's express authorities that should trigger judicial deference); Dames & Moore v. Regan, 453 U.S. 654, 657–58 (1981) (recognizing presidential claims settlement as a longtime practice in which Congress has acquiesced); Brett M. Kavanaugh, *Congress and the President in Wartime*, LAWFARE (Nov. 29, 2017, 3:00 PM), https://www.lawfareblog.com/congress-and-president-wartime (reviewing DAVID BARRON, WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS 1776 TO ISIS (2016)) (discussing the weight that courts should attach to past practice); Joseph Landau, Chevron *Meets* Youngstown*: National Security and the Administrative State*, 92 B.U. L. REV. 1917, 1924–25 (2012) (discussing the possible integration of *Chevron* and executive innovations in national security and foreign affairs). *See generally* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 415 (2012) (assessing patterns of congressional acquiescence); Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 CALIF. L. REV. 1913, 1922–31 (2020) (presenting an expansive view of historical practice and its role in constitutional adjudication).

238. *See* Margulies, *Immigration Law's Boundary Problem*, *supra* note 167, at 708–10.

Austro-Hungarian Empire operatives of the Hungarian dissident and former United States resident Martin Koszta, who had filed documents seeking citizenship.[239] Theodore Roosevelt and Elihu Root protected Japanese children in San Francisco schools from California's segregation efforts and then limited the immigration of unskilled Japanese laborers in the Gentlemen's Agreement with Japan.[240] Congress either acquiesced to or eventually ratified the President's moves.[241]

ii. Aiding Holocaust Refugees Prior to World War II

Illustrating continued executive leeway to protect foreign nationals facing risks abroad, President Franklin D. Roosevelt and officials implementing immigration policy, including Secretary of Labor Frances Perkins, acted to aid Holocaust refugees.[242] Those steps did not meet the overwhelming need.[243] Nevertheless, the executive branch provided substantial relief to hundreds of thousands of noncitizens facing danger abroad, in actions that reached or exceeded the outer limits of executive discretion under the immigration laws then in place.[244] Protection of children at risk was a particular focus.[245]

(a) Delegating the Public Charge Provision to Private Aid Groups

Labor Secretary Perkins was a persistent champion of refugee protection in the years before World War II, as the Nazi regime in Germany targeted Jews and other disfavored groups. In a key move, Perkins, assisted by the Labor Department's Solicitor, Charles Wyzanski, who later became a distinguished federal judge, delegated the task of deciding whether a refugee was "likely . . . to become a public charge" to nonprofit groups.[246] This public charge provision was a basis for excluding noncitizens who, due to poverty or disability, would require financial aid from

239. Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105, 139–41 (2014). *But see* Henry Paul Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 70–71 (1993) (expressing skepticism about the presidential power supporting this episode).

240. Margulies, *Taking Care of Immigration Law*, *supra* note 239, at 154–58.

241. Cox & Rodriguez, *The President and Immigration Law*, *supra* note 167, at 162–63.

242. *See* STEPHEN R. PORTER, BENEVOLENT EMPIRE: U.S. POWER, HUMANITARIANISM, AND THE WORLD'S DISPOSSESSED 55 (2016).

243. *Id.* at 51 (noting that due to immigration quotas in place in the United States before and during World War II, many refugees were "tragically excluded" from entry); *see also* DAVID NASAW, THE LAST MILLION: EUROPE'S DISPLACED PERSONS FROM WORLD WAR TO COLD WAR 12 (2020) (discussing challenges, including congressional wariness, to comprehensive aid to Jewish and other refugees in postwar period).

244. *See* PORTER, *supra* note 242, at 55, 63–64 (2016); *see also* ANITA CASAVANTES BRADFORD, SUFFER THE LITTLE CHILDREN: CHILD MIGRATION AND THE GEOPOLITICS OF COMPASSION IN THE UNITED STATES 73 (Chapel Hill: The U. of N.C. Press, 1st ed. 2022).

245. *See* Bradford, *supra* note 244, at 21.

246. PORTER, *supra* note 242, at 63–64; *see also* Bat-Ami Zucker, *Frances Perkins and the German-Jewish Refugees*, 89 AM. JEWISH HIST. 35, 42 (2001) (discussing the State Department's opposition to a more flexible view of public charge provisions).

the government.[247] Prior to Secretary Perkins's intervention, officials who strove to limit immigration and, in some instances, had anti-Semitic attitudes, took a strict view of public charge requirements.[248] Perkins and Wyzanski pivoted to a new policy stance with a broad view of the Labor Department's legal authority.

Advised by Wyzanski, Secretary Perkins authorized a delegation to charities to file blanket affidavits of support for large groups of refugees, easing formerly daunting documentation requirements.[249] In addition, charities could supply a "single blanket surety bond" that would cover large groups.[250] These steps yielded the admission of over 100,000 Jewish refugees during the pre-war period.[251]

The delegation of public charge decisions to nonprofit groups and the authorization of blanket bonds emerged from a robust reading of executive power under the immigration statute. Under the bond provision, "any alien liable to be excluded because likely to become a public charge . . . may . . . if otherwise admissible, nevertheless be admitted in the discretion of the Secretary of Labor upon the giving of a suitable and proper bond."[252] The provision's mention of *any* alien and *a* suitable and proper bond seemed to frame bonds as a case-by-case determination. Allowing blanket surety bonds, affidavits, and nonprofit auditing thus resulted in the adoption of a sweeping view of executive discretion.

The enlistment of private groups here fits Jackson's second category in *Youngstown*, which allows presidential action based on congressional acquiescence.[253] Congress knew of the Labor Department's broad view as of 1933. However, Congress did not choose to expressly and specifically prohibit blanket bonds or delegation of discretion to nonprofits.[254]

(b) Indefinitely Extending the Stay of Refugees on Visitor Visas

In addition to this robust move, in 1938, President Franklin D. Roosevelt personally authorized immigration officials to permit thousands of refugees who had entered the United States on a temporary visa that had subsequently expired to remain in the United States.[255] Thousands of refugees had entered the United States on temporary visas that eventually

247. 8 U.S.C. § 1182(a)(4); *see also* ALISON PECK, THE ACCIDENTAL HISTORY OF THE U.S. IMMIGRATION COURTS: WAR, FEAR, AND THE ROOTS OF DYSFUNCTION 59–60 (2021) (describing the efforts of Perkins and Wyzanski); Alan M. Kraut, Richard Breitman, & Thomas W. Imhoof, *The State Department, the Labor Department, and German Jewish Immigration, 1930-1940*, 3 J. AM. ETHNIC HIST. 5, 7–10 (1984) (discussing the State Department's use of the public charge provision to exclude refugees and the Labor Department's efforts to pivot to a more protective approach).

248. Kraut, Breitman, & Imhoof, *supra* note 247, at 7–9; Zucker, *supra* note 246, at 43–45

249. *See* PORTER, *supra* note 242, at 63–64.

250. *Id.* at 63.

251. *See id.* at 59.

252. Zucker, *supra* note 246, at 41 (citing Immigration Act of 1917, 39 Stat. 891).

253. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952).

254. *See* Kraut, Breitman, & Imhoof, *supra* note 247, at 13.

255. *Id.* at 21–22; Bradford, *supra* note 244, at 26.

expired.[256] After the notorious *Kristallnacht* campaign of violence directed by Adolf Hitler's Nazi regime against Jews in Germany and Austria, President Roosevelt took action.

President Roosevelt explained that, in light of the growing risk of Nazi persecution, it would be cruel and inhumane to "throw . . . out" this group of noncitizen visitors.[257] As President Roosevelt put it, "from the point of view of humanity," it would not be "right to put [the refugees] . . . on a ship and send them back to Germany under the present conditions."[258] President Roosevelt also voiced the government's legal opinion that extensions would be renewable for the period of danger.[259] Foreshadowing Justice Jackson's second category in *Youngstown*, President Roosevelt stated that United States officials would duly inform Congress and "[i]f the Congress takes no action," refugees with no safe place to return "[would] be allowed to stay in this country."[260] The congressional reaction was mixed, but opposition did not coalesce into a serious effort to derail President Roosevelt's decision. Therefore, President Roosevelt's extension of visitors' stays in the United States is an apt candidate for Justice Jackson's second category of presidential authority and a precursor to DACA.

iii. Humanitarian Relief Based on Home-Country Conditions

More recent executive practice has featured protective initiatives based on foreign policy. President George H.W. Bush and subsequent presidents have asserted executive power under Article II of the Constitution to protect foreign nationals who would be at risk if required to return to challenging situations in their countries of origin.[261] In signing the 1990 Immigration Act, President Bush affirmed the "authority of the executive branch to exercise prosecutorial discretion in suitable immigration cases."[262] Deferred enforced departure (DED) was the vehicle for this exercise of executive power. Since its first use in 1990, DED has been granted to certain individuals from El Salvador, the People's Republic of China, Kuwait, Haiti, Liberia, Venezuela, and Hong Kong.[263]

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256. PORTER, *supra* note 242, at 59; Kraut, Breitman, & Imhoof, *supra* note 247, at 21–22; Zucker, *supra* note 246, at 54–57.

257. President Franklin D. Roosevelt, Press Conference, at transcript p. 240 (Nov. 18, 1938) [hereinafter FDR Press Conf.]; *see also* Zucker, *supra* note 246, at 56–57 (discussing the Roosevelt press conference); Kraut, Breitman, & Imhoof, *supra* note 247, at 21–22 (discussing the Roosevelt press conference).

258. FDR Press Conf., *supra* note 257, at 239.

259. *Id.*

260. *Id.*

261. Presidential Statement on Signing the Immigration Act of 1990, THE AM. PRESIDENCY PROJECT (Nov. 29, 1990) [hereinafter Bush 1990 Signing Statement].

262. *Id.*

263. *See DED-Covered Country – Certain Hong Kong Residents*, U.S. DEP'T OF HOMELAND SEC.: U.S. CITIZENSHIP & IMMIGR. SERVS. (May 5, 2023), https://www.uscis.gov/humanitarian/deferred-enforced-departure/ded-covered-country-certain-hong-kong-residents.

President Bush's 1990 statement referred to situations otherwise covered by newly enacted provisions for granting Temporary Protected Status (TPS) to noncitizens whose home countries had suffered government crackdowns, civil unrest, or natural disasters.[264] As President Bush noted, Congress's TPS provision declared that TPS was to be the exclusive means of permitting removable noncitizens to temporarily remain in the United States "because of their particular nationality" or region of their home country, unless otherwise specified by Congress.[265] President Bush's signing statement asserted that this legislative declaration of exclusivity did not displace the executive branch's discretion to respond to similar exigencies outside the TPS framework; to do so would raise "serious constitutional questions."[266] President Bush exercised this discretion in a range of cases raising humanitarian concerns, including the protection of Chinese students in the United States after the Chinese government's brutal suppression of the student protests at Tiananmen Square in Beijing.[267] In 2014, President Obama cited this executive power in permitting Liberians to stay in the United States even though the Liberians' TPS had lapsed.[268]

President Biden has used DED in a measured way that reflects collaboration with Congress. DED is currently in effect for Liberia, Venezuela, and Hong Kong.[269] Congress recently ratified and expanded DED for Liberians by authorizing adjustment to LPR status for Liberians who have been in the United States since 2014.[270] President Biden has extended DED for Liberians to ensure that eligible individuals have an opportunity to enroll in the statutory legalization program.[271]

In sum, past practice reflecting protection of noncitizens from danger abroad is longstanding, albeit somewhat episodic. The rationale for such protection may extend to DACA recipients. If immigration officials removed this group of noncitizens who grew up and received an education in the United States, they would have to leave the only country they have called home for many years and return to a country that they barely know. For individuals in this situation, the new normal would be disruption and

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264. 8 U.S.C. § 1254a(b)(1)(A); *see also* Sanchez v. Mayorkas, 141 S. Ct. 1809, 1811 (2021) (discussing grants of TPS).

265. 8 U.S.C. § 1254a(g).

266. Bush 1990 Signing Statement, *supra* note 261. The later OLC memorandum supporting DAPA's legality cited this power, which has since come to be known as deferred enforced departure (DED). *See* OLC Memo, *supra* note 191, at 12–14.

267. *See* Blackman, *The Constitutionality of DAPA*, *supra* note 229, at 266. Congress eventually enacted relief for Chinese students; *see also* Chinese Student Protection Act of 1992, Pub. L. No. 102-404, 106 Stat. 1969, *noted in* 8 U.S.C. § 1255 (2016) (ratifying grants of deferred action).

268. Memorandum from Barack Obama, President, on Deferred Enforced Departure for Liberians, to Sec'y of Homeland Sec. (Sept. 26, 2014).

269. *Deferred Enforced Departure*, U.S. DEP'T OF HOMELAND SEC.: U.S. CITIZENSHIP & IMMIGR. Servs. (May 4, 2023), https://www.uscis.gov/humanitarian/deferred-enforced-departure.

270. *See* National Defense Authorization Act, Fiscal Year 2020, § 7611, Pub. L. 116-92, 133 Stat. 2309, 2309–10 (2019); 8 U.S.C. § 1255 (Note).

271. *See* Memorandum from Joseph R. Biden, Jr., President, on Extending and Expanding Eligibility for Deferred Enforced Departure for Liberians, to Sec'y of State (June 27, 2022) (extending DED for Liberians through June 30, 2024).

danger. Past practice provides a template for exercising discretion to sidestep this harsh result.[272]

Discretion protecting current DACA recipients would also represent the kind of tailoring the Supreme Court has urged in recent major questions cases. Recall in the vaccine mandate case, the Court observed that a narrower measure protecting virus researchers and workers in tightly packed workplaces might be acceptable.[273] While the larger DAPA program was an overreach, relief targeting current DACA recipients could fit the tailoring component in recent administrative law decisions. Viewed in this light, DACA is consistent with the congruence canon.

IV. THE BIDEN BORDER POLICY: MANAGING ASYLUM OR MISREADING THE INA

The question of congruence is central in assessing the Biden administration's May 2023 rule on border asylum processing, called CLP.[274] Sorting out the congruence of the Biden border rule is challenging because the rule combines regulatory and protective measures into an integrated policy. The rule limits access to asylum for applicants who have not made an advance appointment for border processing on CBP One, a government app.[275] To encourage using the CBP One app, the rule and other initiatives add other pathways to enter the United States, such as parole, that supplement lining up at the border or surreptitiously entering the United States.[276]

The CLP rule envisions a combination of carrots and sticks—incentives and penalties— that will manage the border. One incentive is the availability of expanded parole for nationals of CHNV.[277] Penalties include sharp limits on grants of asylum for applicants who do not use the CBP One app or enter at points on the border that officials have not designated as ports of entry.[278] However, it is not clear if these incentives and penalties must act in combination under the rule because the rule's preamble states that the asylum limits are legally sufficient even without the parole measures.[279] The Biden administration has made cogent policy arguments about each prong of the policy. Nevertheless, the rule's carrots and sticks conflict with the INA, both when the carrots and sticks function separately and when they act together.[280] Each prong fails the congruence canon because of problems with statutory text, structure, history, and

272. A court could also exercise equitable discretion to bracket current DACA recipients from a holding that the final rule exceeded statutory authority. *See* Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) (discussing the broad scope of equitable discretion to tailor injunctions to the interests of all parties).

273. NFIB v. Dep't of Labor, 142 S. Ct. 661, 665–66 (2022).

274. *CLP*, *supra* note 3, at 31314.

275. *Id.* at 33318.

276. *Cuban Parole Process*, *supra* note 3, at 1267–68.

277. *CLP*, *supra* note 3, at 31316.

278. *Id.* at 31384.

279. *Id.* at 31410.

280. Peter Margulies, *Judge Vacates Biden Border Rule as Conflicting with Asylum Law*, LAWFARE (July 28, 2023, 8:30 AM), https://www.lawfaremedia.org/article/judge-vacates-biden-border-rule-as-conflicting-with-asylum-law.

implementation. Section A describes both incentives and penalties, focusing on their interactions. The next Part focuses on expanded parole to CHNV countries and elsewhere as an unauthorized alternate framework outside the INA.

A. Policy Innovation, Asylum Law, and the Border

Before addressing the CLP rule's legal issues, it is useful to acknowledge that asylum law's breadth has prompted tension between the protective and regulatory aspects of immigration law. As the Supreme Court acknowledged in *Cardoza-Fonseca*, protecting refugees with a well-founded fear of persecution requires a low standard of proof; a higher standard would spawn excessive false-negative errors that wrongly find claimants ineligible for asylum protection.[281] Errors of this kind send meritorious claimants back to face arrest, torture, or death in their home countries.[282] Protection also requires broad threshold eligibility criteria that do not hinder meritorious claimants' flights to safety.[283] However, asylum's low standard of proof and broad eligibility criteria also attract many applications that are not meritorious.[284] The volume of meritless applications creates problems for immigration laws' regulatory dimensions, especially because the status quo makes it difficult to efficiently filter out meritless claims. The huge backlog of cases also strains enforcement, impeding actual removal of noncitizens from the United States, even after an asylum application's final denial. Whatever its legal flaws, in policy terms, the CLP rule is a serious effort to manage the tension between the INA's regulatory and protective dimensions.

The tension between protective and regulatory dimensions of asylum law plays out against the backdrop of push and pull factors.[285] An applicant must show a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion" to be eligible for asylum.[286] This substantive standard partially overlaps with push factors: conditions abroad such as violence, government repression, climate change, and poor economic prospects that impel noncitizens to migrate to other countries such as the United States, where conditions—while imperfect—are better.[287] These push factors, while

281. Immigr. & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987).

282. *Id.* at 424–25.

283. *See* Peter Margulies, *The Boundaries of Habeas: Due Process, the Suspension Clause, and Judicial Review of Expedited Removal Under the Immigration and Nationality Act*, 34 GEO. IMMIGR. L.J. 405 (2019).

284. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1966–67 (2020). *But see* Ingrid Eagly & Steven Shafer, *Measuring* In Absentia *Removal In Immigration Court*, 168 U. PA. L. REV. 817, 851–57 (2020) (arguing that lack of counsel and other factors affect asylum seekers' ability to effectively pursue their claims).

285. *See* Margulies, *Boundaries of Habeas*, *supra* note 283, at 410.

286. 8 U.S.C.S. § 1101(a)(42) (2023).

287. Matthew Lorenzen, *The Mixed Motives of Unaccompanied Child Migrants from Central America's Northern Triangle*, 5 J. MIGRATION & HUM. SEC. 744, 749–54 (2017) (analyzing the role of arduous conditions in Central America that ratcheted up immigration to the United States and would also complicate the task of reintegrating returnees).

powerful drivers of individual decisions, only partially overlap with asylum's well-founded fear standard.

For example, to qualify for asylum based on economic harm, the applicant must show that the harm: (1) is on account of political opinion or one of the other four factors identified above, and (2) entails either (a) "economic deprivation or restrictions [by a persecutor] so severe that they constitute a threat to an individual's life or freedom," or (b) a persecutor's deliberate imposition of severe reductions in the applicant's existing assets.[288] Many applicants who allege economic harm cannot meet this demanding standard.

While push factors do not always result in asylum grants, other aspects of asylum law and procedure create a pull factor that drives attempted border entries.[289] As the Supreme Court observed in *DHS v. Thuraissigiam*,[290] a significant majority of noncitizens receive a credible-fear finding from an asylum officer, which entitles them to a full adversarial hearing before an immigration judge.[291] The government has the legal power to detain many of these asylum applicants until their full hearing.[292] However, low levels of congressional appropriations have resulted in limited detention capacity.[293] As a result, the government has often used its authority under the INA to parole noncitizens, releasing them into the United States interior while they await their hearings. Under the INA, an asylum applicant can obtain a work permit within 180 days of filing an asylum application.[294]

Immigration courts currently have a backlog of over two million cases awaiting a hearing before an immigration judge.[295] Due to the growing backlog, an asylum applicant who files an application today will probably not receive a full hearing until four years from now.[296] Because of the high standard for gaining asylum, immigration judges ultimately deny a majority of asylum claims.[297] Nevertheless, the prospect of working in the United States legally for almost four years and then remaining in the

288. Vicente-Elias v. Mukasey, 532 F.3d 1086, 1088 (10th Cir. 2008).
289. *See* Margulies, *Boundaries of Habeas*, *supra* note 283, at 410.
290. 140 S. Ct. 1959 (2020).
291. *Id.* at 1964–67.
292. *Id.* at 1966.
293. Biden v. Texas, 142 S. Ct. 2528, 2533, 2543 (2022); *id.* at 2548–49 (Kavanaugh, J., concurring).
294. 8 U.S.C. § 1158(d)(2) (2023).
295. Zolan Kanno-Youngs, *Backlogged Courts and Years of Delays Await Many Migrants*, N.Y. TIMES (May 13, 2023), https://www.nytimes.com/2023/05/12/us/politics/immigration-courts-delays-migrants-title-42.html.
296. *See id.*
297. *Thuraissigiam*, 140 S. Ct. at 1966–67. *But see* Eagly & Shafer, *supra* note 284, 851–57 (arguing that lack of counsel and other factors affect asylum seekers' ability to effectively pursue their claims).

country indefinitely is a pull factor that encourages more irregular entries outside of the visa process.[298]

The CLP rule uses incentives and penalties to manage this challenge. As of July 2023, the CBP One app that asylum applicants must use to arrange a border appointment is making 1,450 processing slots available daily.[299] At peak periods with daily apprehensions of more than 7,000 noncitizens, the CBP One app cannot meet the demand.[300] However, it has opened a large number of appointments. Using the 1,450-slot daily statistic yields a weekly level of 10,150 appointments, a monthly level of 43,500 appointments, and an annual figure of 529,250 appointments. As the agencies—the Department of Homeland Security and the Department of Justice—explained in the preamble to the order rule, the slots now available under the CBP One app exceed the daily average of entries from 2010 to 2016.[301] And for smartphone users, the relative ease of using CBP One—despite glitches discussed below—takes some of the nagging anxiety and tedium out of border crossing. That efficiency effect may have contributed to the drop in border crossings in the months after the new rule came into effect.[302]

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298. *Thuraissigiam*, 140 S. Ct. at 1964 (alluding to the risk that after the loss of an asylum case and receipt of the final order of removal, a noncitizen "may not . . . be found"). Noncitizens and "repeat players" in immigration, such as smugglers, try to leverage favorable aspects of immigration law and procedure. *See Cuban Parole Process*, *supra* note 3, at 1270–71 (noting that one factor increasing irregular immigration from Cuba has been Cuban entrants' knowledge of difficulty that United States officials face in returning this group to their home country, given the fraught nature of United States–Cuba relations). Fraud is also a substantial concern in asylum and other types of immigration relief. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-50, ASYLUM: ADDITIONAL ACTIONS NEEDED TO ASSESS AND ADDRESS FRAUD RISKS 3–4 (2015); U.S. GOV'T ACCOUNTABILITY OFF., REPORT TO CONGRESSIONAL COMMITTEES: U.S. CITIZENSHIP AND IMMIGRATION SERVICES: ADDITIONAL ACTIONS NEEDED TO MANAGE FRAUD RISKS 44–50 (Sept. 2022) (detailing ongoing problems with agency efforts to detect and prevent fraud in asylum and other areas); *see also* MICHAEL J. TREBILCOCK, PARADOXES OF PROFESSIONAL REGULATION: IN SEARCH OF REGULATORY PRINCIPLES 97, 119–22 (2022) (discussing how nonlawyer immigration consultants exploit vulnerable noncitizens by, *inter alia*, using fraud to obtain immigration benefits for clients); David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Law*s, 40 VA. J. INT'L L. 673, 684 (2000) (discussing the problem of fraud and its relationship to smuggling networks, which have a commercial stake in irregular immigration); Maslenjak v. United States, 582 U.S. 335, 338–39 (2017) (establishing rules for criminal prosecutions of false statements in naturalization, and recounting the facts in the case before the Court, in which an asylum applicant claimed her husband had been a victim of persecution, although he was actually a major *perpetrator* of wartime atrocities); United States v. Hansen, 143 S. Ct. 1932, 1937–44 (2023) (interpreting the immigration statute to criminalize solicitation and facilitation of illegal acts, rejecting the overbreadth challenge to the statute, and recounting the underlying facts of prosecution, including the defendant's execution of a massive fraudulent "adult adoption" scheme for the benefit of hundreds of unknowing noncitizens seeking a legal status).

299. *See CBP One Appointments Increased to 1,450 Per Day*, U.S. CUSTOMS & BORDER PROT. (June 30, 2023), https://www.cbp.gov/newsroom/national-media-release/cbp-one-appointments-increased-1450-day.

300. Margulies, *Judge Vacates Biden Border Rule*, *supra* note 280.

301. *See CLP*, *supra* note 3, at 31400.

302. *See* Michael D. Shear, Julie Turkewitz, & Edgar Sandoval, *How and Why Illegal Border Crossings Have Dropped So Dramatically*, N.Y. TIMES (July 26, 2023), https://www.nytimes.com/2023/07/26/us/politics/immigration-illegal-border-crossings.html. *But see* Dara Lind, *The True Impact of Biden's Asylum Transit Ban*, IMMIGR. IMPACT (July 28, 2023), https://immigrationimpact.com/2023/07/28/impact-biden-asylum-transit-ban/ (questioning whether a downturn in border crossings will continue and arguing that the rule will also imperil meritorious asylum claims).

Adding to the incentives, the agencies have also provided an opportunity for noncitizens from CHNV—currently a majority of asylum applicants—to apply in their home countries for parole into the United States under 8 U.S.C. § 11182(d)(5).[303] Modeled after the successful United for Ukraine parole program that United States officials initiated as part of the effort to assist Ukraine and respond to Russian aggression, the CHNV program makes a total of 30,000 slots available per month for nationals of these countries who can show humanitarian reasons for parole into the United States, including asylum claims.[304] CHNV participants, who can stay in the United States for a renewable two-year period, must have American sponsors and enter the country at an airport, not the border.[305] Part V of this Article addresses the congruence of the CHNV parole program with the INA. The incentive that these programs provide—giving asylum seekers a choice in what pathway they take into the United States—is the key aspect for the border rule. The agencies' preamble to the border rule highlights these programs, while asserting that even if the courts halted them, the border rule would be within the agencies' discretion.[306]

Seeking to accommodate both protective and regulatory components of immigration law, the border rule also uses penalties. Noncitizens who fail to use the CBP One app will be barred from seeking asylum, unless they can show: (1) either a significant technical failure of the app, such as a crash of the entire system, or a severe language problem; (2) an imminent and extreme threat to life or safety; or (3) proof that they both applied for asylum or other humanitarian protection in a country through which they traveled on the way to the United States and received a final denial of that request.[307] Policymakers hope that the rule will preserve humanitarian protections while regulating border inflow more effectively than past approaches.[308]

B. The Border Rule Meets the Congruence Canon

Despite the CLP rule's innovative approach to managing the border, it lacks congruence with the INA's text, structure, and statutory history. Applying these familiar tools yields the conclusion that the border rule exceeded immigration officials' authority to issue rules that are consistent with the INA's asylum provision.[309] Moreover, although the rule's

303. *See Cuban Parole Process*, *supra* note 3, at 1267–68 (describing the program).

304. *Id.* at 1267.

305. Margulies, *Judge Vacates Biden Border Rule*, *supra* note 280. DHS is extending the CHNV program in a somewhat more restricted form to other countries in Central and South America—including Colombia, El Salvador, Guatemala, and Honduras—whose nationals also seek to enter the United States in large numbers. States such as Texas have challenged these expanded parole programs, arguing that they exceed DHS's authority under the INA in a lawsuit that is now pending before Judge Drew Tipton in the Southern District of Texas.

306. *Id.*

307. *CLP*, *supra* note 3, at 31318.

308. *Id.* at 31329.

309. 8 U.S.C. § 1158(b)(2)(C) (2023).

preamble is lengthy and seriously engages with many issues, it fails to adequately address "third countries'" dysfunctional asylum systems and the danger that asylum applicants will face while waiting in those countries for a CBP One appointment.[310] As a result, the rule—in addition to conflicting with the INA—violates the APA's arbitrary and capricious standard.

1. The INA's Text and Statutory History Illuminate Pathways for Asylum Seekers

As the Supreme Court showed in *Cardoza-Fonseca*, text and statutory history can tilt courts towards a protective reading of the INA's asylum provision.[311] Congress was unusually clear that the statute reflected a broad view of permissible paths to the United States for noncitizens seeking asylum.[312] The statutory history anchors this attribute in Congress's plan to implement international obligations that the United States had assumed under the U.N. Refugee Convention and Protocol.

Under the asylum provision, a noncitizen is eligible to apply for asylum "whether or not [the noncitizen applies] at a designated port of arrival" such as an official border crossing.[313] The liberality of the asylum provision's text on the location of an asylum applicant's border crossing is no accident.[314] The Ninth Circuit addressed this statutory language in two decisions—one by Judge Jay Bybee in 2018[315] and the second by Judge Richard Paez in 2021[316]—considering an asylum limit imposed by former President Trump. As Judge Bybee found and the second decision confirmed, Congress included this clear language against both the backdrop of the U.N. Refugee Protocol, which the United States ratified in 1967, and the U.N. Convention on Refugees, which the protocol incorporates by reference.[317] These international agreements recognize, as did Congress, that an individual fleeing persecution cannot always choose at their leisure a

310. The term third countries refers to countries other than the United States or the asylum seeker's country of origin. An asylum seeker at the United States' southern border will virtually always pass through such a country, including Mexico, Belize, or Colombia.

311. Immigr. & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 427–30 (1987).

312. *Id.* at 424.

313. 8 U.S.C. § 1158(a)(1).

314. East Bay Sanctuary Covenant v. Trump, 909 F.3d 1219, 1233–34 (9th Cir. 2018) [hereinafter *EBSC I*]. In July 2023, District Judge Jon S. Tigar analyzed the border rule's fit with the INA, concluding that the text and structure of the INA's asylum provision conflicted with the rule. *See* East Bay Sanctuary Covenant v. Biden, No. 18-cv-06810-JST, 2023 U.S. Dist. Lexis 128360, at 31–34 (N.D. Cal. July 25, 2023) [hereinafter *EBSC IV*].

315. *See EBSC I*, 909 F.3d at 1233–34.

316. East Bay Sanctuary Covenant v. Trump, 993 F.3d 640, 669 (9th Cir. 2021) [hereinafter *ECSB II*].

317. *EBSC I*, 909 F.3d at 1233–34; *ESBC II*, 993 F.3d at 672–74; 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; 1951 Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. In *EBSC II*, the court cited *Chevron* but decided the case based on traditional tools of statutory interpretation such as text and statutory history. *EBSC II*, 993 F.3d at 669.

particular route into the country in which they seek refuge.[318] The asylum provision's text and history spring from Congress's awareness of the relevance of this principle to the United States' international legal duties. These cues from text and statutory history illustrate the asylum provision's protective valence.

However, Congress also wove a regulatory strand through the asylum provision's fabric. The asylum provision grants rulemaking authority to immigration officials.[319] According to this paragraph, the Attorney General and the Secretary of Homeland Security "may by regulation establish additional limitations and conditions" on eligibility for asylum.[320] Like the rest of the asylum provision and the INA, this rulemaking authority combines a regulatory component with a protective caveat: any agency limit on asylum must be consistent with the INA's asylum provision.[321] Parsing the interaction of the broad language on asylum eligibility in § 1158(a)(1) and the section's authorization of agency rulemaking requires an examination of the asylum provision's structure.

2. Statutory Structure and the Border Rule

Two maxims from statutory structure inform this examination of the asylum provision. First, courts will generally disfavor a reading that a subsection of a provision, or any statutory language, is superfluous.[322] Courts view Congress as acting with a plan; a conclusion that Congress inserted meaningless language into the United States Code would clash with that vision. Second, in considering the relative weight of different portions of a statute, courts will usually view a specific part of a statute as prevailing over a more general part.[323] According to courts, greater specificity correlates with sharper legislative focus on the various dimensions of the issue.[324] Consistent with the structural reasoning in decisions such as *Brown & Williamson* and *MCI*, it would be incongruous to assume that Congress meant *sub silentio* to blur that focus.

Taken together, these anti-surplusage and pro-specificity structural canons have consequences for construing the asylum provision's grant of rulemaking authority. A court cannot view the statute as reducing that

318. *See EBSC I*, 909 F.3d at 1248 (explaining that "in most cases," the manner of an asylum seeker's "entry or presence has nothing to do with" the merits of the individual's claim of persecution).

319. 8 U.S.C. § 1158(b)(2)(C).

320. *Id.*

321. *Id.*

322. *See* SCALIA & GARNER, *supra* note 52, at 174–76. *But see* Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 106–07 (2018) (suggesting that the Supreme Court is inconsistent about the application of canons, including the anti-surplusage canon, and lacks clear rules about ranking canons when they clash).

323. SCALIA & GARNER, *supra* note 52, at 183 (stating that "the specific provision comes closer to addressing the very problem posed by the case at hand"); RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645 (2012) (citing the "commonplace of statutory construction that the specific governs the general" (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992))).

324. SCALIA & GARNER, *supra* note 52, at 183.

power to a nullity—that view would violate the anti-surplusage canon. At the same time, courts should construe the agencies' rulemaking power, which must be consistent with the asylum provision, in light of the more specific parts of § 1158.

A full structural analysis should also consider paragraphs within § 1158 that concretely address the impact on an asylum application of an applicant's stay in another country prior to seeking refuge in the United States. That impact is important for rules governing asylum eligibility at the United States' southern border because by definition every noncitizen who is not a Mexican national and seeks to cross that border has spent some time in a third country (besides the United States and the noncitizen's country of origin). All noncitizens in this category have spent some time in Mexico. In addition, many noncitizens seeking to cross the southern border have taken a route that involves traveling through another country, such as Belize or Colombia.[325]

Furthermore, as the CLP rule's preamble acknowledges, albeit with certain exceptions, users of the CBP One scheduling app will need to spend more time in Mexico while they wait to make and attend an appointment with border officials.[326] One of the exceptions to the CBP One criterion requires that an applicant spend enough time in Mexico or another country to seek asylum or other humanitarian protection—such as protection under the Convention Against Torture (CAT)—there and receive a final denial.[327] But because of the role of time in a third country in any border-crossing asylum seeker's route and in the operation of the CLP rule, the asylum provision's handling of third-country sojourns is central.

The specific paragraphs in § 1158 that address asylum seekers' time in a third country are more protective than the CLP rule. Unlike the CLP rule, those provisions include rigorous safeguards for applicants. Under the statute, an asylum seeker experiences no adverse legal consequences when the applicant's time in other countries was fleeting or no formal agreement between the United States and a given country commits that country to full and fair adjudication of asylum claims.

First consider the agreement provisions. One paragraph in the statute categorically denies asylum to applicants who have traveled through countries with which the United States has a safe third-country agreement.[328] Any such agreement must provide detailed protocols for asylum decisions. Safe third-country agreements involve a writing that is formal and public. As part of the agreement, United States officials must specifically find that the applicant will not be at risk of persecution in the third country and will

325. East Bay Sanctuary Covenant v. Biden, No. 18-cv-06810-JST, 2023 U.S. Dist. Lexis 128360, at 48 (N.D. Cal. July 25, 2023).
326. *CLP*, *supra* note 3, at 31314, 31329.
327. *Id.* at 31321.
328. 8 U.S.C. § 1158(a)(2)(A).

receive a full and fair hearing on their asylum claim.[329] Prior to the Trump administration, the United States' only safe third-country agreement was with Canada, a country whose rule-of-law institutions resemble those of the United States.[330]

A second third-country part of the INA's asylum provision denies asylum to foreign nationals who have firmly resettled in another country.[331] The firm resettlement doctrine also features more robust safeguards for refugees than the CLP rule. As the Supreme Court observed in *Rosenberg v. Yee Chien Woo*,[332] the firm resettlement doctrine foregrounds permanence, safety, and stability.[333] Under the *Rosenberg* decision, legal protections remain despite the ethereal prospect of relief in countries that are mere "stops along the way" in the refugee's flight.[334] Firm resettlement entails a more durable status, in which a country grants the refugee the same rights and obligations that it gives its own nationals.[335]

The safeguards built into both the paragraph on safe third-country agreements and the firm resettlement doctrine should inform analysis of the much looser protections in the CLP rule. The CLP rule does not require a written agreement committing a third country to a full and fair asylum process. Additionally, the rule does not require that a third country treat an asylum applicant as one of its own nationals. While the operation of the rule's CBP One process and the criteria for the third-country asylum exception to the CBP One process both require time in some third country for prospective entrants at the southern border, the rule's protections fall short of the safeguards in § 1158's two specific third-country components.

3. The Border Rule's Unduly Narrow Exceptions

To qualify for asylum in the United States, an applicant under the rule must show a systemic failure of the CBP One app, illiteracy or a serious language deficit, or compelling circumstances such as an acute medical emergency or an "imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder."[336] Since medical emergencies are rare, the medical emergency prong of the exception would be difficult to meet. In any case, this factor would be irrelevant to the

329. 8 U.S.C. § 1158(a)(2)(A).

330. *See* Agreement on Safe Third Country, Can.-U.S., Dec. 5, 2002. Canada and the United States recently agreed to changes to the agreement that expand its scope. *See Canada-US Safe Third Country Agreement*, GOVERNMENT OF CANADA, https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement.html (last visited Mar. 18, 2024). The Trump administration signed "asylum cooperative agreements" with Guatemala, Honduras, and El Salvador—countries whose commitment to the rule of law has to date not equaled such commitments in the United States or Canada—but the Biden administration wisely ended those illusory agreements.

331. 8 U.S.C. § 1158(b)(2)(A)(vi).

332. 402 U.S. 49 (1971).

333. *Id.* at 55–56.

334. *Id.* at 57 n.6.

335. *See Matter of* A-G-G-, 25 I&N Dec. 486, 495–96 (B.I.A. 2011) (holding that a third country must at a minimum extend an offer of lawful permanent residence to the asylum applicant).

336. *CLP*, *supra* note 3, at 31314, 31318.

merits of an applicant's substantive asylum claim. As explained below, the exception for an "imminent and extreme threat to life or safety" of the applicant would also arbitrarily cut off asylum eligibility.

The language of the compelling circumstances exception demonstrates its arbitrary impact on asylum claims and lack of fit with the asylum provision's third-country paragraphs. Suppose an applicant waiting for a CBP One appointment faced an imminent threat that was only moderate, not extreme. That moderate threat might concern assault, robbery, or extortion instead of extreme harm such as "rape, kidnapping, torture, or murder."[337] A rational asylum applicant, echoing the hypothetical claimant in *Cardoza-Fonseca* who learned that the applicant's home government planned to kill one in ten members of the applicant's group,[338] would seek to enter the United States at an undesignated border crossing point, rather than risk this imminent but moderate harm. However, that rational noncitizen's decision would not comport with the rule's exception for imminent and extreme harm. Therefore, the noncitizen in this hypothetical would be ineligible for asylum. That result seems incongruous, in light of the INA's robust asylum protections.

4. Tailoring Exceptions to Fit the INA

Under the congruence canon, the agencies promulgating the border rule could have prevailed in court if they had adequately tailored their exceptions to the CPB One criterion. In July 2023, the district court's decision that invalidated the border rule as contravening the INA found the rule's tailoring insufficient and held that it was arbitrary and capricious under the APA.[339]

In its holding, the district court cited an earlier Ninth Circuit decision involving a rule issued by the Trump administration.[340] The Trump administration's rule categorically barred asylum for any noncitizen who had not first sought protection in a third country.[341] Under the Trump rule, those noncitizens were ineligible, even if they presented themselves at an official port of entry.[342] By finding that the Trump administration's rule was not consistent with the asylum provision and, therefore, exceeded statutory authority, the Ninth Circuit held that any regulation addressing time in a third country had to ensure a safe option for the applicant.[343] Having examined the narrow compelling circumstances test in the CLP rule, the

337. *Id.*

338. Immigr. & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987) (citing ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 180 (1966)).

339. East Bay Sanctuary Covenant v. Biden, No. 18-cv-06810-JST, 2023 U.S. Dist. Lexis 128360, at 55–56 (N.D. Cal. July 25, 2023).

340. *Id.* at 36 (citing East Bay Sanctuary Covenant v. Garland, 994 F.3d 962, 979 (9th Cir. 2021) [hereinafter *EBSC III*].

341. 8 U.S.C. § 1158(a)(2)(A).

342. *Id.* § 1158(a)(1).

343. *EBSC IV*, 2023 U.S. Dist. Lexis 128360, at 36–37.

district court held that the CLP rule did not include a safe option and was, therefore, not consistent with the asylum provision.[344]

While the congruence canon would require tailoring, it would be more deferential than the Ninth Circuit's safe option test. While the Ninth Circuit appeared to suggest that United States immigration officials had to provide a safe option, that view blinks at the risk that pervades asylum processing at the border, whatever legal regime the government employs.[345] A rule that recognizes this inherent risk is "consistent with" the asylum provision.[346] However, a rule should not *increase* the danger that asylum seekers already face. Under the congruency approach, the government would only have to show that its approach was substantially equivalent in safety to the approach taken by the rational asylum seeker described above. This more deferential approach still protects the asylum seeker. However, it recognizes that the pre-rule status quo at the southern border was unsafe and is likely to remain so, whether or not the rule is in effect. Risk hinges on the incidence of crime near the border and the larger temporal window for victimization created by delays in processing.[347] Those factors will persist, whatever the rule's fate. In the days before CBP One, lining up at the border for entry without an appointment often entailed delays because immigration officials lacked the personnel or facilities to process prospective entrants at times of peak demand. Asylum seekers could resort to self-help, by crossing at an undesignated point. However, self-help creates dangers of its own, due to austere topography, severe weather, harassment from smugglers, and unwelcome attention from drug gangs. The safe option test fails to acknowledge these abiding risks.

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344. *Id.* Judge Tigar also found that the CLP rule was "arbitrary and capricious" agency action that violated the APA. Citing Justice Kavanaugh's opinion for the Supreme Court in *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021), Judge Tigar stated that an agency decision has to be "reasonable and reasonably explained." *EBSC IV*, 2023 U.S. Dist. Lexis 128360, at 37. The border rule did not meet this standard, particularly in the preamble's assessment of the levels of violence that confronted asylum seekers in transit countries such as Belize, Colombia, and Mexico and the efficiency and fairness of asylum systems in those countries. Consider Belize. According to the border rule's preamble, Belize, along with Mexico and Colombia, had made "significant strides" in building its asylum system and providing protections for asylum seekers. *CLP*, *supra* note 3, at 31314, 31411. The preamble based its optimistic outlook on asylum protections in Belize on a publication issued by Belize's government on an amnesty program for certain immigrants to that country. However, the window for completing amnesty applications has closed, meaning that the program will not help future asylum seekers. *EBSC IV*, 2023 U.S. Dist. Lexis 128360, at 48. Citing State Department reports, Judge Tigar noted similar flaws in the rule preamble's treatment of conditions and asylum systems in Mexico and Colombia. *Id.* at 48–50. The rule's preamble derides these criticisms of the rule's premises as mere "generalizations." However, countering these criticisms requires more than attaching a negative label to the critics' contentions. This disparity between the preamble's claims and ascertainable facts—often those from official sources—fails the reasoned explanation standard.

345. *See* Mary Martin, *A Tale of Two Cities: Ciudad Juárez, El Paso, and Insecurity at the U.S.-Mexico Border*, *in* CITIES AT WAR: GLOBAL INSECURITY AND URBAN RESISTANCE 103, 109–11 (Mary Kaldor & Saskia Sassen eds., 2020) (discussing unsafe conditions in border regions).

346. 8 U.S.C. § 1158(b)(2)(C) (noting the requirement that eligibility rules must be "consistent with" the asylum provision).

347. *See* Martin, *supra* note 345, at 109–11; Claire R. Thomas, *The So-Called Stateless: Firm Resettlement, African Migrants, and Human Rights Violations in Mexico*, 32 B.U. PUB. INT. L.J. 43, 49–53 (2023).

A substantial-equivalence safety approach, however, would acknowledge these risks by requiring government tailoring to address heightened risks prompted by government action. Under the substantial equivalence test, the agencies that issued the border rule could have broadened their compelling circumstances exception to reach harm that was: (1) at least moderate, and (2) reasonably foreseeable. While the change from the CLP rule's current imminent and extreme test might appear modest, the impact on the ground could be significant. Given the high incidence of crime near the border, any delay of longer than 72-hours could be viewed as creating a risk of moderate and foreseeable harm. If an asylum seeker could not schedule and complete a border appointment within that time, this change would allow that individual to resort to self-help without jeopardizing asylum eligibility. If United States officials believed that a 72-hour period was too short and unduly increased the risk of excessive border inflows, those officials could work with their Mexican counterparts, non-governmental organizations (NGOs), and asylum seekers themselves to create safe zones near the border. That commitment of United States personnel and resources would also further the goal of safe and fair regional asylum processing.[348]

Tailoring of this kind would be congruency's second step, akin to the reasonableness inquiry at *Chevron*'s step two. While the reasonableness inquiry under *Chevron* is often an afterthought or a slam dunk for the government, congruency's tailoring requirement would be more robust. However, it would still provide a measure of deference to government and accommodate immigration law's protective and regulatory dimensions.

V. EXPANDING ADVANCE PAROLE

Like the border rule, the extensive parole program that the Biden administration has put in place for the CHNV countries, and certain other states, has promise as a policy but creates problems under the INA. The parole program cannot eliminate the border rule's statutory problems because of its limited application. Moreover, under the congruence canon, the parole program conflicts with the INA's text, structure, history, and implementation.

The expanded advance parole program for CHNV countries has amorphous and imprecise eligibility requirements. An applicant does not need to file an asylum claim or seek refugee status to qualify. While humanitarian factors must counsel a grant of parole under the program, the policy does not specify what those humanitarian factors entail.[349] An applicant must have sponsors in the United States, but that requirement does not distinguish a successful applicant from millions of people from scores of countries around the world who are not eligible for the program.[350]

348. *See* David A. Martin, *Taming Immigration*, 36 GA. ST. U. L. REV. 971, 999–1001 (2020).
349. *See Cuban Parole Process*, *supra* note 3, at 1267, 1271–72 (discussing criteria).
350. *Id.* at 1267.

As with the CLP rule, the parole program has clear virtues as policy. First, preliminary indications suggest that the incentive aspect of the parole program is working, as many asylum seekers arrived in the early months of the border rule to utilize this alternative pathway.[351] Second, the parole program has apparently encouraged Mexico's cooperation with the CLP rule, since the easing of the border crunch through diversion to the parole program has reduced the enforcement resources that Mexico has to commit to defusing border surges.[352] Third, the CHNV countries each have difficult challenges with government repression and severe economic stagnation that make immigration to the United States a benefit for each country's beleaguered population.[353] Fourth, the economic impact on the United States may well be positive, considering labor shortages and resulting inflation that an influx of foreign labor would alleviate.[354] The requirement that parole program enrollees provide sponsors in the United States acts as a kind of insurance policy against the risk that participants in the program will require long-term assistance from federal, state, or local governments. That said, the central issue is the program's fit with the INA, where negatives outweigh these positives.[355]

A. Parole's Text and Uses

Parole in immigration law refers to one of two situations. Most often, parole comes into play at the border when officials release a noncitizen who lacks a visa or any other basis for admission to the United States from custody.[356] In rarer settings, parole entails advance permission for noncitizens to travel to the United States from countries abroad, such as Ukraine

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351. *See* Shear, Turkewitz, & Sandoval, *supra* note 302.

352. *See Mexico and United States Strengthen Joint Humanitarian Plan on Migration*, WHITE HOUSE (May 2, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/02/mexico-and-united-states-strengthen-joint-humanitarian-plan-on-migration/.

353. *See* ILYA SOMIN, FREE TO MOVE: FOOT VOTING, MIGRATION, AND POLITICAL FREEDOM 65–66 (2020).

354. *Id.* at 68–70.

355. In March 2024, Judge Drew Tipton of the Southern District of Texas held that Texas and other state challengers to the CHNV program lacked standing. *See* Texas v. U.S. Dep't of Homeland Sec., 2024 U.S. Dist. Lexis 40790, at 45–46 (S.D. Tex. March 8, 2024). Judge Tipton found that Texas and the other challengers had not shown the requisite injury in fact to support standing, since they had failed to demonstrate that the program increased their net costs. *Id.* at 23–35. In his standing analysis, Judge Tipton found that the CHNV program had generally reduced irregular entries from CHNV countries, since it funneled prospective entrants into the parole process. *Id.* at 23. In addition, Judge Tipton found that costs that states had cited, such as Texas's spending to subsidize its issuance of driver's licenses to parolees, did not entail a concrete or specific injury. *Id.* at 33–35. Reinforcing this point, Judge Tipton found that Texas had accrued a revenue surplus through an increased volume of driver's license fees, since the individual fee amount that Texas charged was higher than Texas's costs for issuing each license. *Id.* at 33–34. Because Judge Tipton found that the state plaintiffs lacked standing, he did not address the substantive issues that this section of the Article discusses.

356. Biden v. Texas, 142 S. Ct. 2528, 2543 (2022); In May 2023, a district court in Florida ruled against that the government's proposal to cope with periods of severe border crowding by granting parole without first serving the parolee with a notice to appear in immigration court for removal proceedings. Florida v. Mayorkas, No. 3:23cv9962-TKW-ZCB, 2023 U.S. Dist. Lexis 83406, at *7, *16 (N.D. Fla. May 11, 2023). That topic, which also raises some intricate procedural issues, is beyond the scope of this Article.

during its armed conflict with Russia.[357] The two parole provisions in the INA are narrow. The general provision, which applies to all parole decisions apart from those involving noncitizens eligible for refugee status, authorizes parole "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit."[358] The refugee provision, which Congress added in 1980 when it enacted a comprehensive framework for refugee admissions, authorizes parole for those eligible for refugee status for "compelling reasons in the public interest with respect to that particular alien."[359]

Congress's language in both provisions is narrow in two aspects: (1) the substantive standards required to receive parole, and (2) the modes of decision required in parole cases. In the general provision, the standard is "urgent" or "significant" justifications, and the mode of decision permits "only . . . case-by-case [decisions]."[360] The refugee provision requires "compelling reasons," and permits decisions about "that particular" applicant.[361] The narrowing language about both the substance of parole and the mode of decision suggests legislative emphasis on limiting parole's scope. While there are minor differences between the two provisions, they are purely semantic in nature. Under the general provision, a senior immigration official has "discretion" over parole.[362] Under the refugee provision, a senior official "determines" whether a noncitizen qualifies.[363] The layered narrowing language in each paragraph reveals Congress's realization that wider access to parole might undermine the regulatory commitments that form a cornerstone of the immigration statute.

Standard dictionaries confirm that there is no daylight between the two paragraphs. The linguistic evidence is particularly strong on the mode of decision. The Cambridge Dictionary definition of case-by-case decision-making states that this mode hinges on "the facts of the particular situation."[364] The Merriam-Webster Dictionary defines particular as the quality of being "distinctive among other examples or cases of the same general category."[365] Each paragraph conveys a strong preference for individual decisions. Any difference in wording probably stems from the determination of the Congress that passed the Refugee Act in 1980 to restrict parole in language that specifically addressed the refugee context.

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357. *Uniting for Ukraine*, U.S. DEP'T OF HOMELAND SEC.: U.S. CITIZENSHIP AND IMMIGR. SERVS. (Dec. 5, 2023), https://www.uscis.gov/ukraine.

358. 8 U.S.C. § 1182(d)(5)(A).

359. § 1182(d)(5)(B).

360. § 1182(d)(5)(A).

361. § 1182(d)(5)(B).

362. § 1182(d)(5)(A).

363. § 1182(d)(5)(B).

364. *See Case-by-case*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/case-by-case (last visited Mar. 19, 2024).

365. *Particular*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/particular (last visited Mar. 19, 2024).

Focusing solely on text, the Biden administration's expanded parole programs do not fit Congress's scheme. The incentive aspect of immigration control provided by the programs may be descriptively accurate based on the first months of the border rule's implementation. However, even if this policy benefit is lasting, it seems incongruous to interpret statutory language that limits the executive branch's ability to allow noncitizens to cross the border as encouraging executive decisions to this effect. Similarly, it would seem odd to permit the executive branch to increase arrivals in the United States based on provisions that appear to reduce executive discretion on that front. An examination of statutory structure, history, and implementation yields the same negative impression.

B. Parole Through the Prism of Statutory Structure and History

Reinforcing the narrowing message of the parole paragraphs' text, we turn next to statutory structure and history. Structure includes the relationship of the two parole paragraphs and their role in the larger statute. Each of the two parole paragraphs has a different role in the INA's overall scheme. Their interaction with the larger statute and with each other cements the narrowing message of the statute.

Each parole paragraph plays a structural role in limiting the executive branch's ability to circumvent established categories of legal status in the INA. Congress enacted a predecessor of the current general parole paragraph in 1952. At that time, Congress authorized parole for "emergent reasons" or reasons deemed "strictly in the public interest."[366] Since the immigration statute did not, at that time, include a comprehensive framework for refugee admissions, Congress encouraged or acquiesced in the use of parole authority to admit certain groups facing persecution on an ad hoc basis.[367] The general parole paragraph's current wording, inserted by Congress in 1996 as part of a general tightening of immigration law, reflects Congress's determination to tie immigration inflows to the regular visa process, in which noncitizens seek admission based on family ties with United States citizens, LPRs, or skilled employment.[368]

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366. *See* Michele R. Pistone, *Justice Delayed is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers*, 12 HARV. HUM. RTS. J. 197, 227 n.167 (1999) (citing to 1982 regulations).

367. Refugee admission until the 1980 Refugee Act reflected the geopolitical currents of the Cold War and its aftermath, favoring noncitizens fleeing Communist rule. *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 502–03, 505–06 (2020) (discussing President Eisenhower's parole of Hungarians fleeing after a failed uprising against control by the Soviet Union); PORTER, *supra* note 242, at 145–47 (discussing dialogue between President Eisenhower and Congress regarding parole of Hungarian refugees, which pivoted from initial support to subsequent reluctance); Margulies, *Immigration Law's Boundary Problem*, *supra* note 167, at 716 (analyzing the interaction between the Executive and Congress over parole of Hungarian refugees).

368. That regular process also included nonimmigrants, such as tourists, students, and temporary workers. Several scholars have examined the meaning of changes in the parole standard. *See* Jillian Blake, *Fragile Immigration Legality Collapses in the Trump Era*, 30 S. CAL. INTERDISCIP. L.J. 305, 310 (2021) (noting that "Congress changed the parole statute in the 1990s to only allow parole to be granted on a 'case by case basis'"); *cf.* Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV.

Congress added the refugee paragraph in 1980 for a related reason: after passage of the Refugee Act of 1980, the INA included an elaborate framework governing eligibility for asylum and refugee status, collaboration between the President and Congress on annual refugee admissions, and various aspects of asylum procedure.[369] Legislators, including champions of refugee rights such as Senator Edward M. Kennedy of Massachusetts, believed that the executive branch should channel refugee admissions through the hard-won framework in the INA rather than continue the ad hoc admissions of refugees under the parole provision of the 1952 Act.[370]

The anti-surplusage canon and the logic of the refugee provision also have ramifications for construction of the general parole provision. The urgent humanitarian reasons cited in the general provision do not authorize the blanket admission of noncitizens who could be admitted as refugees under the refugee provision. Suppose that United States officials could tell noncitizens located abroad that they would be admitted into the United States without any inquiry into the circumstances of their departure from their country of origin. That failure to inquire would be troubling under the general provision, which requires some measure of case-by-case consideration. The failure to inquire would also undermine the refugee provision by allowing United States officials to parole a large group that might include many refugees or applicants for refugee status. At that point, the refugee provision might become a dead letter. The anti-surplusage canon would bar such a cavalier treatment of the limits of that provision.

C. Parole and Past Practice

Statutory implementation, encompassed in past agency or executive practice, similarly does not support the Biden administration's expanded advance parole program. Past practice, as the Supreme Court has noted, supports broad use of parole to cope with surges at the southern border. However, advance parole from abroad has been much rarer, limited to situations of armed conflict with extensive congressional buy-in, such as the parole of Hungarian freedom fighters in the 1950s and later resettlement efforts for refugees from Southeast Asia in the wake of the Vietnam war.[371]

1115, 1136 (2015) (explaining that as a consequence of Congress's narrowing of the definition of parole in 1996, immigration officials had to "find other ways" to address large groups of noncitizens without an established legal status).

369. *See* 8 U.S.C. §§ 1157–1158.

370. Rebecca Hamlin & Philip E. Wolgin, *Symbolic Politics and Policy Feedback: The United Nations Protocol Relating to the Status of Refugees and American Refugee Policy in the Cold War*, 46 INT'L MIGRATION REV. 586, 589, 617–18 (2012) (discussing growing congressional resistance to ad hoc use of parole for refugees and legislators' perspective about the importance of using Refugee Act procedures).

371. *See* PORTER, *supra* note 242, at 145–47 (discussing help for Hungarian refugees in the 1950s); Margulies, *Immigration Law's Boundary Problem*, *supra* note 167, at 716 (discussing help for Hungarian refugees in the 1950s); *id.* (discussing congressional ratification of help to Cuban refugees from the Castro regime, including the Cuban Adjustment Act); Hamlin & Wolgin, *supra* note 370, at

The Uniting for Ukraine program that the Biden administration started in 2022 in response to Russian aggression embodies this longtime trend.[372] The Ukraine situation involved a fierce armed conflict with a perennial adversary.[373] It also generated substantial congressional support.[374] The most recent parole programs have not featured these factors.

In Ukraine, the United States' failure to accept its fair share of refugees would have suggested that the United States was not fully supportive of the effort to block Russia's aggression and opened up a fissure between the United States and its allies. President Biden, Secretary of State Blinken, and DHS Secretary Mayorkas were correct to take the initiative in refugee resettlement. In addition, Congress fully supported resettlement efforts, viewing them as part of the overall effort to counter Russia.[375] In this way, the Ukraine parole was another point on the continuum that included the Hungarian parole in the 1950s and the admission of Cubans in the early-mid 1960s.

While every CHNV country's situation is difficult, they currently lack the geopolitical import of the Ukraine crisis. Every country in the program has major problems that operate as push factors on immigration, such as political repression and difficult economic conditions. That said, many countries around the world share these problems. If United States officials started a comparable program for the scores of countries with virtually identical challenges, the meticulously woven fabric of the INA's detailed provisions on immigrant and nonimmigrant visas would be in tatters. Because of that manifest lack of a limiting principle, the advance parole program exceeds immigration officials' statutory authority.

D. Tailoring Parole

Narrow tailoring of advance parole could yield consistency with the INA's statutory scheme. For example, the Biden administration could have limited advance parole to countries like Ukraine and Afghanistan, where the United States' role in an armed conflict created unique imperatives. Those factors include the need to show support for an ally and acceptance of responsibility for the United States' own role in creating conditions that required resettlement. In addition, immigration officials could

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617–18 (detailing congressional pushback against certain uses of parole and efforts to limit parole's use); *supra* notes 366–70 and accompanying text (detailing congressional pushback against certain uses of parole and efforts to limit parole's use).

372. *See Uniting for Ukraine*, *supra* note 357 (noting that the program was a "key step" related to the response to the Russian invasion of Ukraine); *see also* Tarini Parti, Andrew Restuccia, & Michelle Hackman, *Biden Says U.S. to Send Ukraine $800 Million in Military Aid*, WALL ST. J. (Apr. 21, 2022, 11:29 AM) (linking refugee effort with United States' military assistance to Ukraine and additional sanctions on Russia).

373. *See Ukraine Conflict: Russian Forces Attack from Three Sides*, BBC (Feb. 24, 2022), https://www.bbc.com/news/world-europe-60503037.

374. *See* Parti, Restuccia, & Hackman, *supra* note 372.

375. *See* Emily Cochrane & Catie Edmondson, *The Senate is Expected to Pass a $40 Billion Aid Package for Ukraine, Sending it to Biden*, N.Y. TIMES, May 19, 2022 (detailing congressional support of aid to Ukraine, including help for refugees settling in the United States).

have required applicants to describe their level of risk for persecution or torture. Based on this information, officials could have granted parole to applicants who were at imminent risk. Screening of that kind would have complied with the statute's requirement that the government show a particular noncitizen's compelling reasons.[376] Tailoring along these lines might not have had the full array of policy benefits that officials discerned in their broader approach. However, that more modest effort would have fit the statutory framework. The sweeping approach that the Biden administration adopted lacked such tailoring and hence exceeded the executive branch's power under the INA.

VI. STUDENT VISAS AND EXPANDING POST-DEGREE TRAINING

The congruence canon also helps resolve questions about the scope of employment authorization for holders of student visas (F-1 students). Since 1947, immigration officials have authorized limited periods of post-degree practical training as a capstone for F-1 students pursuing a course of study.[377] The period of practical training remained within the range of twelve to eighteen months for approximately sixty years; officials extended the period, which by then was called OPT, to twenty-nine months in 2008.[378] In 2016, following a rulemaking process including notice and comment under the APA, officials extended OPT further, to a maximum of thirty-six months for STEM students.[379]

A consortium of labor unions representing technical workers challenged the thirty-six-month OPT rule as exceeding executive branch authority.[380] The D.C. Circuit ruled in favor of the program, citing the history of OPT and finding that OPT was reasonably related to the purpose of the F-1 visa.[381] Under the congruence canon, which would consider the presence of a limiting principle and the need for tailoring to that principle, OPT would be valid for up to thirty-six months as substantially related to the F-1 visa, but longer periods of OPT would be presumptively ultra vires.

A. Statutory Text and Structure

The INA's text is ambiguous regarding the F-1 visa and the government's authority to add post-degree time.[382] The statute's structure adds some support for the government's view, but that support is not decisive.

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376. 8 U.S.C. § 1182(d)(5)(B).

377. Washington Alliance of Technology Workers v. U.S. Dep't of Homeland Sec., 50 F.4th 164, 180–82 (D.C. Cir. 2022), *reh'g. denied*, 58 F.4th 506 (D.C. Cir. 2023), *cert. denied*, 144 S. Ct. 78 (2023).

378. Pauline Khoo, *If You Extend It, They Will Come: The Effects of the STEM OPT Extension* 6 (Ctr. for Growth and Opportunity, Working Paper, 2023), https://www.thecgo.org/wp-content/uploads/2023/04/Effects-STEM-OPT-Extension_02.pdf.

379. *See* Improving and Expanding Training Opportunities, *supra* note 3, at 13040, 13045 (March 11, 2016).

380. *Washtech*, 50 F.4th at 167.

381. *Id.* at 193–94.

382. *Id.*

Under the relevant provision, a noncitizen may obtain a nonimmigrant visa "to pursue a full course of study" and enter the United States "temporarily and solely for the purpose of pursuing such a course of study."[383] The adverb solely tilts this paragraph toward a narrow construction that would disfavor post-degree employment. Other parts of the INA temper this view, but not as much as the government claimed in the OPT litigation.

The government points to an INA provision stating that admission of nonimmigrants "shall be for such time and under such conditions as the Attorney General may by regulations prescribe."[384] While this power may seem broad, the subsequent language narrows that authority. It states that the power "include[es] when . . . [the official] deems necessary the giving of a bond with sufficient surety . . . to insure that . . . [the noncitizen] will depart from the United States."[385] The more specific language focuses on means of enforcing time limits; under maxims such as *ejusdem generis* and *noscitur a sociis*, which ascribe meaning to statutory terms based on surrounding terms, this enforcement-centered language would blunt the argument for a sweeping view of senior officials' power over time and conditions of a nonimmigrant's stay in the United States.[386]

Other provisions that refer to a senior immigration official's authority over employment are not relevant. For example, a section of the INA defines an "unauthorized alien" for employment purposes as a foreign national who is not an LPR or "authorized to be . . . employed by this chapter or by the Attorney General."[387] The preamble to the 2016 OPT expansion cites this provision.[388] However, the provision cannot bear this weight. This section has a far more limited role: it furnishes guidance to employers who risk sanctions if they fail to exercise due diligence in hiring noncitizens.[389] Flagging the need for due diligence by regulations' subjects—here, employers—does not herald the onset of absolute discretion for regulators.[390] Such sources of supposed textual authority, in Justice Scalia's familiar metaphor, comprised mere mouseholes that were a poor fit for the elephant of protective discretion that the government sought to

383. 8 U.S.C. § 1101(a)(15)(F)(i).
384. 8 U.S.C. § 1184(a)(1).
385. *Id.*
386. SCALIA & GARNER, *supra* note 52, at 195–213.
387. 8 U.S.C. § 1324a(h)(3).
388. *See* Improving and Expanding Opportunities, *supra* note 3, at 13,045. The D.C. Circuit also relied in part on this provision. *See* Washington Alliance of Technology Workers v. U.S. Dep't of Homeland Sec., 50 F.4th 164, 191–92 (D.C. Cir. 2022).
389. *See, e.g.*, 8 U.S.C.A. § 1324a(b)(1) (West 2023) (describing the need for an employer to attest under oath to following due diligence procedures and specifying certain documents that meet statutory requirements); 8 U.S.C.A. § 1324a(e) (West 2023) (outlining compliance procedures, including complaints, investigations, and hearings). Underlining the guidance theme, the provision of the INA following the section on employer sanctions prohibits national origin or other discrimination—such as not hiring naturalized citizens, refugees, asylees, or LPRs—that some employers might use to avoid any potential risk of sanctions. *See* 8 U.S.C.A. § 1324b (West 2023) (barring "unfair immigration-related employment practice[s]").
390. Texas v. United States, 809 F.3d 134, 183–84 (5th Cir. 2015).

accommodate.[391] Indeed, the government's post-Immigration Reform and Control Act (IRCA) explanation for its regulations on employment authorization for IRCA grantees acknowledged the limited role of this provision.[392]

Certain tax provisions also provide only modest concrete support for the 2016 OPT expansion of post-degree employment authorization. To understand why the tax provisions provide only limited support, it is important to understand the difference between pre-degree F-1 employment, which often involves work for the student's educational institution, and post-degree employment. Immigration authorities have long allowed F-1 students to work on campus or off-campus in part-time jobs that directly benefit other students—such as work in a college library—or that benefit the student's institution—such as work in an off-campus research laboratory.[393] A college or university, like any other employer, must deduct payroll taxes from the gross pay of any employee.[394] Congress has exempted employment of F-1 students from federal payroll tax.[395]

Both the preamble to the 2016 OPT expansion and the D.C. Circuit relied on this tax legislation to show that Congress must have contemplated post-degree work by F-1 students.[396] However, the tax provisions are also susceptible to a narrower interpretation: they provide guidance to college employers who hire F-1 students for part-time pre-degree work, informing those employers that they need not deduct payroll taxes that fund programs such as Social Security and Medicare, for which foreign students are not eligible. The tax provisions are not expressly limited to pre-degree employment. However, that absence of any express limitation does not provide conclusive proof that Congress contemplated post-degree employment for F-1 students. As discussed later, that proof stems from the

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391. *Id.* at 183 n.186 (observing that, "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions") (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)); *see also See* Dep't of Homeland Sec. v. Regents Univ. Cal., 140 S. Ct. 1891, 1925–26 (2020) (Thomas, J., dissenting) (applying similar reasoning in concluding that DACA exceeded the power that Congress had delegated to the executive branch).

392. 8 C.F.R. § 274a.12(c)(14) (2024) (cited in *Regents*, 140 S. Ct. at 1902). In its 1987 explanation, the government assured Congress that the number of noncitizens receiving deferred action, and thus authorization to work, "is quite small and the impact on the labor market is minimal." *See* Employment Authorization; Classes of Aliens Eligible, 52 Fed. Reg. 46092 (U.S. Dep't of Just., Immigr. & Naturalization Serv. Dec. 4, 1987). Officials observed that the number of work authorizations resulting from deferred action was "previously considered to be *not worth recording*." *Id*. at 46093 (emphasis added).

393. *See* Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec., 50 F.4th 164, 190–91 (D.C. Cir. 2022) (noting that challengers to the 2016 OPT expansion did not contest that immigration officials could grant work permits for pre-degree on-campus work); *see also Student and Exchange Visitor Program: Employment*, U.S. DEP'T OF HOMELAND SEC.: U.S. IMMIGR. AND CUSTOMS ENF'T, https://www.ice.gov/sevis/employment (last visited Mar. 19, 2024) (explaining requirements for pre-degree work).

394. *Student Worker Tax Exemptions*, RUTGERS: UNIV. FIN. AND ADMIN., https://finance.rutgers.edu/student-abc/tax-information/student-worker-tax-exemptions (last visited Mar. 19, 2024).

395. I.R.C. § 3121(b)(19) (West 2023).

396. *See* Improving and Expanding Training Opportunities, *supra* note 3, at 13040, 13060; *Washtech*, 50 F.4th at 191.

statutory history of the F-1 visa. The tax provisions are consistent with that history but provide only limited additional support.

The ambiguity of the INA's text and structure on the issue of F-1 students' post-degree work could trigger the categorization costs that this Article has linked to both the *Chevron* and major questions doctrines. Recall that categorization costs in statutory interpretation involve shorthand labels that discourage a careful look at the congruence canon's ingredients of statutory text, structure, history, and implementation. Courts incur these costs when they halt their inquiries after a cursory inquiry into a statute's text, sometimes misapprehending that text's import, as the Supreme Court recently did in *Sackett*.[397]

Categorization costs accrued in both the D.C. Circuit's decision and Judge Neomi Rao's dissent from the court's denial of rehearing.[398] The categorization costs that the D.C. Circuit incurred are less serious but still noteworthy. The D.C. Circuit sidestepped costs that *Chevron* could trigger by relegating its *Chevron* analysis to a secondary rationale.[399] The court's primary analysis discussed the history and implementation of post-degree practical training, which this Article discusses in the next Subsection.[400] However, the court blurred this apt focus on statutory history and implementation with an unduly expansive view of senior officials' power under § 1184(a)(1) and § 1324a(h)(3).[401] In particular, the court relied on these limited provisions to posit a free-standing executive branch power to decree the time and conditions for nonimmigrant visas, as long as the resulting rules are reasonably related to the underlying visa provisions.[402] This portion of the court's opinion may be dicta, but the court's broad reading does not provide adequate guidance for future agency rulemaking.

While Judge Rao discerned this flaw in the court's opinion, analysis of the case without a full look at all the relevant interpretive materials, including statutory history and implementation, would have accrued categorization costs.[403] For Judge Rao, the F-1 visa provision's authorization of entry into the United States solely for academic purposes categorically ruled out post-degree employment.[404] As an alternative basis for viewing the 2016 OPT expansion as exceeding executive branch authority, Judge Rao asserted that the statutory text was ambiguous, triggering the major

397. Sackett v. EPA, 143 S. Ct. 1322, 1340–41 (2023); *see also id.* at 722–28 (Kavanaugh, J., concurring) (providing a comprehensive view of statutory materials to illustrate the flaws in the Court's approach); *see* discussion *supra* Sections II.A.3–4 (critiquing *Sackett*).

398. *See* Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec., 58 F.4th 506, 510–11 (D.C. Cir. 2023) [*Washtech II*] (Rao, J., dissenting); *see also Washtech*, 50 F.4th at 198–204 (Henderson, J., dissenting) (critiquing the court's rationale and outcome).

399. *See Washtech I*, 50 F.4th at 192–93.

400. *Id.* at 180–84, 187–88; *see infra* notes 413–17 and accompanying text.

401. *See Washtech I*, 50 F.4th at 177–78 (discussing 8 U.S.C.A. § 1184(a)(1) (West 2023)); *see also id.* at 191–92 (discussing 8 U.S.C.A. § 1324a(h)(3) (West 2023)).

402. *Id.* at 178–79.

403. *See Washtech II*, 58 F.4th at 509–11 (Rao, J., dissenting).

404. *Id.* at 510–11 (citing 8 U.S.C.A. § 1101(a)(13)(A) (West 2023)).

questions doctrine and thus precluding assumed or implicit delegations.[405] Judge Rao was correct that the court's reasonably related test was unduly broad.[406] However, Judge Rao's dissent triggered categorization costs through an unduly narrow reading of the F-1 via provision and use of the major questions doctrine to short-circuit inquiry into statutory history and implementation.[407] We now turn to a closer examination of those interpretive materials.

B. Statutory History and Implementation

Statutory history and implementation show that the executive branch has authority to grant employment authorization for significant periods of post-degree work by F-1 students.[408] The next Subsection discusses tailoring and explains the appropriate test for post-degree work entails its substantial—not merely reasonable—relationship to an approved course of study. However, the starting point for that analysis should be Congress's enactment of the 1952 Immigration and Nationality Act against the backdrop of agency authorization of post-degree practical training.

In studying statutory history to understand the impact of changes or continuity in statutory language, courts may resort to the prior-construction canon.[409] According to this canon, a prominent agency or judicial reading of statutory language controls interpretation of similar language that Congress used in reenacting that statute or enacting related statutes.[410] The canon fosters stability and predictability in the law.[411]

Post-degree practical training for F-1 students presents a textbook case of the prior-construction canon. When Congress enacted its comprehensive changes to immigration law in the 1952 INA, it was aware of the agency's 1947 interpretation of student visa provisions to include

405. *See id.* at 510.

406. *See id.*

407. *See id.* at 509–11.

408. *Optional Practical Training (OPT) for F-1 Students*, U.S. DEP'T OF HOMELAND SEC.: U.S. IMMIGR. AND CUSTOMS ENF'T (Mar. 31, 2023), https://www.uscis.gov/working-in-the-united-states/students-and-exchange-visitors/optional-practical-training-opt-for-f-1-students.

409. *See* SCALIA & GARNER, *supra* note 52, at 322–24; Lorillard v. Pons, 434 U.S. 575, 580–81 (1978); *see also* Bragdon v. Abbott, 524 U.S. 624, 643–45 (1998) (holding that the Americans with Disabilities Act incorporated well-established agency and judicial view from interpretations of predecessor statutes that asymptomatic Human Immunodeficiency Virus (HIV) was a protected disability).

410. *See* SCALIA & GARNER, *supra* note 52, at 322–24.

411. *Id.* at 324; *see also* United States v. Hansen, 599 U.S. 762, 776–78 (2023) (explaining that when Congress included the terms, "encourages" and "induces," in the immigration provision criminalizing assisting a noncitizen to "come to, enter, or reside in the United States . . . in violation of law," Congress imported prior judicial readings of these terms in a specialized criminal context, which contemplated intentional and direct help in the commission of illegal acts); *cf.* Frankfurter, *supra* note 6, at 537 (noting that when a term has acquired influential meaning from an earlier source and Congress uses the term in legislation, the term "brings the old soil with it"); Anita S. Krishnakumar, *The Common Law as Statutory Backdrop*, 136 HARV. L. REV 608, 667–73 (2022) (suggesting limits to the Supreme Court's use of common law as an aid to interpretation); Kevin Tobia, Brian G. Slocum, & Victoria Nourse, *Progressive Textualism*, 110 GEO. L.J. 1437, 1477–79 (2022) (arguing for an empirical study of ordinary people's responses as a data base for statutory meaning).

post-degree work in furtherance of the visa-holder's course of study.[412] Congress could have included language that disallowed this reading, but it did not.[413] Indeed, as part of preparatory work for the 1952 immigration statute, a Senate report documented the agency's reading as a common-sense interpretation of existing law.[414] In the ensuing period of more than seventy years that the agency has followed this policy, Congress has not sought to add language that would countermand that interpretation.[415] Taken together, the statutory history and implementation provide a convincing basis for the validity of authorization to perform post-degree work.

The saliency of these interpretive materials brings the authorization of post-degree work within the rubric of almost all Supreme Court decisions under the major questions doctrine. *Sackett* is the one case applying this method that would not yield this conclusion about post-degree work.[416] However, the other decisions, where statutory history and implementation are central, would support this result.[417]

C. Enter Tailoring

The only remaining question is whether the 2016 OPT expansion is adequately tailored. Here, the D.C. Circuit's reasonably related test raises questions.[418] The test is broad; recall that lower courts have frequently found that agency interpretations were reasonable under *Chevron*'s step two if they satisfied step one.[419] Moreover, reading a free-wheeling delegation to do what is reasonable into the INA seems to lack the limiting principle that the Court has sought in administrative law cases. If a test is necessary at all, it should ask whether the current practical training rule bears a substantial relationship to the approach that Congress ratified in 1952.

The 2016 OPT expansion meets the substantial relationship test. Today's STEM graduates have typically done academic work that is far more sophisticated than the graduates of 1947 or 1952.[420] If authorizing renewable six-month periods up to eighteen months was the baseline at that time, an expansion to thirty-six months seems to be substantially related to today's greater complexities.[421] The close involvement of the F-1 students'

412. *See* Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec., 50 F.4th 164, 180–81 (D.C. Cir. 2022).

413. *Id.* at 180–82.

414. S. Rep. No. 81-1515, at 503 (1950) (recounting that "since the issuance of the revised regulations in August 1947 . . . practical training has been authorized for 6 months after completion of the student's regular course of study").

415. *Washtech*, 50 F.4th at 182–83.

416. *See* Sackett v. EPA, 143 S. Ct. 1322, 1362–64 (Kavanaugh, J., concurring) (criticizing the Court's approach as misreading the statutory language and other relevant factors).

417. *See supra* notes 104–46 and accompanying text (discussing recent major questions decisions that are consistent with the congruence canon).

418. *See generally Washtech*, 50 F.4th at 178–79.

419. Kenneth A. Bamberger & Peter L. Strauss, Chevron's *Two Steps*, 95 VA. L. REV. 611, 622–24 (2009) (suggesting a more robust role for *Chevron's* step two).

420. *See Washtech*, 50 F.4th at 179.

421. *Id.* at 171, 179–80.

degree-granting institutions reinforces the tailoring of the 2016 expansion.[422] While future expansions would strain the substantial relationship standard beyond the breaking point, the 2016 expansion passes the test.

CONCLUSION

The major questions doctrine is a double-edged sword. Viewed with appropriate modesty, the major questions doctrine highlights traditional tools of statutory interpretation, including statutory text, structure, history, and implementation. However, viewed as a stand-alone solvent for complex statutory problems in the administrative state, the major questions doctrine can spawn arbitrary results and judicial overconfidence. The congruence canon is an antidote for these ills.

The congruence canon calls courts back to traditional interpretive tools. However, it does more than just reassemble a vintage toolkit. Throughout this Article, the essential component of interpretation has been sequential and independent analysis of text, structure, and other classic criteria. Without sequencing and independence, courts can simply use the toolkit to solidify their underlying ideological or policy preferences. The concept of categorization costs shows that labels such as *Chevron* deference or the major questions doctrine can exacerbate this quandary, allowing subjective notions of statutory ambiguity free rein. The attributes of sequencing and independence keep interpreters honest.

The congruence canon adds another factor: the degree of tailoring in agency action. Lack of tailoring is the best explanation for the invalidation of the vaccine mandate in *NFIB* because the Court invited the agency to craft a narrower rule that would apply to crowded workplaces and virus researchers and upheld the rule for Medicaid and Medicare facilities in *Biden v. Missouri*.[423] Tailoring could fit within *Chevron*'s step two on the reasonableness of agency action or within the APA's prohibition on arbitrary and capricious action under *State Farm*. Expressly recognizing tailoring's importance would help make judicial review of agency action more stable and predictable.

Longtime precedents such as *MCI* and *Brown & Williamson* illustrate the virtues of the traditional approach. In each case, the Court looked carefully at the materials at hand, as Justice Stevens's recommended in *Chevron*. More recent decisions such as *West Virginia* have seen a hardening of the major questions doctrine that could increase categorization costs. Most of the recent decisions sidestepped categorization costs, but troubling signs of methodological confusion emerged, including the Court's misreading of statutory materials regarding wetlands protection in *Sackett*, the insufficiently precise analysis of statutory structure in *West Virginia* on

422. *Id.* at 179–80.
423. 142 S. Ct. 647 (2022).

the Clean Power Plan, and the failure in *NFIB* to fully acknowledge the role played by the vaccine mandate's lack of tailoring.

Immigration decisions reinforce the congruence canon's central role. In *Cardoza-Fonseca*, explicating the statute's well-founded fear language required a healthy dose of context on the specialized meaning of the phrase in asylum law. It also required a careful examination of statutory history. A variant of the major questions doctrine that reinforced agency flexibility appeared in *Texas A* and *Texas B*, in which the Court focused on past practice. The Court suggested in *Texas A* and *Texas B* that reducing the interpretive weight of official discretion's longstanding pedigree required a clearer statement than the one Congress provided.

The congruence canon is a clear lens for current immigration issues. The new border rule is a serious policy effort that introduces the CBP One app for managing border inflows. However, the restrictions on asylum in the rule fail to provide a sufficiently tailored exception for applicants who cannot safely wait in Mexico for a CBP One appointment. While no rule can ensure absolute safety for asylum seekers passing through Mexico, the new rule fails the test of substantial equivalent safety required by congruency tailoring.

The Biden administration's expanded advance parole policy also is a serious policy innovation that runs afoul of the INA's detailed framework. Expanding parole makes sense as a matter of policy incentives and penalties. However, the expansion of parole has no limiting principle that would prevent parole from becoming an unauthorized alternative to the INA's detailed structure of immigrant and nonimmigrant visas.

Finally, the expansion of practical training for F-1 students is consistent with the INA. Applying the prior-construction canon, statutory history shows that Congress ratified the concept of practical training over seventy years ago, when it enacted the 1952 Act with knowledge of this innovation. However, the D.C. Circuit's reasonable relationship test for the duration of practical training lacks an adequate limiting principle. Requiring proof of a more rigorous substantial relationship would fit better with the INA's current structure. Given the increasing complexity of STEM education, the 2016 expansion to a practical training period of thirty-six months is substantially related to the F-1 visa's purpose but further expansion would likely exceed executive discretion.

A return to form with added tailoring may not seem like an earth-shaking interpretive move. However, it adds light and clarity to the process. Moreover, it reduces the heat and noise that the major questions doctrine has produced. These effects are ample justification for a renewed concentration on core principles.