

## Deference, Delegation, and Immigration Law

Adam B. Cox†

The history of immigration jurisprudence is a history of obsession with judicial deference. The foundational doctrine of constitutional immigration law—the “plenary power” doctrine—is centrally concerned with such deference.<sup>1</sup> Under the doctrine’s earliest incarnation, the Supreme Court treated a challenge to a federal immigration policy excluding Chinese immigrants as nearly nonjusticiable, writing that the federal government’s decisions about how to regulate immigration were “conclusive upon the judiciary.”<sup>2</sup> Even in the modern constitutional era, the Supreme Court has invoked the plenary power to justify watered-down review of gender classifications in the immigration code.<sup>3</sup> And some lower courts have suggested that the plenary power precludes *any* judicial scrutiny of immigration decisions affecting arriving immigrants.<sup>4</sup>

This century-old doctrine has been augmented by developments in administrative law that often obligate judges to defer to agencies’ factual and legal judgments. The *Chevron* doctrine is perhaps the best-known strand of these developments. Under *Chevron*, courts must defer to reasonable agency interpretations of ambiguous statutory provisions, even if the court disagrees with those interpretations.<sup>5</sup> Sister doctrines in administrative law counsel courts to defer to factual determinations by agencies as well.<sup>6</sup>

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† Assistant Professor of Law, The University of Chicago Law School. Many thanks to Ahilan Arulanantham, Alison LaCroix, Jonathan Masur, and Adam Samaha for helpful comments. Thanks also to Kit Slack and Sarah Waxman for excellent research assistance.

<sup>1</sup> See Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 Cal L Rev 373, 381–84 (2004).

<sup>2</sup> *The Chinese Exclusion Case*, 130 US 581, 606 (1889).

<sup>3</sup> See, for example, *Fiallo v Bell*, 430 US 787, 792 (1977).

<sup>4</sup> See, for example, *Jean v Nelson*, 727 F2d 957, 964 (11th Cir 1984) (en banc):

[T]here are apparently no limitations on the power of the federal government to determine what classes of aliens will be permitted to enter the United States or what procedures will be used to determine their admissibility. . . . Aliens may therefore be denied admission on grounds that would be constitutionally impermissible or suspect in the context of domestic legislation.

<sup>5</sup> *Chevron U.S.A. Inc v NRDC*, 467 US 837, 843 (1984).

<sup>6</sup> See, for example, *Allentown Mack Sales and Service, Inc v NLRB*, 522 US 359, 366 (1998) (requiring courts to defer to agency fact findings that are supported by “substantial evidence on the record as a whole”).

Taken together, these constitutional traditions and administrative law trends would appear to make it inevitable that federal courts will passively accept administrative judgments on immigration matters.<sup>7</sup> Yet Judge Posner's recent immigration jurisprudence flips this foundational premise on its head: his immigration opinions exhibit extremely searching review. Rather than reflecting constitutional or administrative law deference, his opinions treat immigration authorities with great skepticism. Moreover, Posner's lack of deference is far from idiosyncratic. Today a growing number of federal judges review decisions by the immigration courts with apparent skepticism.<sup>8</sup> In fact, the trend is significant enough to count as an important—though often overlooked—thread of modern immigration jurisprudence.

What might account for this unexpected skepticism? In this short Essay commemorating Judge Posner's twenty-fifth year on the bench, I want to suggest two possibilities. The first has to do with democracy, and focuses on the relationship between Congress and the President in the immigration arena. The second has more to do with institutional competence, and focuses on the relationship between federal judges and the administrative immigration courts. Part I introduces the first theory, and Part II the second.

### I. NONDELEGATION NORMS AND IMMIGRATION LAW

In order to make sense of Judge Posner's unusual treatment of immigration courts, it is helpful to start with one possible source of that treatment—the Constitution itself. At first glance, it might seem counterintuitive to look to the Constitution as a potential source of judicial skepticism, given what I described above as constitutional immigration law's preoccupation with judicial deference in the immigration arena. But this longstanding focus on the role of the judiciary has obscured a different separation of powers issue—a nondelegation concern—that might help explain Judge Posner's skepticism.

Constitutional immigration law has long been concerned with separation of powers problems. These issues are at the center of the immigration plenary power doctrine, which in its classic formulation requires that courts give great deference to political branch decisions about immigration policy and enforcement. Plenary power doctrine

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<sup>7</sup> And, in fact, several prominent administrative deference cases decided by the Supreme Court have been immigration cases. See, for example, *INS v Aguirre-Aguirre*, 526 US 415, 425 (1999) (extending *Chevron* beyond the rulemaking context by holding that the Board of Immigration Appeals should be accorded *Chevron* deference when it interprets statutory terms in the context of case-by-case adjudication).

<sup>8</sup> See, for example, *Chen v DOJ*, 426 F3d 104, 115 (2d Cir 2005); *Fiadjoe v Attorney General*, 411 F3d 135, 154–55 (3d Cir 2005); *Lopez-Umanzor v Gonzales*, 405 F3d 1049, 1054 (9th Cir 2005).

thus focuses on the distribution of authority between the judiciary and the political branches of the federal government. For all this attention to the constitutional distribution of authority between courts and the political branches, however, immigration courts and commentators have consistently overlooked a second separation of powers issue: the difficult question of how immigration power is distributed *within* the political branches, between Congress and the executive generally, or more specifically between Congress and administrative agencies. For that reason, they have also failed to ask what role, if any, courts should play in enforcing that distribution of power.

Constitutional immigration law provides little guidance about the distribution of immigration authority between Congress and the executive. The Supreme Court has sometimes suggested that immigration power is distributed within the political branches in the same fashion as most other lawmaking powers. But it is far from clear that immigration is like other areas. In most other areas, Article I gives Congress clear supremacy with respect to lawmaking. Immigration law, however, is nothing like this; the constitutional source of power to make immigration law has always been contested and uncertain. While Article I confers on Congress power to establish a “uniform rule of naturalization,”<sup>9</sup> the Supreme Court has not read this provision as the sole source of federal authority over immigration. Instead, the Court has for over a century made conflicting and ambiguous pronouncements about the source of federal immigration authority. Sometimes the Court has stated that the immigration power derives from an extraconstitutional source—from principles of international law, or from the foundational attributes of sovereignty.<sup>10</sup> On other occasions the Court has indicated that the immigration power is part and parcel of the foreign relations power.<sup>11</sup> And, to round things out, the Court has from time to time suggested that the immigration power is entailed by the combination of a number of enumerated powers.<sup>12</sup>

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<sup>9</sup> US Const Art I, § 8, cl 4.

<sup>10</sup> See, for example, *Fong Yue Ting v United States*, 149 US 698, 711 (1893) (“The right to exclude or to expel all aliens . . . [is] an inherent and inalienable right of every sovereign and independent nation.”); *The Chinese Exclusion Case*, 130 US 581, 603 (1889) (noting that the power to exclude aliens “is an incident of every independent nation”).

<sup>11</sup> See, for example, *Fong Yue Ting*, 149 US at 705 (noting that “the constitution [sic] has committed the entire control of international relations,” which includes the power to exclude and expel noncitizens, to the national government); *The Chinese Exclusion Case*, 130 US at 605–06 (stating that the federal government is “invested with power over all the foreign relations of the country,” and therefore has the power to “preserve [the nation’s] independence, and give security against foreign aggression and encroachment . . . whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us”).

<sup>12</sup> The enumerated powers suggested by the Court include the Treatymaking Clause, the War Powers Clauses, the Foreign Commerce Clause, the Republican Government Clause, and

Confusion about the source of immigration power creates substantial uncertainty about the distribution of that authority between Congress and the executive. Nonetheless, there are hints in the case law that courts are sometimes uncomfortable with the role that the executive branch immigration agencies play in formulating immigration policy. Article III judges, including Posner on occasion, seem to suggest that some of the interpretive authority claimed by the immigration agencies should be reserved for Congress. Thus, I suggest that the surprising judicial skepticism directed at immigration courts might best be understood as reflecting a nondelegation norm.

Classically, nondelegation principles in constitutional law prohibit Congress from delegating lawmaking power to the executive branch. The nondelegation doctrine is essentially a dead letter today—if any such general doctrine really ever existed.<sup>13</sup> But nondelegation principles are still alive and well in particular contexts. As Cass Sunstein has pointed out, for example, courts today sometimes restrict delegation by refusing to apply standard deference doctrines in situations where there is reason to think that Congress, rather than an administrative agency, should be forced to make a particular policy choice.<sup>14</sup> Sunstein identifies a number of interpretive canons—which he calls “nondelegation canons”—that override default delegation rules in this way. He argues that these canons serve as a kind of “democracy-forcing minimalism”: they are “designed to ensure that certain choices are made by an institution with a superior democratic pedigree.”<sup>15</sup> The idea of nondelegation canons links the protection of individual rights or other important interests to questions of appropriate institutional design. In other words, the theory focuses on promoting democratic legitimacy or accountability by *selecting* the institution with the better democratic pedigree. (We might therefore contrast this strategy with theories of subsidiary delegation in administrative law, which focus on promoting rule of law virtues by *constraining* the decisionmaking institution.<sup>16</sup>)

Why might courts apply a nondelegation norm in immigration cases? Do those cases implicate the kinds of choices that courts might

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the Naturalization Clause. See, for example, *Fong Yue Ting*, 149 US at 712–13; *The Chinese Exclusion Case*, 130 US at 604.

<sup>13</sup> See Eric A. Posner and Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U Chi L Rev 1721, 1722 (2002).

<sup>14</sup> See Cass R. Sunstein, *Nondelegation Canons*, 67 U Chi L Rev 315, 316 (2000).

<sup>15</sup> *Id.* at 317.

<sup>16</sup> On issues of subsidiary delegation, see generally Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 Yale L J 1399 (2000). For a discussion of the relationship between institution-constraining rules and institution-selecting rules in a different context, see Adam B. Cox, *Designing Redistricting Institutions*, 5 Election L J 412, 413–18 (2006).

conclude should be made by Congress rather than administrative actors? To answer this question, it is helpful to recognize that one of Sunstein's nondelegation canons makes an occasional appearance in immigration jurisprudence: the rule of lenity.<sup>17</sup> For more than half a century, courts have periodically invoked the rule of lenity in immigration cases.<sup>18</sup> As in the criminal context (where the rule of lenity is more frequently invoked), courts wield this canon of statutory construction in immigration cases to interpret ambiguities against harsher punishment—which means against deportation or exclusion, and in favor of the noncitizen. The effect is to restrict delegation by denying deference to contrary agency interpretations of immigration provisions. If Congress wants the provisions to be interpreted against noncitizens, it must make that policy choice itself; the decision cannot be left to an administrative agency.

The canon itself, however, cannot be the reason for judicial skepticism in immigration cases. The immigration rule of lenity, like its counterpart in the criminal arena, is almost inevitably invoked only in the breach by federal courts. Moreover, while the rule of lenity does reflect concern about the harshness of deportation, this antipenal sentiment is certainly not unique to immigration law. Thus, the sentiment does not fully explain whether there is something distinctive about immigration law *qua* immigration law that would support a nondelegation norm in this arena.

Still, the rule of lenity is helpful in highlighting the possibility that there might be some aspect of immigration cases that implicates the kind of choices courts could want to reserve to Congress. Is there such a feature that might justify invoking the democracy-reinforcing rubric of nondelegation? Perhaps the most plausible candidate would be the claim that immigration decisions are distinctive because they concern the allocation of the primary good of membership within a democracy.

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<sup>17</sup> In addition to the rule of lenity, the canon of constitutional avoidance—another of Sunstein's nondelegation canons—is sometimes invoked in immigration cases. See Sunstein, 67 U Chi L Rev at 316 (cited in note 14). That canon instructs courts to, whenever possible, avoid interpreting a statute in a manner that would raise serious questions about the statute's constitutionality. Accordingly, courts applying the canon would refuse to defer to an agency's interpretation of a statute that raises constitutional questions—even if that interpretation would ordinarily receive *Chevron* deference. In this fashion, the canon operates as a nondelegation mechanism. For a discussion of the long history of courts applying the constitutional avoidance canon in the immigration arena, see Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L J 545, 560–73 (1990).

<sup>18</sup> See, for example, *Bonetti v Rogers*, 356 US 691, 699 (1958) (“When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.”); *Fong Haw Tan v Phelan*, 333 US 6, 10 (1948); *Delgado v Carmichael*, 332 US 388, 391 (1947). For perhaps the earliest hint of the lenity idea in immigration jurisprudence, see *Yamataya v Fisher*, 189 US 86, 99–101 (1903).

Courts might conclude that an institution with a stronger democratic pedigree than the Board of Immigration Appeals should make those membership-allocation decisions. Immigration decisions—decisions to admit or deport immigrants—often implicate membership in the political and constitutional community in at least two different ways. First, each particular decision by the Board resolves the membership status of an individual noncitizen by determining whether the noncitizen's conduct should or should not make her deportable, excludable, or so forth. Second, the Board's decisions in the aggregate allocate membership across cases by interpreting the asylum requirements, the criminal deportation provisions, and so on to elaborate a set of rules that regulate the extension and deprivation of various forms of membership to existing and potential immigrants. This feature of immigration policy has led political theorists like Michael Walzer to argue that such decisions are among the most important we make: "The primary good that we distribute to one another is membership in some human community. And what we do with regard to membership structures all our other distributive choices."<sup>19</sup>

On this account, judicial skepticism in immigration cases is partly about democracy and delegation—or, more specifically, about the kind of democratic processes the courts demand be used to make some set of sensitive membership judgments involving immigration.<sup>20</sup>

To be sure, there are a few problems with this interpretation of the case law. The first is conceptual. The idea of "membership" is a bit slippery; a quick survey of the vast literature on citizenship confirms this much.<sup>21</sup> For that reason, it might be difficult to define the boundaries of a principle that prefers Congress to make interpretive decisions that affect the distribution of "membership" in the national political community. Some might claim that other sorts of decisions—say, government decisions that allocate educational benefits, or welfare benefits, or access to health care—also implicate "membership" in a sense

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<sup>19</sup> Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* 31 (Basic Books 1983).

<sup>20</sup> While I have focused above on the distribution of authority between Congress and the executive branch immigration agencies, this democracy-reinforcing account could, of course, also focus on the distribution of immigration authority within the executive branch. See generally Elena Kagan and David J. Barron, *Chevron's Nondelegation Doctrine*, 2001 Sup Ct Rev 201. One might complain, for example, that the immigration judges and the Board of Immigration Appeals do not deserve deference because they lack the democratic pedigree of, say, the Attorney General or perhaps the President. The Supreme Court suggested such an intra-executive branch nondelegation principle in *Hampton v Mow Sun Wong*, 426 US 88, 101–05 (1976).

<sup>21</sup> See generally, for example, Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton 2006); Judith N. Shklar, *American Citizenship: The Quest for Inclusion (The Tanner Lectures on Human Values)* (Harvard 1991); James H. Kettner, *The Development of American Citizenship, 1608–1870* (North Carolina 1978).

sufficient to require congressional rather than agency decisionmaking. One could try to avoid this difficulty by acknowledging that the theory picking out immigration decisions is partial (in the sense that it may not reach all decisions that bear importantly on membership). But that would not fully resolve the conceptual issues because circumscribing the boundaries of what constitutes an “immigration” decision is itself somewhat tricky.

In addition to this conceptual difficulty, there is a more serious problem. Even if there is consensus that, for example, the distribution of membership is implicated by the basic decision about what conduct should make a noncitizen deportable, one would still have to *justify* the conclusion that Congress should not be permitted to delegate these decisions to administrative agencies.<sup>22</sup> This presents a tough problem of democratic and constitutional theory. But it is a problem more generally with existing discussions of nondelegation canons. They provide an interpretive account of why the judiciary might require Congress to make certain decisions, but they generally do not develop a thoroughgoing defense of courts’ decision to prefer Congress. For example, while the nondelegation idea is an intuitively attractive account of the canon of constitutional avoidance, more work would need to be done to justify fully the conclusion that constitutionally sensitive issues must be decided by Congress rather than administrative agencies ultimately accountable to the President. In this short Essay, however, my ambition is more modest. I want simply to suggest that the nondelegation idea might, as a descriptive matter,

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<sup>22</sup> There is an additional complication here: one would also have to sort out the question whether the power is Congress’s to delegate in the first place. As I explained above, the Constitution itself does not contain much guidance about how immigration lawmaking authority is distributed within the political branches. Scholars have sometimes suggested that the immigration power is clearly derived exclusively from Article I, § 8, which gives Congress the power to regulate naturalization. See, for example, Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 Colum L Rev 2097, 2178 (2004). But the Supreme Court has never clearly specified the source of immigration power, and has on occasion suggested that the executive might have independent constitutional authority over immigration policy. See, for example, *Knauff v Shaughnessy*, 338 US 537, 542 (1950):

The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.

To the extent that the executive is vested with an independent source of power over immigration, it becomes less clear how one should think about issues of delegation and nondelegation in the immigration arena.

provide an attractive reinterpretation of the surprising absence of administrative deference in many immigration cases.<sup>23</sup>

If nondelegation norms are at work, there remains one final difficulty. Nondelegation principles are designed to promote congressional decisionmaking, not to liberate judicial decisionmaking. A fairly common approach to constraining such decisionmaking in individual cases is for judges implementing a nondelegation norm to agree upon an interpretive default that they enforce in the absence of a clear decision by Congress. In constitutional avoidance cases, the interpretive default is the reading that does not raise constitutional questions. In rule of lenity cases, the interpretive default is the reading that narrows (rather than expands) the scope of criminal liability. In immigration cases, courts could similarly adopt an interpretive default. The rule of lenity's history in immigration jurisprudence might suggest one: reading statutes to protect the existing membership status of a noncitizen, absent a clear decision by Congress to strip the noncitizen of her status.

That is not to say, of course, that such a default is a necessary corollary to an immigration nondelegation norm. Judges could also enforce the norm by employing ordinary tools of statutory interpretation. And in fact, that approach is more consistent with the actual practice of immigration review by federal courts. Posner and other judges do not typically construe ambiguity in the Immigration and Nationality Act in favor of noncitizens when they refuse to defer to the immigration courts. Instead, they make their own judgment about the meaning of the relevant statute.<sup>24</sup> While this second approach might appear to shift some measure of interpretive authority from agencies to judges, rather than to Congress, the appearance is somewhat misleading. Judges inevitably must play some role in order to enforce a nondelegation norm. When judges implement the norm by employing an interpretive default, that role is perhaps obscured. But it is judges, of course, who establish the interpretive default—as well as decide when to invoke it. That ordinary statutory interpretation leaves

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<sup>23</sup> This theory might also help explain why, as Hiroshi Motomura has documented, the doctrine of constitutional avoidance has so often been applied in immigration cases where the constitutional concerns are weak or nonexistent. See Motomura, 100 *Yale L J* at 545 (cited in note 17). The aggressive application of the constitutional avoidance doctrine might simply be an artifact of courts trying to shoehorn their delegation concerns about membership decisions into an existing doctrine that operates to prevent delegation.

<sup>24</sup> *Mei v Ashcroft*, 393 F3d 737 (7th Cir 2004), provides a good example. In that case Posner concluded that it would be meaningless to defer to the immigration court's interpretation of the deportation provision covering "crime[s] involving moral turpitude," but still interpreted the ambiguous provision to cover Mei's conviction. *Id.* at 739. Rather than construing the provision narrowly and forcing Congress to make the decision about whether the provision reached as far as the immigration court had concluded, he resolved the ambiguity about the outer limits of the provision's coverage himself. See *id.* at 740–42.



some room for judgment, therefore, does not undermine the possibility that such an interpretive exercise is part of a nondelegation-inspired exercise by a court.

In short, judicial skepticism of agency action in modern immigration cases may be in part about the distribution of power between Congress and the executive, a separation of powers problem long overlooked by immigration jurisprudence and scholarship.

## II. AGENCY INCOMPETENCE AND ADMINISTRATIVE LAW

Nondelegation norms may not be the only explanation for judicial skepticism of the immigration agencies. In recent cases, Posner's (and other judges') skepticism appears to stem at least in part from dissatisfaction with the decisionmaking process *within* the agency. In such cases, Posner does not directly challenge administrative law's conventional wisdom that an agency with primary responsibility for implementing a statute should receive substantial deference from federal courts when it discharges that responsibility. Instead, he concludes that deference is not due because the immigration agencies are failing to discharge this duty when they decide immigration cases. On this account, therefore, the exceptional treatment of immigration cases concerns the distribution of interpretive authority between the judiciary and the executive, rather than between the executive and Congress.<sup>25</sup>

In recent years, Posner has more and more frequently concluded that both the immigration judges who conduct deportation proceedings and the Board of Immigration Appeals that reviews decisions of the immigration judges are inept. Time and time again he has complained that "the adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice."<sup>26</sup> Among other rebukes, he has labeled the immigration courts' deci-

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<sup>25</sup> Moreover, it is clear that one cannot fit this apparent lack of deference into standard administrative law doctrines. As I noted above, the Supreme Court has held that the Board of Immigration Appeals's interpretations of immigration statutes are due *Chevron* deference. See *INS v Aguirre-Aguirre*, 526 US 415, 425 (1999). Even putting aside this holding, the immigration courts' interpretations seem to qualify for deference under most conventional accounts of *United States v Mead*, 533 US 218 (2001)—accounts that focus on whether an agency interpretation carries the "force of law" (the immigration courts' interpretations clearly do), as well as accounts that emphasize procedural formality.

<sup>26</sup> *Benslimane v Gonzales*, 430 F3d 828, 830 (7th Cir 2005). See also *Pasha v Gonzales*, 433 F3d 530, 531 (7th Cir 2005) ("At the risk of sounding like a broken record, we reiterate our oft-expressed concern with the adjudication of asylum claims by the Immigration Court and the Board of Immigration Appeals . . . . The performance of these federal agencies is too often inadequate. This case presents another depressing example.").

sions arbitrary,<sup>27</sup> unreasoned,<sup>28</sup> irrational,<sup>29</sup> inconsistent,<sup>30</sup> and uninformed.<sup>31</sup>

Posner's concerns about competence extend to the immigration agencies' handling of both factual and legal questions. He has frequently found that immigration judges are uninformed about the factual questions they are charged with resolving or, even worse, that they ignore available evidence and base factual findings on bald assertions. With respect to questions of law, Posner has reached similar conclusions. Consider his evaluation of the immigration courts in *Mei v Ashcroft*.<sup>32</sup> The case concerned whether the petitioner was deportable for having committed a "crime involving moral turpitude." The

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<sup>27</sup> See, for example, *Benslimane*, 430 F3d at 832 (chastising the immigration judge for "arbitrarily denying a motion for a continuance").

<sup>28</sup> See, for example, *Hor v Gonzales*, 421 F3d 497, 500 (7th Cir 2005) ("In short, there is no reasoned basis for the immigration judge's conclusion, which was based . . . [on] unsubstantiated conjectures."); *Joshi v Ashcroft*, 389 F3d 732, 736–37 (7th Cir 2004) ("A decision that resolves a critical factual question without mention of the principal evidence cannot be considered adequately reasoned."); *Mamedov v Ashcroft*, 387 F3d 918, 919 (7th Cir 2004) ("As in a number of recent [immigration] cases, the opinion by the immigration judge . . . is unreasoned."); *Lian v Ashcroft*, 379 F3d 457, 461–62 (7th Cir 2004) ("The immigration judge failed to give the issue a responsible analysis. That is to put it mildly. Lian's counsel presented a huge mass of evidence bearing on the only issue in the case. . . . All this material (and more) was, so far as we can determine, completely ignored by the immigration judge.")

<sup>29</sup> See, for example, *Hor*, 421 F3d at 501 ("To be entitled to deference, [an immigration judge's] determination . . . must rest on more than [an] implausible assertion backed up by no facts."); *Iao v Gonzales*, 400 F3d 530, 533 (7th Cir 2005) ("The immigration judge's opinion cannot be regarded as reasoned; and there was no opinion by the Board of Immigration Appeals . . . [The petitioner] is entitled to a rational analysis of the evidence by them."); *Mengistu v Ashcroft*, 355 F3d 1044, 1047 (7th Cir 2004) ("[A]s we tirelessly repeat, . . . an agency opinion that fails to build a rational bridge between the record and the agency's legal conclusion cannot survive judicial review."); *Galina v INS*, 213 F3d 955, 958 (7th Cir 2000) ("The Board's analysis was woefully inadequate, indicating that it has not taken to heart previous judicial criticisms of its performance in asylum cases. . . . The elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board in this as in other cases.")

<sup>30</sup> See, for example, *Djouma v Gonzales*, 429 F3d 685, 687–88 (7th Cir 2005) (criticizing the ad hoc way in which immigration judges determine the credibility of asylum applicants, and taking the Department of Homeland Security and the Department of Justice to task for "fail[ing] to provide the immigration judges and the members of the Board of Immigration Appeals with any systematic guidance on the resolution of credibility issues in these cases").

<sup>31</sup> See, for example, *id.* at 688 ("The [immigration agencies] seem committed to case by case adjudication in circumstances in which a lack of background knowledge denies the adjudicators the cultural competence required to make reliable determinations of credibility."); *Hor*, 421 F3d at 500 (criticizing immigration judges deciding asylum cases for being woefully uninformed about the conditions in the countries where the asylum claims arose); *Iao*, 400 F3d at 533–34 (claiming that "[a] lack of familiarity with relevant foreign cultures" was a "disturbing feature" of this case, as well as of many other immigration cases); *Lian*, 379 F3d at 459 (criticizing immigration judges for not being knowledgeable about foreign countries whose practices and laws are relevant to the judges' determinations); *Comollari v Ashcroft*, 378 F3d 694, 696 (7th Cir 2004) (criticizing an immigration judge in an asylum case for getting wrong the basic—and dispositive—fact of which government was in power in Albania in 1999).

<sup>32</sup> 393 F3d 737 (7th Cir 2004).

threshold question was whether the Board of Immigration Appeals's interpretation of this statutory term was due *Chevron* deference. Judge Posner concluded that it would be meaningless to give deference to the Board:

Since Congress did not define "crime involving moral turpitude" when it inserted the term in the immigration statute, . . . it is reasonable to suppose à la *Chevron* that Congress contemplated that the agency charged with administering the statute would define the term, and specifically would tailor the definition to the policies embodied in the immigration statutes. The Board of Immigration Appeals has done neither. . . . It is not deploying any insights that it might have obtained from adjudicating immigration cases.<sup>33</sup>

Moreover, Posner's concerns extend beyond issues of competence; he has often also questioned the immigration courts' impartiality. In asylum cases, for example, Posner has hinted that immigration judges are unfairly predisposed against the asylum seekers whose petitions they are adjudicating.<sup>34</sup> He has suggested the same with respect to criminal deportation cases. Many criminal deportation cases concern the question whether a noncitizen is deportable for having been convicted of an "aggravated felony"—a statutory term of art under the immigration laws.<sup>35</sup> As with other statutory terms in the immigration statute, Posner has often rejected rather than deferred to the government's interpretation of the "aggravated felony" provision. A concern about bias seems to animate this lack of deference; in one recent case, for example, he lamented that "[t]he only consistency that we can see in the government's treatment of the meaning of 'aggravated felony' is that the alien always loses."<sup>36</sup>

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<sup>33</sup> Id at 739. See also *Sahi v Gonzales*, 416 F3d 587, 588 (7th Cir 2005) ("The primary responsibility for defining key terms in the immigration statute that the statutes themselves do not define . . . is that of the Board of Immigration Appeals as the Attorney General's delegate. The Board has failed to discharge that responsibility.").

<sup>34</sup> See, for example, *Pramatarov v Gonzales*, 454 F3d 764, 766 (7th Cir 2006) (noting that the immigration judge's questioning of the asylum seeker "was so harsh and rude as to suggest bias").

<sup>35</sup> See 8 USC §§ 1101(a)(43), 1227(a)(2)(A)(iii) (2000).

<sup>36</sup> *Gonzales-Gomez v Achim*, 441 F3d 532, 535 (7th Cir 2006). Judge Posner's apparent concern that the immigration courts in *Gonzales-Gomez* were acting partially—almost like prosecutors rather than adjudicators—suggests a parallel to another context in which courts do not afford *Chevron* deference: federal criminal prosecutions. Courts have never deferred to interpretations of federal criminal law adopted by the Attorney General or her subordinate United States Attorneys who are charged with enforcing federal criminal law. See generally Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 Harv L Rev 469 (1996) (arguing in favor of deference in the federal criminal law context). There are some oft-overlooked similarities between immigration law and federal criminal law—regulatory areas that both involve large

In short, across a broad spectrum of immigration cases, Judge Posner has repeatedly suggested that there is something exceptional (but not exceptionally good) about the immigration agencies and how they resolve immigration cases. To be sure, Posner is not the only federal judge to reach this conclusion. For some time, a number of federal appellate judges have suggested that the immigration courts are fundamentally incompetent, biased, or both. And this chorus has grown louder in recent years, as a variety of “streamlining” procedures designed to expedite the processing of immigration cases has further eroded the ability of immigration judges and the Board of Immigration Appeals to devote sufficient resources to individual cases.<sup>37</sup>

On this account, Judge Posner’s skepticism in immigration cases appears to be driven by a judgment about comparative institutional competence. Such judgments are, of course, central to debates about deference in administrative law.<sup>38</sup> For example, *Chevron* deference is often defended on the ground that administrative agencies have greater expertise and more democratic accountability than courts. But administrative law jurisprudence has generally made these judgments of institutional competence wholesale rather than retail. In fact, that was part of the point of *Chevron*—to create a general, trans-substantive doctrine of administrative deference to replace the more ad hoc approach to deference that had previously characterized administrative law jurisprudence. That is not to say that the post-*Chevron* world is one with uniform deference to all forms of administrative decisionmaking. Far from it.<sup>39</sup> But the doctrine does not generally authorize courts to decide whether deference is appropriate by evaluating directly the competence of the administrative decision-

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enforcement agencies. Perhaps these similarities help explain Posner’s concern about the impartiality of the immigration agencies.

<sup>37</sup> See generally Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals’s Summary Affirmance Procedures*, 16 *Stan L & Policy Rev* 481, 499–501 (2005) (summarizing the limitations placed on the Board of Immigration Appeals by recent streamlining procedures); John R.B. Palmer, Stephen W. Yale-Loehr, and Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 *Georgetown Immig L J* 1, 29–32 (2005) (discussing the criticisms of the streamlining procedures adopted since October 1999); Letter from Richard A. Posner to Senator Richard J. Durbin (Mar 15, 2006) (concluding that “[t]he Board’s problem is that it is overwhelmed by appeals and thus cannot do an effective filtering job”).

<sup>38</sup> More generally, issues of comparative competence are central to questions about the distribution of interpretive authority among different institutional actors in our constitutional system. See generally Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard 2006).

<sup>39</sup> See generally *Mead*, 533 US 218 (holding that *Chevron* deference applies only when Congress intended the agency’s interpretations to carry the force of law); Thomas W. Merrill and Kristin E. Hickman, *Chevron’s Domain*, 89 *Georgetown L J* 833 (2001) (discussing the types of agency interpretations to which *Chevron* deference does not or should not apply).

makers whose rulings are being reviewed.<sup>40</sup> This, however, is precisely what Judge Posner appears to be doing in his immigration jurisprudence. And it is this that makes his lack of deference to the legal and factual determinations of the immigration courts so striking.

If this descriptive account is correct, what should we make of it? We might question whether federal courts are really in a position to make the judgment about agency competence that Judge Posner has made about the immigration courts. But perhaps the federal courts, which each year review more than ten thousand immigration court decisions,<sup>41</sup> are uniquely well positioned to make that determination. In any event, if we assume that Posner has accurately concluded that the immigration courts are incompetent, an important question remains: should a federal appellate judge respond to the incompetence of the immigration courts by refusing to give deference to the agency's factual and legal judgments—in other words, by creating a de facto doctrine of administrative law exceptionalism for immigration law?

Posner never directly considers this question in his immigration jurisprudence. But while he implicitly answers it in the affirmative, several complicating factors make it quite difficult to identify the best judicial response. On the side of Posner's immigration administrative exceptionalism is one obviously important interest—the interest of the individual noncitizens whose cases he reviews. After all, without his skeptical review a number of people would likely have been wrongly deported without a minimally acceptable adjudication of their claims and, in several cases, in fairly clear contravention to the requirements of the Immigration and Nationality Act.

Nonetheless, Posner is but one federal judge. However Herculean his talents might be, he cannot personally decide more than a small fraction of the immigration cases in the Seventh Circuit. And, of course, he cannot decide any of the far greater numbers of immigration cases that flow through the federal circuits with far larger immi-

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<sup>40</sup> Note that, in one sense, Judge Posner's approach is somewhat more categorical than the approach suggested by *Mead*. There the Court appears to contemplate adjusting deference on a policy-by-policy basis to reflect the nuances of Congress's delegation decision. Here Judge Posner appears to make a rough judgment about the institutional competence of an entire administrative institution—the immigration courts—and then use that judgment to calibrate his level of deference in all cases coming from that institution.

<sup>41</sup> See *Recent Case: Third and Seventh Circuits Condemn Pattern of Error in Immigration Courts*, 119 Harv L Rev 2596, 2596 (2006) (noting that immigration appeals have “swollen in the past five years from three percent to eighteen percent of all federal appeals”). See also Palmer, Yale-Loehr, and Cronin, 20 Georgetown Immig L J at 44–45 (cited in note 37) (discussing monthly rates of filings).

gration dockets.<sup>42</sup> This highlights one potential problem—a coordination problem—with Posner’s immigration exceptionalism.

As Adrian Vermeule and others have noted, the judiciary is a “they,” not an “it.”<sup>43</sup> For that reason, Posner’s skeptical review of immigration agencies can only advance the interest of large numbers of potential deportees if a sufficient number of federal judges adopt a similar review strategy. Ordinarily, of course, federal judges coordinate to a certain extent through the system of judicial precedent and oversight by the Supreme Court. But these usual means of coordination are much less likely to work here than in some other contexts. As I noted above, there is no ready doctrinal toehold in administrative law jurisprudence for Posner’s direct assessment of the immigration courts’ competence. Accordingly, his skeptical standard of review stands outside the ordinary doctrinal framework for reviewing administrative decisions. And because it exists outside this framework, it is more difficult for other federal courts to coordinate around it in the way that they do around precedent. Perhaps even more important, its extradoctrinal status makes it very unlikely to be adopted anytime soon by the Supreme Court.

Putting aside the coordination issue, there is a more general difficulty with the immigration exceptionalism approach: it is not clear whether, in the long run, it is better for deportees specifically or the immigration adjudication system generally for federal courts to engage in skeptical, intensive review of the immigration courts.<sup>44</sup> If the administrative adjudication system is failing, there are at least three ways to correct for its failures. The first is for federal courts to step into the breach, as Posner has done. But it is unclear whether this is a sustainable strategy—or whether it can ever be more than a marginally effective one—given the huge volume of immigration adjudication and the limited capacities of the federal judiciary.<sup>45</sup>

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<sup>42</sup> The Second and Ninth Circuits have by far the largest immigration dockets. These circuits each decide more than twice the number of cases decided by the average circuit. See Palmer, Yale-Loehr, and Cronin, 20 *Georgetown Immig L J* at 44–45 (cited in note 37).

<sup>43</sup> See generally Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 *J Contemp Legal Issues* 549 (2005).

<sup>44</sup> This possibility is a specific example of a more general concern about the role of courts in promoting social and institutional change. For a discussion of the more general concern, see, for example, Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago 1993).

<sup>45</sup> This strategy is also limited by the fact that many noncitizens in immigration proceedings have difficulty seeking review of agency rulings—some because they are prohibited from doing so by limitations on judicial review in the immigration code, some because they are unable to pay the filing fees associated with judicial review, and some because they would have to remain in detention for a long period of time in order to pursue their claims in federal court.

A second possibility is to persuade or coerce the immigration agencies to improve their administrative adjudication system. Posner has often in his opinions pressed the Attorney General to do just this. Among others, he has pleaded for two particular improvements. Sometimes he has suggested that the proper way for the Attorney General to discharge his duty to interpret the immigration statute would be to promulgate more rules defining the statute's key terms to provide more guidance to immigration judges and the Board of Immigration Appeals.<sup>46</sup> At other times, Judge Posner has suggested changes to the specificity of the policymaking action rather than its form: he has begged the Board to lay down more rules—or at least more specific standards—to guide its own process of adjudication.<sup>47</sup>

These reforms might go some distance towards improving the adjudication of immigration cases in the administrative system. Neither would necessarily get at Posner's concerns about bias, but both might alleviate some of his rule of law and arbitrariness concerns.<sup>48</sup> This said, it is unclear whether Posner's intensive oversight makes it more or less likely that the agency will reform its adjudicatory process. His oversight might spur the agency by raising the cost of shoddy administrative adjudication. The immigration courts often must spend additional resources to revisit decisions that have been overturned by appellate courts, and the appellate court opinions themselves can be quite embarrassing to the agency (as many of Judge Posner's are). These costs might have disciplining effects.<sup>49</sup> On the other hand, the immigration agencies might have less of an incentive to improve their adjudicatory processes if greater oversight by Article III courts enables the agencies essentially to outsource some of their adjudicatory effort. Some have suggested that the Attorney General's "streamlining" regulations for the Board of

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<sup>46</sup> I leave to one side the question whether administrative law jurisprudence smiles or frowns on judicial attempts to push administrative decisionmaking into a particular procedural form—in this case the rulemaking process rather than agency adjudication.

<sup>47</sup> See, for example, *Djouma*, 429 F3d at 687–88; *Sahi*, 416 F3d at 588–89; *Mei*, 393 F3d at 739.

<sup>48</sup> These are, of course, concerns that have long animated the delegation debate in administrative law more generally. This highlights the way in which the two theories of Posner's immigration skepticism—the nondelegation theory and the immigration court incompetence theory—track two threads of this delegation debate. One thread has focused on preventing certain delegations from Congress to the executive (and this thread is typically given the "nondelegation" label), while the second thread has focused on promoting internal controls on delegation. See note 16 and accompanying text.

<sup>49</sup> Of course, the remand required by *SEC v Chenery Corp*, 318 US 80 (1943), when a federal court invalidates an agency decision can cause delay and duplication of effort that is costly for the noncitizen in deportation proceedings as well as for the immigration courts.

Immigration Appeals have done just this, reducing the adjudicatory burden on the agency by shifting that effort to federal courts.<sup>50</sup>

The third way to correct for the perceived failing of the immigration courts is to persuade Congress to overhaul the structure of immigration adjudication.<sup>51</sup> Here too, intensive oversight by federal courts might either advance or retard such reform efforts. Federal court judges might act as whistleblowers, providing valuable information to Congress about agency incompetence. This information might be consumed directly by congressional oversight committees (particularly when the judicial criticism comes from a prominent judge like Posner). Or it might be used by immigrants' rights advocates to bolster the credibility of their arguments to these oversight bodies. Still, intensive oversight by federal courts might also alleviate the perceived need for administrative reform. If federal courts are dedicating additional resources to police the immigration courts, Congress might conclude that it is not worth investing its own energy to restructure that system of adjudication. Moreover, efforts to encourage internal reform by the agency and external reform by Congress might work at cross-purposes. If the efforts prompt agency reform that improves the adjudicative process at the margins, the marginal improvement might make it less likely that Congress will jump in and undertake more wide-ranging reforms.

Sometimes, however, it might be possible for a federal judge to pursue all three of the above strategies simultaneously. In fact, it may be that Judge Posner's scathing immigration jurisprudence has managed to do just this—to correct egregious errors in individual cases (perhaps even setting off a cascade among other judges, who will themselves step in and correct more errors); to embarrass the immigration agencies to an extent that increases the likelihood of internal reform; and to signal Congress about significant problems in the current system. Such a feat might not be possible in all situations or for all judges, and for that reason it will not always be clear what a well-intentioned judge should do when confronted with an incompetent or biased agency decisionmaking structure. But Judge Posner's conspicuous skepticism in immigration cases illustrates a role that the federal

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<sup>50</sup> See, for example, Palmer, Yale-Loehr, and Cronin, 20 *Georgetown Immig L J* at 31 (cited in note 37).

<sup>51</sup> Over the past several decades, there have been recurring calls for Congress to establish an Article I immigration court much like the bankruptcy court system. See Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 *Notre Dame L Rev* 644, 644–45 (1980). Legislation to create such a court has been introduced in Congress several times. See, for example, HR 3187, 99th Cong, 1st Sess (Aug 1, 1985); Immigration Court, 104th Cong, 2d Sess (Sept 28, 1996), in 142 *Cong Rec E1806-01* (Sept 28, 1996).



judiciary might play in overseeing executive behavior—a role quite different than that captured by *Chevron* and its progeny.

#### CONCLUSION

Judge Posner's striking skepticism of immigration courts might be grounded in two quite different sources: nondelegation norms on the one hand and institutional incompetence on the other. Drawing attention to these possibilities is crucial to understanding his jurisprudence. More importantly, introducing these possibilities highlights more fundamental, and largely unaddressed, questions about the institutional relationship between Congress, the executive, and judiciary in the immigration arena. Often these questions have been obscured by immigration scholarship's obsession with the plenary power doctrine and ideas of immigration law's exceptionalism. My goal here has been to illuminate—and promote conversation about—these oft-overlooked questions.