

EXECUTIVE DEFERENCE IN U.S. REFUGEE LAW: INTERNATIONALIST PATHS THROUGH AND BEYOND *CHEVRON*

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ABSTRACT

When Congress amended U.S. immigration law via the Refugee Act of 1980, it did so with the explicit purpose of bringing U.S. asylum law into conformity with the nation's international refugee treaty obligations. Nevertheless, U.S. courts interpreting domestic asylum provisions routinely discount international legal norms, laboring under the mistaken perception that the Chevron doctrine requires deference to the executive agency's interpretation of asylum law regardless of its compatibility with international law. As a result, domestic asylum law has become jurisprudentially unmoored from international refugee law to the serious detriment of asylum seekers.

This Article argues that neither Chevron nor the policies underlying it compel the lockstep deference that courts afford the Board of Immigration Appeals' interpretation of U.S. asylum law. The Article charts two alternate paths by which courts may reject

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agency statutory interpretations that are inconsistent with international refugee law: a route through Chevron that navigates within existing Supreme Court jurisprudence, and a route beyond Chevron based on the limited applicability of this administrative law doctrine to the asylum-adjudication context. Addressing further impediments to the reconciliation of domestic and international law, the Article demonstrates that courts are indeed capable of applying a coherent interpretive methodology to determine the content of refugee treaty obligations, particularly if engaged by government lawyers committed to reestablishing the international legality of U.S. practice.

In seeking to remove a fundamental administrative law obstacle to the implementation of international refugee law, the Article lends impetus to broader scholarly efforts to align U.S. law with this nation's international human rights obligations. It also provides a framework that enables courts, immigration attorneys, and government policymakers to situate U.S. asylum law in the more rights-protective context that Congress intended.

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INTRODUCTION

Asylum law is one of the most thoroughly international areas of U.S. law. Not only has the United States ratified the core international refugee law treaty,¹ but Congress, in passing the Refugee Act of 1980, has adopted implementing legislation with the

1. In 1968, the United States ratified the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, obligating it to comply with the substantive provisions of the Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150. See *infra* Part I.A.1.

explicit purpose of bringing U.S. law into conformity with the nation's international obligations under the treaty.² Domestic statutory provisions deliberately track the language of the treaty's central prohibition against removal of individuals to persecution, as well as the treaty's definition of a refugee.³ The United States is a longstanding member of the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR),⁴ the international agency mandated with supervising the application of treaties relating to refugees. And one would be hard pressed to find areas of legal regulation that are inherently more international than the transnational flight of foreign nationals to the United States and similarly situated foreign states around the world.

Given U.S. asylum law's express international law underpinnings, one would expect U.S. courts interpreting it to employ international law norms, or at least to set aside the general resistance U.S. courts regularly display toward foreign and international law.⁵ Yet courts have been surprisingly willing to discount international law governing domestic asylum statutes by deferring to expansive executive agency statutory interpretations that do not conform—and

2. Congress passed the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.), to bring U.S. law into conformity with the nation's obligations under the Protocol. See H.R. REP. NO. 96-608, at 17–18 (1979) (describing changes to the law made to satisfy the Protocol's obligations). See *infra* Part I.A.2.

3. Compare Convention Relating to the Status of Refugees, *supra* note 1, 19 U.S.T. at 6261, 6276, 189 U.N.T.S. at 152, 176, with 8 U.S.C. § 1101(a)(42) (2006), and 8 U.S.C. § 1231(b)(3)(A); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 437 (1987) (“Indeed, the definition of ‘refugee’ that Congress adopted . . . is virtually identical to the one prescribed by Article 1(2) of the Convention . . .”).

4. The UNHCR Executive Committee is an intergovernmental group that advises the UNHCR in the exercise of its protection mandate. It meets annually and publishes its discussions in *Conclusions on International Protection*.

5. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting) (“[T]he basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.”); *Atkins v. Virginia*, 536 U.S. 304, 325 (2002) (Rehnquist, C.J., dissenting) (“For if it is evidence of a national consensus for which we are looking, then the viewpoints of other countries [on the execution of mentally disabled persons] are simply not relevant.”); Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary 109th Cong. 471 (2006) (statement of Samuel A. Alito, Jr.) (“I think the framers would be stunned by the idea that the Bill of Rights is to be interpreted by taking a poll of the countries of the world.”). See generally David Zaring, *The Use of Foreign Decisions by Federal Courts: An Empirical Analysis*, 3 J. EMPIRICAL LEGAL STUD. 297, 297 (2006) (“[F]ederal courts rarely cite to foreign decisions, they do so no more now than they did in the past, and on those few occasions where they do cite foreign decisions, it’s usually not to help them interpret domestic law.”).

in many cases, have made no effort to conform—to limitations created by U.S. international treaty obligations.⁶ Preferring administrative agency interpretations over international legal obligations is not simply an academic concern. Writing in the late 1990s, Professor Joan Fitzpatrick aptly observed that because the international refugee law framework has a rights-protective purpose,⁷ “divorcing international and domestic law tends to operate to the grave detriment of asylum seekers.”⁸ In contrast with other areas of administrative regulation, the “grave detriment” to which she refers is not the loss of a benefit or the imposition of an economic burden. Favoring agency interpretations that frequently maximize executive deportation powers effectively strips refugees of their international treaty protections and enables the U.S. government to deport them to countries in which they face persecution. This result is perversely at odds with Congress’s intention that the domestic Refugee Act would create an asylum policy “consistent with this country’s tradition of welcoming the oppressed of other nations and with our obligations under international law.”⁹

Fitzpatrick explained that domestic asylum law had become unmoored from international refugee law for two basic reasons: first, because U.S. courts “lack [a] coherent methodology for approaching international law,” and second, because of “a lack of systematic commitment to preserving the international legality of U.S. practice.”¹⁰ This Article explores a third related and often-ignored reason that U.S. international obligations toward refugees have been diluted: excessive judicial deference to the Board of Immigration

6. See *infra* Part I.B; see also Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT’L L. 1, 3 (1997) (“Ignoring the unusual prominence of international standards in shaping domestic refugee law, some administrators and courts resist international constraints.”); John S. Kane, *Refining Chevron—Restoring Judicial Review to Protect Religious Refugees*, 60 ADMIN. L. REV. 513, 516 & n.12 (2008) (arguing that the “excessive judicial deference to restrictive BIA decisions” in refugee cases is a result of courts misreading the *Chevron* doctrine).

7. The Convention generally provides a more rights-protective framework than domestic statutes alone because, at the very least, the Convention’s provisions must be interpreted in light of its humanitarian purpose, affording greater protection to refugees in cases of doubt. See *infra* notes 71–73 and accompanying text.

8. Fitzpatrick, *supra* note 6, at 12. She further observed that “[i]f left unprotected by domestically enforceable international norms, asylum-seekers are at risk of arbitrary *refoulement*, especially during periods of heightened concern about foreign policy, border control or absorptive capacity.” *Id.*

9. H.R. REP. NO. 96-608, at 17–18 (1979).

10. Fitzpatrick, *supra* note 6, at 3–4.

Appeals (BIA) under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*¹¹ The *Chevron* doctrine instructs courts to defer to the reasonable statutory interpretation of the agency charged with administering a statute in cases when Congress does not express a clear intent about the interpretation of the statute.¹² Throughout the life of the Refugee Act, U.S. courts have been laboring under the mistaken perception that they are bound, under the *Chevron* doctrine, to defer to the BIA's construction of U.S. refugee statutes, regardless of whether that construction is consistent with international law. Accordingly, U.S. courts, if they reference it at all, regularly treat international law as a persuasive, nonbinding guide that is trumped by *Chevron* deference to a BIA interpretation, even if that interpretation is inconsistent with international law. Similarly, because of their failure to adopt a coherent methodology to determine the meaning of refugee treaty provisions, U.S. courts erroneously assume that textual ambiguity in those provisions indicates ambiguity in congressional intent to comply with the treaty. Courts, in turn, interpret this perceived ambiguity in congressional intent to warrant agency deference under *Chevron*. As a consequence, U.S. courts are often persuaded by government lawyers to interpret the statute in a manner that prioritizes executive discretion over the requirements of international law.

Though deference to agency judgment is sensible in many areas of statutory interpretation, neither *Chevron* nor the policies underlying it compel the lockstep deference that courts afford the BIA's construction of asylum provisions. Indeed, reflexive deference is inconsistent with congressional intent to conform domestic asylum law to the nation's international obligations.¹³ To resolve this tension, this Article charts two alternate paths through which courts may reject BIA statutory interpretations that are inconsistent with international refugee law. The first provides a path through *Chevron*, navigating within existing Supreme Court jurisprudence. The second offers a path beyond *Chevron*, grounded in the doctrine's limited applicability to the distinct domain of judicial review of BIA interpretations of asylum law.

Part I of this Article sets out the relevant international and domestic refugee law frameworks. It lays out the interpretive

11. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

12. *Id.* at 843–44.

13. *See infra* Part IV.

principles by which federal judges may determine the content of U.S. international obligations, including the meaning of the United Nations Convention Relating to the Status of Refugees (Convention)¹⁴ provisions that underpin the domestic statute. It then demonstrates the unsystematic methods by which federal judges disregard these interpretive principles and simply defer under *Chevron* to the BIA's statutory construction, even when the Agency's interpretation is neither derived from nor reconciled with corresponding treaty provisions. An emblematic example of this is the deference shown by seven courts of appeals to the BIA interpretation of the Immigration and Nationality Act's provision permitting removal of individuals who pose a danger to the community to countries where their life or freedom might be threatened.¹⁵ All seven circuits deferred to the BIA even though the statute mirrors the Convention, and the BIA's interpretation is directly at odds with relative international consensus on the meaning of the corresponding treaty provision.

Part II discusses the three leading cases in which the Supreme Court has applied the *Chevron* framework to Refugee Act provisions: *INS v. Cardoza-Fonseca*¹⁶ in 1987, *INS v. Aguirre-Aguirre*¹⁷ in 1999, and *Negusie v. Holder*¹⁸ in 2009. These cases reveal the Court's lack of a coherent approach to the role of international law in construing domestic asylum provisions, and its lack of a consistent methodology for interpreting the Convention's terms.

Parts III and IV set forth the two alternate paths through which courts may reject BIA statutory interpretations that are inconsistent with the Convention. Part III addresses the path through *Chevron*. It maintains that courts may reject outright a Convention-incompatible interpretation as inconsistent with congressional intent to achieve conformity with the Convention, absent a clear indication to the contrary. Alternatively, courts may apply various canons of statutory construction to find that a Convention-incompatible interpretation is not reasonable under *Chevron*.

Part IV, in contrast, offers an alternate path beyond *Chevron*. It contends that the traditional rationales of agency expertise and

14. Convention Relating to the Status of Refugees, *supra* note 1.

15. 8 U.S.C. § 1231(b)(3)(B)(ii) (2006).

16. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

17. *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999).

18. *Negusie v. Holder*, 129 S. Ct. 1159 (2009).

political accountability underpinning *Chevron* deference may not apply to the BIA's interpretation of asylum provisions, particularly in light of systemic problems in the operation of the BIA and immigration courts, and the unique international framework underlying domestic refugee law. Because of the statute's treaty underpinning that defines the legal boundaries of executive conduct with respect to refugees, the *Chevron* doctrine raises specific separation-of-powers concerns in the asylum context by allowing the executive to redefine the limits of its power.

Part V considers the obstacles—other than *Chevron* deference—that prevent U.S. courts from properly reconnecting domestic and international refugee law. It recognizes that even setting *Chevron* deference aside, courts must apply a more coherent methodology when interpreting international law, and the government and judiciary must commit to preserving the international legality of U.S. practice. I argue that these hurdles to a more internationally engaged judiciary are not as difficult to overcome as might be supposed, and that overcoming them is in the national interest. The Article concludes that, as the United States engages in a process of reinvigorating the role of the United Nations and international institutions,¹⁹ judicial reengagement (or in many cases, engagement) with international law in this area may be more feasible than one might expect.

I. DEFERENCE AND DIVERSION: STRAYING FROM THE INTERNATIONAL LAW FRAMEWORK

A. *The International and Domestic Refugee Law Framework*

1. *The International Refugee Law Framework.* The core international treaty governing refugees is the 1951 United Nations Convention Relating to the Status of Refugees,²⁰ to which 144 states are party.²¹ Drafted in the aftermath of the Second World War, the

19. President Barack Obama received the Nobel Peace Prize for stewarding the United States in this direction within the first year of his presidency. See Press Release, Norwegian Nobel Comm., The Nobel Peace Prize for 2009 (Oct. 9, 2009), available at http://nobelprize.org/nobel_prizes/peace/laureates/2009/press.html.

20. Convention Relating to the Status of Refugees, *supra* note 1.

21. *Status of the United Nations Convention Relating to the Status of Refugees*, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/home.aspx> (follow the “Status of Treaties (MTDSG)” hyperlink; then follow the “CHAPTER V” hyperlink; then follow the “Convention relating to the Status of Refugees. Geneva, 28 July 1951” hyperlink) (last visited Jan. 5, 2011).

Convention grew out of the recognition in the 1948 Universal Declaration of Human Rights of the right to seek and enjoy asylum from persecution.²² The Convention defines a “refugee” as a person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” is unable or unwilling to return to the country of his or her nationality.²³ Owing to its historical context, however, Article 1 of the Convention restricted the definition of “refugee” to those who became refugees by reason of events occurring before January 1, 1951.²⁴ In 1967, a new Protocol Relating to the Status of Refugees²⁵ (Protocol) came into force, obligating states to apply the substantive provisions of the Convention²⁶ to refugees without any temporal or geographical limitation.²⁷ Although the United States never ratified the Convention, it acceded to the Protocol in 1968 and is therefore bound by all of the substantive provisions of the Convention.²⁸

The cornerstone of international refugee protection is the prohibition against *refoulement*—the return of a person to persecution—embodied in Article 33 of the Convention.²⁹ This principle is now so widely accepted that it has attained the status of

22. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 14, U.N. GAOR, 3d Sess., U.N. Doc. A/810, at 74 (Dec. 10, 1948).

23. Convention Relating to the Status of Refugees, *supra* note 1, 19 U.S.T. at 6261, 189 U.N.T.S. at 152.

24. *Id.*

25. Protocol Relating to the Status of Refugees, *supra* note 1.

26. Convention Relating to the Status of Refugees, *supra* note 1, arts. 2–34, 19 U.S.T. at 6264–76, 189 U.N.T.S. at 156–76.

27. Protocol Relating to the Status of Refugees, *supra* note 1, 19 U.S.T. at 6225, 606 U.N.T.S. at 268–69.

28. The Protocol has 145 states parties. *Status of the United Nations Protocol Relating to the Status of Refugees*, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/home.aspx> (follow “Status of Treaties (MTDSG)” hyperlink; then follow “CHAPTER V” hyperlink; then follow “Protocol relating to the Status of Refugees. New York, 31 January 1967” hyperlink) (last visited Jan. 5, 2011). The United States is one of only a handful of states that is party to the Protocol but not the Convention (most states are party to both). Given the cross-referential relationship between the Protocol and Convention, this Article will use the terms “Convention” and “Protocol” interchangeably when referring to the United States’ international refugee law obligations.

29. Article 33(1) of the Convention provides: “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Convention Relating to the Status of Refugees, *supra* note 1, 19 U.S.T. at 6276, 189 U.N.T.S. at 176.

customary international law.³⁰ The protection against refoulement may only be withdrawn under the limited circumstances set forth in Article 33(2) of the Convention, namely when a person presents a threat to national security or to the safety of the community.³¹ Article 1F of the Convention excludes individuals from refugee status if there are “serious reasons for considering” that the individual has previously committed certain heinous acts.³²

2. *Congress Intended Congruence: Domestic Implementation of the Convention via the Refugee Act.* In 1980, Congress passed the Refugee Act,³³ which amended the Immigration and Nationality Act of 1952 (INA).³⁴ Unlike most other areas of law,³⁵ the legislative

30. See, e.g., Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, Dec. 12–13, 2001, *Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶ 4, U.N. Doc. HCR/MMSP/2001/09 (Jan. 16, 2002) (noting “the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law”); see also ELIHU LAUTERPACHT & DANIEL BETHLEHEM, *THE SCOPE AND CONTENT OF THE PRINCIPLE OF NON-REFOULEMENT: OPINION* ¶ 216, at 149 (2003), available at <http://www.unhcr.org/publ/PUBL/419c75ce4.pdf> (“[N]on-refoulement must be regarded as a principle of customary international law.”); AM. SOC’Y OF INT’L LAW, *THE MOVEMENT OF PERSONS ACROSS BORDERS* 123 (Louis B. Sohn & Thomas Buergenthal eds., 1992) (“[*Nonrefoulement*] has become a rule of customary international law, a generally accepted principle.”). For the application of principles of statutory construction to the nonrefoulement obligation as customary international law, see *infra* note 234.

31. Convention Relating to the Status of Refugees, *supra* note 1, 19 U.S.T. at 6276, 189 U.N.T.S. at 176. Under the Convention framework, the exceptions to the nonrefoulement obligation under Article 33 are invoked, if applicable, after an individual has been determined to be a refugee. These exceptions were intended to be construed narrowly. See *infra* note 76 and accompanying text.

32. Convention Relating to the Status of Refugees, *supra* note 1, 19 U.S.T. at 6263–64, 189 U.N.T.S. at 156. In contrast to Article 33, under the international framework these were intended to be considered at the time of the initial assessment of whether an individual satisfies the refugee definition. U.S. law does not reflect this distinction, instead grouping the Article 33(2) exceptions and Article 1F exclusionary clauses together.

33. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

34. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2006)).

35. One important exception is legislation and regulations governing relief from removal based on the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which reflect similar congressional intent to conform U.S. law with the nation’s international obligations under that convention. The United States Senate advised and consented to the ratification of CAT on October 27, 1990. 136 CONG. REC. 36,192–99 (1990). In 1998, Congress implemented the United States’ obligations under CAT into domestic law, through the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, div. G, § 2242, 112 Stat. 2681, 2681-761, -822 (codified at 8 U.S.C. § 1231

history of the Refugee Act explicitly acknowledges congressional intent to bring the domestic laws of the United States into full conformity with the nation's international obligations under the Protocol, specifically with respect to Article 1 (refugee status) and Article 33 (nonrefoulement) of the Convention.³⁶ The House Judiciary Committee described the amendments as necessary “so that U.S. statutory law clearly reflects our legal obligations under international agreements.”³⁷ The Committee determined that it was “both necessary and desirable that United States domestic law include [Article 33 of the Convention]” in the withholding of deportation provision, and that it was “desirable, for the sake of clarity, to conform the language of that section to the Convention.”³⁸ In this respect, the Refugee Act is one of a small number of incorporative statutes that directly incorporate international treaty language and concepts into U.S. domestic law.³⁹

note). In enacting FARRA, Congress elected to give U.S. obligations under CAT “wholesale effect” under U.S. domestic law. *See* *Medellín v. Texas*, 128 U.S. 1346, 1365 (2008) (noting that FARRA “direct[s] the ‘appropriate agencies’ to ‘prescribe regulations to implement the obligations of the United States under Article 3’ of” CAT (quoting 8 U.S.C. § 1231 note)); *see also* *Silva-Rengifo v. Att’y Gen.*, 473 F.3d 58, 68 (3d Cir. 2007) (“FARRA implements U.S. obligations under CAT.”). Indeed, section 2242(f)(2) of FARRA explicitly states that “the terms used in this section have the meanings given those terms in the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.” FARRA § 2242(f)(2), 112 Stat. at 2681-823. Arguments concerning the application of international law to the interpretation of asylum provisions may thus apply equally to the torture protection provisions of the immigration statute.

36. *See* Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 40-41, 60 (1981) (noting that the U.S. definition of refugee “adopted the UN definition,” and that the statute as a whole was drafted while considering U.S. “obligations under the Protocol”).

37. H.R. REP. NO. 96-608, at 18 (1979).

38. *Id.* Congress gave numerous other indications of its intent to conform the Refugee Act with U.S. obligations under the Convention. *See* H.R. REP. NO. 96-781, at 19-20 (1980) (Conf. Rep.), *reprinted in* 1980 U.S.C.C.A.N. 160, 160-61 (adopting the “internationally-accepted definition of refugee contained in the U.N. Convention and Protocol” and noting that the withholding of removal provision is to be “construed consistent with the Protocol”); H.R. REP. NO. 96-608, at 9-10 (stating that the Act will “finally bring United States law into conformity with the internationally-accepted definition of the term ‘refugee’ set forth in the [Convention and Protocol]”); S. REP. NO. 96-256, at 4, 9 (1979) (stating that the Act’s refugee definition “will bring United States law into conformity with our international treaty obligations” and provide relief “to those who qualify under the terms of the United Nations Protocol”).

39. *See* John F. Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 VA. J. INT’L L. 655, 659 (2010) (mentioning the Refugee Act as an example of an incorporative statute). Professor Coyle observes that in addition to the Refugee Act, other examples of “incorporative statutes” may be found in conservation law, intellectual property law, arbitration law, maritime

The Supreme Court has, on multiple occasions, confirmed the derivative relationship between U.S. obligations under the Protocol and the Refugee Act's asylum and withholding of removal provisions. In the foundational case of *INS v. Cardoza-Fonseca*, the Court affirmed that it is "clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, . . . that one of Congress' primary purposes was to bring United States refugee law into conformance with the [Protocol]."⁴⁰ In drawing this conclusion, the Court considered not only Congress's virtually verbatim adoption of the Protocol's definition of "refugee," but also the "many statements indicating Congress' intent that the new statutory definition of 'refugee' be interpreted in conformance with the Protocol's definition."⁴¹

The BIA has also recognized Congress's intent to conform domestic refugee law with U.S. obligations under the Protocol, and to "give 'statutory meaning to our national commitment to human rights and humanitarian concerns.'"⁴²

3. *The Domestic Refugee Law Framework.* Based on the Convention, the INA provides two alternative forms of relief from removal for noncitizens at risk of persecution: a permanent form of relief— asylum— or a more limited form of relief— withholding of removal, previously known as withholding of deportation. The language of the refugee definition and the withholding provision substantially mirrors Articles 1 and 33 of the Convention, respectively.⁴³

The Refugee Act included a new provision that gave the attorney general discretion to grant asylum to an individual who qualifies as a "refugee,"⁴⁴ based on the Protocol definition.⁴⁵ Asylum

transport law, and criminal law. *Id.* at 659 & nn.12–17. To date, this class of statutes has received curiously limited scholarly attention within the United States. *Id.* at 660.

40. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987).

41. *Id.* at 437.

42. *In re S-P-*, 21 I. & N. Dec. 486, 492 (B.I.A. 1996) (quoting S. REP. NO. 96-256, at 1).

43. Notably, the Convention does not distinguish between withholding of removal and asylum; it enjoins states from refouling any person who satisfies the refugee definition. Convention Relating to the Status of Refugees, *supra* note 1, 19 U.S.T. at 6276, 189 U.N.T.S. at 176.

44. 8 U.S.C. § 1158(a) (2006). Under the current version of the statute, the secretary of homeland security and the attorney general have discretion to grant asylum. 8 U.S.C. § 1158(b)(1)(A) (2006). The 1996 amendments to the provision via the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, 110

entitles a person to apply for lawful permanent resident status, which provides greater rights and benefits, including a pathway to eventual citizenship after one year of residence.⁴⁶ In addition to adding the asylum provision, the Refugee Act also amended the withholding of deportation provision⁴⁷ to reflect the nonrefoulement obligation under Article 33 of the Convention.⁴⁸ It became mandatory (as opposed to discretionary) for the attorney general to withhold deportation of a person who would otherwise be sent to a country in which her life or freedom would be threatened on account of a Convention ground.⁴⁹

As a practical matter, noncitizens generally apply for asylum and withholding of removal simultaneously as alternative requests for relief.⁵⁰ Noncitizens may apply for asylum affirmatively or defensively.⁵¹ A noncitizen files an affirmative application with the

Stat. 3009, 3009-546 (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C.), did not constrict the basic eligibility criteria for asylum contained in the “refugee” definition. *Id.* § 604, 110 Stat. at 3009-690 (codified as amended at 8 U.S.C. § 1158). IIRIRA did, however, impose significant procedural obstacles on asylum applicants, including a time limit of one year after entry to the United States (subject to limited exceptions) on applying under INA § 208(a)(2)(B) & (D), 8 U.S.C. § 1158(a)(2)(B) & (D). IIRIRA § 604, 104 Stat. at 3009-690 (codified as amended at 8 U.S.C. § 1158); *see also* Fitzpatrick, *supra* note 6, at 1–2 n.5 (noting that IIRIRA “imposes onerous procedural obstacles to asylum applicants, including a time limit on application of one year following entry, subject to exceptions for changed conditions or extraordinary circumstances”).

45. *See* INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (relying on the Protocol’s definition of a refugee as any person who “is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution”); Universal Declaration of Human Rights, *supra* note 22, at 74 (“Everyone has the right to seek and enjoy in other countries asylum from persecution. . . . [However, t]his right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.”).

46. Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102, 102-06, 105-06 (codified as amended in scattered sections of 8 U.S.C.).

47. The withholding of deportation provision, formerly codified as INA § 243(h), is now the “withholding of removal” statute at INA § 241(b)(3), 8 U.S.C. § 1231(b)(3).

48. *See, e.g.,* Sale v. Haitian Council Ctrs., Inc., 509 U.S. 155, 180 (1993) (noting that “Article 33.1 uses the words ‘expel or return (‘refouler’)’ as an obvious parallel to the words ‘deport or return’ in § 243(h)(1)”). For further discussion regarding congressional intent to implement U.S. obligations under Article 33 of the Convention via the withholding of removal statute, *see supra* Part I.A.2.

49. 8 U.S.C. § 1231(b)(3).

50. *See* 8 C.F.R. § 208.1–.4 (2010) (enumerating the rules for asylum and withholding of removal).

51. *See* Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501, 1506–07 (2010) (describing the procedures associated with affirmative and defensive asylum applications).

United States Citizenship and Immigration Services (USCIS), a branch of the Department of Homeland Security (DHS), if she is not involved in removal proceedings. A USCIS decision is subject to review by an immigration judge (IJ) within the Department of Justice's Executive Office for Immigration Review (EOIR).⁵² IJ decisions are, in turn, subject to review by the BIA.⁵³ A noncitizen who has already been placed in removal proceedings before an IJ may also file an asylum or withholding claim as a defense against removal. The IJ's decision on a defensive application is similarly reviewable by the BIA.⁵⁴ On rare occasions, the attorney general may review a BIA decision and substitute it with her opinion.⁵⁵

The BIA is an administrative body within the EOIR.⁵⁶ It consists of fifteen members appointed by the attorney general to act as the attorney general's delegates.⁵⁷ Following streamlining reforms in 2002,⁵⁸ IJ decisions may be "affirmed without opinion" (AWO) by a single BIA member.⁵⁹ A single BIA member may also provide a written opinion.⁶⁰ A small number of cases are adjudicated by a three-member panel when the BIA needs to reverse an IJ opinion, resolve inconsistencies among opinions, or establish new precedent.⁶¹ Only a limited number of BIA decisions rendered by a three-member panel

52. *Id.*

53. *See* 8 C.F.R. § 1003.1(b)(3) (giving the BIA appellate jurisdiction).

54. *See id.*

55. *See id.* § 1003.1(h) (providing for attorney-general review when the attorney general directs the BIA to refer the case and when either the chairman, the majority of the BIA, or the DHS secretary requests review).

56. *See id.* § 1003.1(a)(1) (detailing the organization of the BIA).

57. *Id.*

58. For a discussion of the deleterious implications of these reforms on the quality of BIA decisionmaking, see *infra* notes 294–98 and accompanying text.

59. *See* 8 C.F.R. § 1003.1(e)(4) ("The Board member to whom a case is assigned shall affirm the decision of the Service or the immigration judge, without opinion, if the Board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that (A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or (B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.").

60. *See id.* § 1003.1(e)(5) ("If [a BIA member] . . . determines . . . that [a] decision is not appropriate for [AWO], [the BIA member] shall issue a brief order affirming, modifying, or remanding the decision under review, [or can] designate[] the case for decision by a three-member panel . . .").

61. *Id.* § 1003.1(e)(6).

or by the board en banc are designated as precedential.⁶² The vast majority of the BIA's decisions are unpublished,⁶³ and its decisions are subject to limited judicial review by federal courts of appeals.⁶⁴

4. *Treaty Interpretation Methodology Applicable to the Convention.* Like domestic statutes, the text of Convention provisions may not always lend itself to a singular, clear interpretation. But such ambiguity does not mean courts cannot authoritatively determine a provision's meaning. Like domestic statutes, the meaning of terms in international treaties is derived by considering various interpretive sources according to established methodology and principles codified in the 1969 Vienna Convention on the Law of Treaties (Vienna Convention).⁶⁵ The Vienna Convention's approach to the interpretation of treaties has been recognized both by U.S. courts⁶⁶ and by the International Court of Justice (ICJ)⁶⁷ as embodying customary international law. A

62. See *id.* § 1003.1(g) (“By majority vote of the permanent Board members, selected decisions of the Board rendered by a three-member panel or by the Board en banc may be designated to serve as precedents in all proceedings involving the same issue or issues.”).

63. EOIR, U.S. DEP'T OF JUSTICE, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL 9 (2006), available at <http://www.justice.gov/eoir/vll/qapracmanual/apptmtn4.htm>.

64. See 8 U.S.C. § 1252 (2006); Baum, *supra* note 51, at 1507 (noting that the majority of BIA cases heard by federal courts of appeals have involved asylum claims since the 1996 amendments to the immigration laws foreclosed review of most other types of BIA decisions).

65. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331. These principles are necessarily oversimplified here; a detailed discussion of treaty interpretation theory is beyond the scope of this Article.

66. Although the United States is not a party to the Vienna Convention, see *Status of the United Nations Vienna Convention on the Law of Treaties*, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/home.aspx> (follow “Status of Treaties (MTDSG)” hyperlink; then follow “CHAPTER XXIII” hyperlink; then follow “Vienna Convention on the Law of Treaties. Vienna, 23 May 1969” hyperlink) (last visited Jan. 5, 2011), U.S. courts have “treat[ed] the Vienna Convention as an authoritative guide to the customary international law of treaties.” *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 309 (2d Cir. 2000). See generally Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 434 (2004) (noting that although the Senate has not ratified the Vienna Convention, “many lower federal and state courts apply the convention's treaty interpretation provisions routinely as customary international laws”); Maria Frankowska, *The Vienna Convention on the Law of Treaties Before the United States Courts*, 28 VA. J. INT'L L. 281, 286 (1988) (arguing that although the United States is not party to the Vienna Convention, the treaty is nonetheless an informative guide because it is “a restatement of customary rules, binding states regardless of whether they are parties to the convention”).

67. See, e.g., *Oil Platforms (Iran v. U.S.)*, Preliminary Objection, 1996 I.C.J. 803, 812 (Dec. 12) (stating that the Vienna Convention embodies “customary international law”); IAN ROBERTSON SINCLAIR, *VIENNA CONVENTION AND THE LAW OF TREATIES* 153 (1984) (“There

fundamental principle of treaty interpretation, frequently overlooked by U.S. judges,⁶⁸ is that treaty language has “no ‘ordinary meaning’ in the absolute or abstract.”⁶⁹ Article 31(1) of the Vienna Convention underscores that the “ordinary meaning” of a treaty provision is determined in context, and in light of the treaty’s object and purpose.⁷⁰

A key source for determining the object and purpose of a treaty is its preamble.⁷¹ In the case of the Convention, the first two paragraphs of the preamble underscore the rights-protective purpose of the treaty,⁷² referencing the United Nations’ concern that refugees enjoy the widest possible exercise of the fundamental rights and freedoms guaranteed to all people.⁷³ A second interpretive source is

is no doubt that Articles 31 to 33 of the [Vienna] Convention constitute a general expression of the principles of customary international law relating to treaty interpretation.”)

68. *Cf.* *Gonzalez v. Gutierrez*, 311 F.3d 942, 948 (9th Cir. 2002) (“Although in interpreting a treaty we begin with the text, we may look beyond the written words to other factors for interpretive guidance. Appropriate sources to consult include the purposes of the treaty, its drafting history, and its post-ratification understanding.” (citations omitted) (internal quotation marks omitted)). For further discussion, see *infra* Part I.B.2.

69. *Land, Island & Maritime Frontier Dispute (El Sal./Hond.: Nicar. intervening)*, 1992 I.C.J. 351, 719 (Sept. 11) (separate opinion of Bernárdez, J.) (“[D]ue account [must] be taken of . . . various interpretive principles and elements, and not only of [the] words or expressions used in the interpreted provision[s] taken in isolation.”).

70. Vienna Convention on the Law of Treaties, *supra* note 65, 1155 U.N.T.S. at 340 (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”). Despite this most basic rule of treaty interpretation, “literalism continues to have real appeal, particularly to governments and courts anxious to simplify their own task, or to be seen to be making ‘more objective’ decisions.” JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 51 (2005).

71. The International Court of Justice regards the preamble to a treaty as “a principle and natural source from which indications can be gathered of a treaty’s objects and purposes.” *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.)*, 1991 I.C.J. 53, 142 (Nov. 12) (Weeramantry, J., dissenting); *see also* *Rights of Nationals of United States of America in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 176, 196 (Aug. 27) (relying on the preamble to interpret the object and purpose of a treaty); *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266, 282 (Nov. 20) (same).

72. In *Matter of S-P-*, 21 I. & N. Dec. 486 (B.I.A. 1996), the BIA recognized “the fundamental humanitarian concerns of asylum law.” *Id.* at 492. The BIA held that in enacting the Refugee Act, “Congress sought to bring the Act’s definition of ‘refugee’ into conformity with the [Protocol] and, in so doing, give ‘statutory meaning to our national commitment to human rights and humanitarian concerns.’” *Id.* (quoting S. REP. NO. 96-256, at 4 (1979)). This “approach is designed to afford a generous standard for protection in cases of doubt.” *Id.*; *cf.* *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 183 (1993) (considering the “humanitarian intent” of the Convention irrelevant to the construction of its provisions).

73. *Convention Relating to the Status of Refugees*, *supra* note 1, 19 U.S.T. at 6259, 189 U.N.T.S. at 150–52.

the historical record of the treaty's drafting, or *travaux préparatoires*,⁷⁴ which, in the case of the Convention, was carefully defined, approved by states, and published.⁷⁵ Statements by several of the Convention's drafters, including the U.S. delegate, indicate an expectation that the nonrefoulement obligation would be interpreted broadly and that its exceptions would be limited and construed narrowly.⁷⁶ This interpretation is also consistent with the general principle that exceptions to international human rights treaties must be interpreted narrowly.⁷⁷

Other sources of treaty interpretation include the interpretation of the treaty by other states parties,⁷⁸ the work of scholars on the treaty,⁷⁹ and, in the case of the Convention, the views of the UNHCR.⁸⁰ Although the UNHCR is not a centralized status-

74. Vienna Convention on the Law of Treaties, *supra* note 65, 1155 U.N.T.S. at 340. The ICJ has relied on the *travaux préparatoires* to fill textual voids. *See, e.g.,* Reservations to Convention on Prevention of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 21 (May 28) (taking into account the treaty's drafting history in construing its meaning). The ICJ has also relied on the *travaux préparatoires* to interpret treaty terms as a matter of first impression. *See, e.g.,* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, Judgment, 1984 I.C.J. 392, 406 (Nov. 26).

75. HATHAWAY, *supra* note 70, at 56.

76. For example, "[T]he United Kingdom delegate stated that 'the authors of [Article 33(2)] had sought to restrict its scope so as not to prejudice the efficiency of the article as a whole.'" Case Law, *Factum of the Intervenor United Nations High Commissioner for Refugees ("UNHCR") Suresh v. The Minister of Citizenship and Immigration; The Attorney General of Canada S.C.C. No. 27790 in the Supreme Court of Canada (On Appeal from the Federal Court of Appeal)*, 14 INT'L J. REFUGEE L. 141, 153 (2002). He noted that "[t]he power to expel [a refugee] would not, of course, be employed if it would endanger his life." *Id.* (first alteration in original). Similarly, the U.S. delegate stated that "it would be highly undesirable to suggest in the text of [Article 33] that there might be cases, even highly exceptional cases, where a man might be sent to death or persecution." *Id.* (alteration in original).

77. *See, e.g.,* Klass v. Germany, 28 Eur. Ct. H.R. (ser. A) ¶ 42 (1978) ("[A]n exception to a right guaranteed by the [European Convention on Human Rights] is to be narrowly interpreted.").

78. Vienna Convention on the Law of Treaties, *supra* note 65, 1155 U.N.T.S. at 330. *But see* HATHAWAY, *supra* note 70, at 73 ("[T]he Vienna Convention does not require deference to all state practice, but only to such practice as derives from a sense of legal obligation, rather than—as is most common in the human rights context—from state self-interest or expediency.").

79. Statute of the International Court of Justice art. 38(1)(d), June 26, 1945, 59 Stat. 1055, 1060, 3 Bevens 1153, 1187; *see also* Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980) (holding that "[t]he law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law'" (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160 (1820))).

80. The UNHCR is the U.N. agency mandated to provide international protection to refugees and, in particular, to supervise the application of treaties relating to refugees. Convention Relating to the Status of Refugees, *supra* note 1, 19 U.S.T. at 6259, 189 U.N.T.S. at 150; Protocol Relating to the Status of Refugees, *supra* note 1, 19 U.S.T. at 6223, 606 U.N.T.S. at

determination body, it promotes uniformity in state practice by issuing guidelines and opinions, including the seminal *Handbook on Procedures and Criteria for Determining Refugee Status (Handbook)*.⁸¹ In the United States, the UNHCR does not play a formal adjudicative or administrative role; however, it files amicus briefs and advisory opinions with U.S. courts on matters of international refugee law and Convention interpretation.⁸² The Supreme Court has noted that although nonbinding, the UNHCR *Handbook* “provides significant guidance in construing the Protocol, to which Congress sought to conform”⁸³ and that “[i]t has been widely considered useful in giving content to the obligations that the Protocol establishes.”⁸⁴ The BIA has similarly referenced the *Handbook* on numerous occasions when interpreting Convention provisions,⁸⁵ and the *Handbook* is cited

267. The Convention and Protocol explicitly require the commitment of states parties to cooperate with the UNHCR in the exercise of its functions and to facilitate the UNHCR’s duty to supervise the application of the Convention. Convention Relating to the Status of Refugees, *supra* note 1, 19 U.S.T. at 6259, 189 U.N.T.S. at 150; Protocol Relating to the Status of Refugees, *supra* note 1, 19 U.S.T. at 6223, 606 U.N.T.S. at 267.

81. OFFICE OF THE UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (1992); *see also* Fitzpatrick, *supra* note 6, at 13 n.79 (observing that “[t]he United States was among the states requesting the UNHCR to draft” the *Handbook*).

82. *See* Fitzpatrick, *supra* note 6, at 12 (“[T]he formal role of the UNHCR in the application of refugee law in the United States is rather marginal.”).

83. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987); *see also* M.A. A26851062 v. *INS*, 858 F.2d 210, 214–15 n.3 (4th Cir. 1988) (stating that “[w]e assume that Congress was aware of the criteria articulated in the Handbook when it passed the [Refugee] Act in 1980, and that it is appropriate to consider the guidelines in the Handbook as an aid to construction of the Act” (citing *U.S. Refugee Program: Oversight Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the H. Comm. on the Judiciary*, 97th Cong. 24, 26 (1981) (memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, to David Crossland, General Counsel, INS))).

84. *Cardoza-Fonseca*, 480 U.S. at 439 n.22.

85. *See In re T-Z-*, 24 I. & N. Dec. 163, 172 n.9, 172–73 (B.I.A. 2007) (using the *Handbook* definition of persecution in defining the requisite level of economic harm to constitute persecution); *In re S-A-*, 22 I. & N. Dec. 1328, 1334 (B.I.A. 2000) (citing the *Handbook* for the overarching principle of “the fundamental humanitarian concerns of asylum law”); *In re N-M-A-*, 22 I. & N. Dec. 312, 324 (B.I.A. 1998) (using the *Handbook* to define the well-founded fear of persecution in the context of regime change, and establishing an exception to the cessation provision under 8 C.F.R. § 208.13(b)(1)(ii) (1998) which “mirror[ed] the language of Article 1C(5) of the 1951 Convention”); *In re S-M-J-*, 21 I. & N. Dec. 722, 725 (B.I.A. 1997) (referencing the *Handbook* to interpret the context of an asylum applicant’s statements, and establishing what benefit the BIA should accord to an applicant’s statements); *see also In re Y-B-*, 21 I. & N. Dec. 1136, 1141 n.2 (B.I.A. 1998) (citing the *Handbook* as a guideline for how much information an adjudicator may require of an asylum applicant to confirm the factual aspects of a claim); *In re H-*, 21 I. & N. Dec. 337, 347 (B.I.A. 1996) (referencing the *Handbook*

throughout EOIR's Asylum Officer Basic Training Course materials.⁸⁶ But courts have also occasionally relied on the Supreme Court's observation that the *Handbook* is nonbinding to diminish its significance.⁸⁷ Beyond the *Handbook*, U.S. courts have displayed no coherency in their use of UNHCR views published elsewhere, relying on its advisory opinions or amicus briefs as an aid to treaty interpretation in some cases⁸⁸ and simply ignoring its views in others.⁸⁹ The courts of other countries have confirmed that later UNHCR sources, such as the Conclusions of its Executive Committee, are "of considerable persuasive authority."⁹⁰ Some scholars argue that despite the dismissive attitude of U.S. courts, they have a *legal* obligation

as support for the assertion that "central to a discretionary finding in past persecution cases should be careful attention to compelling, humanitarian considerations that would be involved if the refugee were to be forced to return to a country where he or she was persecuted in the past"); *In re R-*, 20 I. & N. Dec. 621, 625–26 (B.I.A. 1992) (looking to the *Handbook* as evidence that a well-founded fear of persecution usually must exist on a countrywide basis); *In re Chen*, 20 I. & N. Dec. 16, 19 (B.I.A. 1989) (citing the *Handbook's* reference to a "general humanitarian principle" as evidence that victims of past persecution should in some cases be treated as refugees even when future persecution is not likely); *In re Fefe*, 20 I. & N. Dec. 116, 118 (B.I.A. 1989) (referencing the *Handbook's* guideline that, to demonstrate eligibility for asylum, an applicant usually must corroborate prior written statements with personal testimony); *In re Dass*, 20 I. & N. Dec. 120, 125 (B.I.A. 1989) (pointing to the *Handbook's* requirement that an asylum applicant's statements must be supported by relevant background information).

86. See, e.g., U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM OFFICER BASIC TRAINING COURSE, SOURCES OF AUTHORITY (2007), available at http://www.uscis.gov/files/article/AOBTC_Lesson_3_Sources_of_Authority.pdf. The course's "Introduction to the United Nations High Commissioner for Refugees (UNHCR) and Concepts of International Protection" Lesson (Mar. 1, 2005), available at http://www.rmscdenv.org/aobtc/UNHCR_ConceptsofIntlProtection.pdf, however, betrays the importance the USCIS attributes to international law, noting that "training on this lesson in [the Asylum Officer Basic Training Course] will be minimal and the contents of the lesson will not be tested." *Id.*

87. See *infra* notes 180–81 and accompanying text.

88. See, e.g., *Yusupov v. Att'y Gen.*, 518 F.3d 185, 203 n.30 (3d Cir. 2008) (citing UNHCR sources' interpretation of the term "danger" in Article 33.2 of the Protocol).

89. For example, in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), the majority flatly ignored the UNHCR's explanation of the language of Article 33 in its amicus brief, choosing instead to tortuously imply the opposite meaning—that the Protocol was not intended to govern parties' conduct outside of their national borders—into the UNHCR *Handbook*, which was silent on the question of the Protocol's extraterritorial application. *Id.* at 182 n.40; see also Fitzpatrick, *supra* note 6, at 14 ("While the UNHCR occasionally seeks to offer an authoritative interpretation of the Protocol as *amicus curiae* in major asylum cases, the courts have adopted no consistent response to the UNHCR's participation."). *But cf.* *Sale*, 509 U.S. at 197 n.8 (Blackmun, J., dissenting) ("The majority neglects to point out that the current High Commissioner for Refugees acknowledges that the Convention *does* apply extraterritorially.").

90. N.Z. Refugee Status Appeals Auth., *Refugee Appeal No. 1/92 Re SA*, UNITED NATIONS HIGH COMM'R FOR REFUGEES (Apr. 30, 1992), <http://www.unhcr.org/refworld/docid/3ae6b73d8.html>.

under the Protocol to take those sources into account because, although not legally binding, they are considered authoritative and may not be dismissed by domestic courts without justification.⁹¹

Accordingly, just as numerous statutory interpretative canons exist to guide U.S. courts through the complexities and ambiguities of the U.S. Code, there are a set of interpretive principles and sources available to U.S. courts to determine the content of U.S. obligations under international law and the meaning of international treaty terms. Given the binding nature of U.S. refugee treaty obligations and the availability of these interpretive tools, there appears to be little justification for courts' tendency to disregard international refugee law based on the apparent ambiguity of treaty language.⁹²

B. According Deference to BIA Interpretations Regardless of Inconsistency with the Convention

1. *The Chevron Doctrine.* For almost a quarter century, federal courts have reviewed administrative agency decisions in light of the deference principles established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*⁹³ The Supreme Court has held that the *Chevron* deference framework applies to the BIA's interpretation of asylum provisions of the INA.⁹⁴ *Chevron* has been the source of a vast body of scholarship⁹⁵ and has been described as "the Court's most important decision about the most important issue in modern

91. For example, Professor Walter Kälin argues that

as part of States Parties' duty to cooperate with UNHCR and to accept its supervisory role under Article 35 of the 1951 Convention and article II of the 1967 Protocol, they have to take into account Executive Committee Conclusions, the UNHCR *Handbook*, UNHCR guidelines, and other UNHCR positions on matters of law (for example *amicus curiae* and similar submissions to courts . . .), when applying the 1951 Convention and its Protocol.

Walter Kälin, *Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and Beyond*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 613, 627 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003).

92. For a discussion of this trend and how it may be addressed, see *infra* Parts I.B.2. and V.B.1., respectively.

93. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

94. See *Negusie v. Holder*, 129 S. Ct. 1159, 1164–65 (2009) ("[T]he BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'" (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999))); see also *infra* Part II.B–C.

95. See Note, *The Two Faces of Chevron*, 120 HARV. L. REV. 1562, 1562 (2007) (asserting that *Chevron* "has generated a substantial body of legal scholarship"—6,094 citations in law review articles by the author's count).

administrative law.”⁹⁶ The subject of much of that scholarship is beyond the scope of the present Article, which will focus specifically on the (mis)application of *Chevron*’s basic rationales and principles in the refugee context.

In *Chevron*, the Court considered what, if any, deference a reviewing court owes to an administrative agency’s interpretation of a statute that it administers.⁹⁷ The *Chevron* Court directed lower courts to employ a two-step approach in reviewing agency interpretations of acts of Congress to determine whether deference is owed.⁹⁸ First, courts must “employ[] traditional tools of statutory construction” to determine whether Congress expressed a clear intent as to the meaning of a statutory term.⁹⁹ When Congress has expressed itself clearly, “The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”¹⁰⁰ However, “if the statute is silent or ambiguous with respect to the specific issue,” the reviewing court proceeds to the second step, in which “the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”¹⁰¹

The second step was based on the Court’s controversial theory¹⁰² that Congress implicitly delegated to administrative agencies the authority to interpret any gaps in statutes that they administer relatively free from judicial interference.¹⁰³ The Court further justified

96. Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 809 (2002).

97. Specifically, the Court considered whether to defer to the Environmental Protection Agency’s (EPA) interpretation of the undefined term “stationary source,” which described the category of industrial plants that were subject to environmental restrictions under the Clean Air Act Amendments of 2007, Pub. L. No. 95-95, § 309, 91 Stat. 685, 781 (codified as amended at 42 U.S.C. § 7619 (2006)). The EPA had promulgated a regulation interpreting the term in a manner that would limit the kinds of plants that were subject to environmental restrictions. *See Chevron*, 467 U.S. at 840. The Court held that the EPA’s narrow interpretation was entitled to deference, *id.* at 865, overruling the Ninth Circuit’s decision to substitute the EPA’s interpretation with one more consistent with the statute’s perceived environmental purpose, *id.* at 841–42.

98. *Chevron*, 467 U.S. at 842–43.

99. *Id.* at 843 n.9.

100. *Id.*

101. *Id.* at 843.

102. *See, e.g., Kane, supra* note 6, at 535 (“[T]he [*Chevron*] Court created a fiction of implied Congressional delegation.”).

103. *See id.* (“The *Chevron* Court inferred this implicit delegation from the fact that Congress authorizes agencies in certain circumstances to make legally binding pronouncements through rulemaking or adjudication.”). More recently, the Court has cited the implied

deference based on the agency's particular expertise in a complex regulatory scheme, the lack of judicial expertise in the field, and the detailed fashion in which the agency had considered the issue in that case.¹⁰⁴ Additionally, the Court considered deference appropriate because, unlike courts, administrative agencies are politically accountable.¹⁰⁵ This attribute, the Court reasoned, was significant when agency decisions involve balancing conflicting policy interests, such as the considerations of economic growth versus environmental objectives that were implicated in the statute under consideration in *Chevron*.¹⁰⁶

2. *Deference to Unmoored BIA Interpretations—The “Particularly Serious Crime” Example.* Throughout the life of the Refugee Act, federal courts have routinely deferred under the *Chevron* doctrine to the BIA's interpretation of INA refugee provisions.¹⁰⁷ They have done so despite the fact that the BIA's interpretations are rarely derived from or reconciled with analyses of corresponding Convention provisions under international law, and as a result, sometimes conflict with them. To the extent that courts consider the Convention at all, they generally either interpret *Chevron* to mean that BIA interpretations trump interpretations of Convention provisions under international law, or they find that when

delegation theory as the primary reason for according deference to statutory interpretation by an administrative agency. See *Negusie v. Holder*, 129 S. Ct. 1159, 1167 (2009) (“[A]mbiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.” (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005))).

104. *Chevron*, 467 U.S. at 863, 865.

105. *Id.* at 864–66. The Court acknowledged that agencies are not directly accountable to the people, but found it sufficient that the chief executive is accountable. *Id.* at 865.

106. *Id.* at 863.

107. Kane, *supra* note 6, at 516 (“Our courts too often misread the Supreme Court's decision in *Chevron* as tying the Judiciary's hands in refugee protection cases.”). Routine deference to the BIA is not unique to refugee cases. Federal courts have been criticized for excessive deference to the BIA's interpretation of immigration provisions across the board. See, e.g., Maureen B. Callahan, *Judicial Review of Agency Legal Determinations in Asylum Cases*, 28 WILLAMETTE L. REV. 773, 775 (1992) (asserting that in immigration cases, courts frequently apply “an unduly deferential standard of review to agency legal determinations”); Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 530 (2003) (“In immigration cases, . . . many claim that the Court is too deferential to interpretations made by the Attorney General.”). Excessive deference is also common in appellate court review of the BIA's application of law to facts. See, e.g., *Mejilla-Romero v. Holder*, 600 F.3d 63, 92 (1st Cir. 2010) (Stahl, J., dissenting) (“In my view, this court has allowed the standard of review in asylum cases to become an ever more impermeable barrier to any meaningful appellate review.”).

the meaning of a Convention provision is not clear on its face, then congressional intent is ambiguous and the BIA's "reasonable" construction deserves deference.

An emblematic example of this problem is the widespread deference federal courts have given to the BIA's interpretation of the bar on eligibility for withholding of removal for individuals who pose a danger to the community. Section 241(b)(3)(B)(ii) of the INA provides that a person is ineligible for withholding of removal if she, "having been convicted by a final judgment of a particularly serious crime[,] is a danger to the community of the United States."¹⁰⁸ This bar, enacted via the Refugee Act, implements one of the two exceptions to protection against refoulement under Article 33(2) of the Convention¹⁰⁹ and directly mirrors the language of Article 33(2).¹¹⁰ There is relative consensus among the UNHCR,¹¹¹ leading refugee law scholars,¹¹² and the courts of other countries such as Canada¹¹³ and

108. 8 U.S.C. § 1231(b)(3)(B)(ii) (2006).

109. The first version of the provision was codified at 8 U.S.C. § 1253(h) (1988). There have been three subsequent amendments to the definition of a "particularly serious crime" beyond the Convention definition. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, § 305(3), 110 Stat. 3009-546, 3009-602 (codified as amended at 8 U.S.C. § 1231 (2006)) (establishing the statute's current form, which categorically bars aggravated felons sentenced to five years or more of imprisonment); Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 413(f), 110 Stat. 1214, 1269 (codified as amended at 8 U.S.C. § 1253(h)) (relaxing the categorical bar to comply with U.S. obligations under the Protocol); Immigration Act of 1990, Pub. L. No. 101-649, § 515, 104 Stat. 4978, 5053 (codified as amended at 8 U.S.C. § 1158) (establishing a categorical bar to withholding of removal for individuals convicted of an aggravated felony). For a further discussion of AEDPA and its modifications to comply with the Protocol, see *Delgado v. Holder*, 563 F.3d 863, 869 (9th Cir. 2009).

110. *See* Convention Relating to the Status of Refugees, *supra* note 1, 19 U.S.T. at 6276, 189 U.N.T.S. at 176.

111. *See* UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION: APPLICATION OF THE EXCLUSION CLAUSES: ARTICLE 1F OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES ¶¶ 2, 4 (2003) ("[Article] 33(2) . . . deal[s] . . . [with] the withdrawal of protection from *refoulement* from . . . recognised refugees who pose a danger to the host State (for example, because of serious crimes they have committed there).").

112. *See, e.g.,* ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 234 (1966) (emphasizing that Article 33(2) "can clearly not refer to a past danger, but only to a present or future danger"); LAUTERPACHT & BETHLEHEM, *supra* note 30, ¶ 147, at 129 (indicating that the exception "hinges on an appreciation of a *future* threat from the person concerned rather than on the commission of some act in the past").

113. *Pushpanathan v. Canada* (Minister of Citizenship & Immigration), [1998] 1 S.C.R. 982, para. 12 (Can.) (finding that a government must "make the added determination that the person poses a danger to the safety of the public or to the security of the country . . . to justify *refoulement*").

the United Kingdom¹¹⁴ that Article 33(2) requires two distinct determinations: first, a finding that the person seeking refugee protection has been convicted by a final judgment of a “particularly serious crime” and, second, a subsequent individualized, *prospective* assessment of whether the refugee constitutes a future danger to the community.¹¹⁵ Although the BIA’s early interpretation of the danger-to-the-community bar required a separate determination of dangerousness,¹¹⁶ the BIA has held since its 1986 decision in *Matter of Carballe*¹¹⁷ that the individualized assessment of actual dangerousness is not necessary.¹¹⁸ Thus, according to the BIA, a person may be refouled on the basis of a previous offense alone, even if the individual poses no current or future threat to community safety.¹¹⁹ The BIA’s single-paragraph statutory interpretation in *Matter of Carballe* makes no mention of the Convention.¹²⁰

Courts of appeals in seven circuits¹²¹ have, applying the *Chevron* doctrine, deferred to the BIA’s interpretation in *Matter of Carballe*

114. *R v. Sec’y of State for the Home Dep’t*, [2006] EWHC 3513 (Eng. Q.B.) (noting the policy that the government must consider whether a noncitizen has been convicted of a particularly serious crime and whether that noncitizen poses a danger to the community).

115. *See supra* notes 111–14.

116. *See In re Frentescu*, 18 I. & N. Dec. 244, 247 (B.I.A. 1982) (“In judging the seriousness of a crime, we look to such factors as . . . whether the type and circumstances of the crime indicate that the alien will be a danger to the community.”), *superseded by statute on other grounds*, 8 U.S.C. § 1253(h) (1990), *as recognized in Afridi v. Gonzales*, 442 F.3d 1212, 1220 n.4 (9th Cir. 2006).

117. *In re Carballe*, 19 I. & N. Dec. 357 (B.I.A. 1986).

118. *Id.* at 360 (“[A]liens who have been finally convicted of particularly serious crimes are presumptively dangers to this country’s community.”).

119. *See, e.g., id.* (“The phrase ‘danger to the community’ is an aid to defining a ‘particularly serious crime,’ not a mandate that administrative agencies or the courts determine whether an alien will become a recidivist.”).

120. *Id.* The paragraph follows a description of two arguments advanced by the Immigration and Naturalization Service in favor of its construction, namely the absence of the word “and” between the two parts of the provision (omitting the fact that Article 33(2) is identically worded) and the fact that the House Judiciary Committee Report notes that the exception is intended for “aliens . . . who have been convicted of particularly serious crimes *which* make them a danger to the community.” *Id.* at 359–60 (quoting H.R. REP. NO. 96-608, at 17 (1979)). The BIA did not consider any other aspect of the Refugee Act’s legislative history, including Congress’s intent to implement the Protocol.

121. The Second Circuit noted in *Ahmetovic v. INS*, 62 F.3d 48 (2d Cir. 1995), that this “interpretation conflating the two requirements has been accepted by every circuit that has considered the issue.” *Id.* at 53 (collecting cases); *see also* *Yousefi v. INS*, 260 F.3d 318, 327–28 (4th Cir. 2001) (deferring to the BIA’s construction of § 1231); *Choeum v. INS*, 129 F.3d 29, 42–43 (1st Cir. 1997) (same); *Hamama v. INS*, 78 F.3d 233, 240 (6th Cir. 1996) (same); *Al-Salehi v. INS*, 47 F.3d 390, 393 (10th Cir. 1995) (same); *Garcia v. INS*, 7 F.3d 1320, 1323 (7th Cir. 1993) (same); *Martins v. INS*, 972 F.2d 657, 661 (5th Cir. 1992) (same).

and subsequent cases.¹²² For example, in *Choeum v. INS*,¹²³ the petitioner argued before the First Circuit that Congress intended the provision to comply with U.S. obligations under the Protocol, which, according to an opinion by the UNHCR Representative, requires a separate dangerousness determination.¹²⁴ Applying *Chevron*, the court dismissed the petitioner's arguments, holding that "where the statute is ambiguous, and the BIA has offered a reasonable interpretation of its provisions, it would be improper for this court to substitute the advisory opinion of an international body for the reasoned judgment of the domestic administrative agency with primary responsibility for administering the statute."¹²⁵ In a similar case, the Second Circuit admitted it was troubled by the BIA's failure to give separate consideration to petitioner's actual dangerousness based on the plain language of the statute.¹²⁶ It deferred to the BIA, however, on the basis of the ambiguity of the statutory language and its understanding that *Chevron* prohibited it from substituting its own construction for that of an administrative agency.¹²⁷ The court cursorily dismissed the petitioner's "arguments concerning international treaty law" as without merit.¹²⁸

In contrast, the Seventh Circuit was willing to consider the views of international law scholars on Article 33(2) but found that the "uncertainty" as to a resolved consensus position under international law warranted deference to the BIA.¹²⁹ The Sixth Circuit also recognized the "particularly serious crime" exception as the codification of U.S. obligations under the Protocol, but similarly found that because neither the Protocol nor the UNHCR *Handbook*

122. Subsequent BIA decisions have addressed later versions of the bar enacted through the AEDPA and IIRIRA amendments described in note 109, *supra*.

123. *Choeum v. INS*, 129 F.3d 29 (1st Cir. 1997). *Choeum* concerned the BIA's decision in *Matter of Q-T-M-T-*, 21 I. & N. Dec. 639 (B.I.A. 1996), which held that § 413(f) did not require a separate dangerousness requirement, despite the fact that the provision explicitly referenced the Protocol. *Id.* at 645–47.

124. *Choeum*, 129 F.3d at 42.

125. *Id.* at 43.

126. *Ahmetovic*, 62 F.3d at 52.

127. *Id.* at 53. The court also based its decision on the unanimity of other circuits and "the seeming intent of Congress," which it derived solely from the single sentence in the House Judiciary Committee Report that the BIA cited in *Matter of Carballe*. *Id.* (citing H.R. REP. NO. 96-608, at 18 (1979)); *see also supra* note 120 and accompanying text.

128. *Ahmetovic*, 62 F.3d at 53.

129. *Garcia v. INS*, 7 F.3d 1320, 1325–26 (7th Cir. 1993).

defines the term, Congress did not express clear intent as to its meaning.¹³⁰

In the most recent case to consider the provision, *N-A-M v. Holder*,¹³¹ the UNHCR and three leading refugee law scholars filed amicus curiae briefs in the Tenth Circuit, drawing the court's attention to the widely accepted interpretation of Article 33(2) that conflicts with the BIA's construction.¹³² The court held that amici's arguments came too late in the day: "Although N-A-M and the distinguished amici make strong arguments that the BIA is not accurately interpreting the statute and its treaty-based underpinnings, we are constrained by our precedent to hold otherwise."¹³³ With this decision, the court upheld its earlier decision in *Al-Salehi v. INS*,¹³⁴ which accorded deference under *Chevron* to *Matter of Carballé* on the basis of the statute's "uncertain" language.¹³⁵ Notably, the *Al-Salehi* court did not dispute the petitioner's argument that legislative intent to abrogate or modify a treaty must be clearly expressed.¹³⁶ It deferred to the BIA's interpretation, however, because it found the language of Article 33(2) equally ambiguous, and the petitioner did not cite any international authority to dispel this ambiguity.¹³⁷

In each case, the circuit court deferred to the BIA's construction of the statute despite its inconsistency with at least one interpretive source for the Convention (or in some cases, multiple interpretive sources). The various reasons given—the BIA trumps UNHCR;¹³⁸ international law is irrelevant;¹³⁹ the lack of treaty interpretation consensus warrants BIA deference;¹⁴⁰ ambiguity in the treaty's plain language equals ambiguity in congressional intent;¹⁴¹ the asylum seeker bears the burden of clarifying ambiguity in treaty¹⁴²—reflect a lack of any systematic approach toward the treaty, as well as a

130. *Hamama v. INS*, 78 F.3d 233, 239 (6th Cir. 1996).

131. *N-A-M v. Holder*, 587 F.3d 1052 (10th Cir. 2009).

132. Deborah Anker, Guy S. Goodwin-Gill, and James C. Hathaway filed a joint brief as amicus curiae. *Id.* at 1053.

133. *Id.* at 1057.

134. *Al-Salehi v. INS*, 47 F.3d 390 (10th Cir. 1995).

135. *Id.* at 393–94.

136. *Id.* at 395.

137. *Id.*

138. *See supra* text accompanying notes 123–25.

139. *See supra* text accompanying notes 126–28.

140. *See supra* text accompanying notes 129–30.

141. *See supra* text accompanying note 130.

142. *See supra* cases cited notes 131–37.

fundamental discomfort with the task of interpreting it. Under the hazy cover of *Chevron*, each court sidestepped the task of meaningfully reconciling the BIA's construction with congressional intent that the statute comport with U.S. obligations under Article 33.

II. SUPREME COURT JURISPRUDENCE ON *CHEVRON* AND THE CONVENTION

The Supreme Court has addressed the construction of the Refugee Act on very few occasions, especially compared with the almost fifty thousand asylum claims immigration courts receive each year.¹⁴³ It has directly interpreted the asylum provisions using the *Chevron* framework in three key cases: *INS v. Cardoza-Fonseca* in 1987, *INS v. Aguirre-Aguirre* in 1999, and *Negusie v. Holder* in 2009. These cases demonstrate the Court's lack of a coherent approach to the role of the Convention in establishing the construction of domestic asylum provisions or of any consistent methodology for interpreting the treaty's terms. On the one hand, the absence of a well-defined or sophisticated approach to the interpretation of international refugee law is troubling, particularly to the extent it represents a broader antipathy toward international and foreign law. But the incoherence also presents an opportunity, leaving open the possibility that the Court could establish a line of jurisprudence that reflects a proper commitment to compliance with international law.

A. *Cardoza-Fonseca: Defining a Path*

In *Cardoza-Fonseca*, Justice Stevens wrote one of the Court's most significant opinions supporting a limited reading of *Chevron*, which he had authored three years earlier.¹⁴⁴ *Cardoza-Fonseca* concerned the evidentiary standard for a "well founded fear of persecution" that applicants must demonstrate to be eligible for asylum under INA § 208(a).¹⁴⁵ It came three years after the Court's

143. In 2008, immigration courts received 47,459 asylum claims (affirmative and defensive); they received over 55,000 claims in 2006 and in 2007. EOIR, U.S. DEP'T OF JUSTICE, FY 2008 STATISTICAL YEAR BOOK, at I1 (2009), available at [http://pards.org/eoir/EOIR_2008_Statistical_Year_Book_\(March_2009\)__\(PDF_-_483KB\).pdf](http://pards.org/eoir/EOIR_2008_Statistical_Year_Book_(March_2009)__(PDF_-_483KB).pdf).

144. As one of the Court's first opportunities to grapple with the application of *Chevron* beyond the EPA, *Cardoza-Fonseca* was a landmark decision both within and outside the immigration context.

145. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987).

much-criticized decision in *INS v. Stevic*,¹⁴⁶ in which the Court had established a heightened evidentiary standard for withholding of removal based on pre-1986 jurisprudence, rather than on the new “well-founded fear of persecution” standard in the Protocol.¹⁴⁷ In *Cardoza-Fonseca*, the government argued that the asylum evidentiary standard should conform with the more stringent “clear probability of persecution” standard that the *Stevic* Court established for withholding of removal.¹⁴⁸ The majority in *Cardoza-Fonseca* rejected the government’s position, instead embracing the Convention-based approach advanced by the petitioner, UNHCR, and other amici, which only required that an applicant demonstrate a “well founded fear of persecution.”¹⁴⁹ The Court declined to defer under *Chevron* to the BIA’s inconsistent construction.¹⁵⁰

Cardoza-Fonseca limited *Chevron* in three significant ways. First, it cabined (somewhat artificially¹⁵¹) the applicability of deference requirements to those BIA decisions that fill statutory gaps as distinct from those that address pure issues of statutory construction. The majority rejected the immigration agency’s request for heightened deference on the basis that “[t]he question whether Congress intended the [asylum and withholding] standards to be identical is a pure question of statutory construction for the courts to decide.”¹⁵² It distinguished these types of statutory construction questions from the “process of case-by-case adjudication”¹⁵³ through which an agency

146. *INS v. Stevic*, 467 U.S. 407 (1984). For a critique of *Stevic*, see, for example, Fitzpatrick, *supra* note 6, at 9, which notes *Stevic*’s “corrosive effect.”

147. *Stevic*, 467 U.S. at 429–30. Ironically, in *Stevic*, the government argued that the asylum and withholding of removal standards could be different (and that the withholding standard need not be as generous as the asylum standard). *Id.* at 413–14.

148. *Cardoza-Fonseca*, 480 U.S. at 430. In *Stevic*, decided pre-*Chevron*, the Court addressed the standard for withholding of deportation under INA § 243(h). *Stevic*, 467 U.S. at 409. *Stevic* (and numerous amici curiae, including the UNHCR) argued that the standard ought to turn on the definition of “refugee” under the Protocol, which governs Article 33’s prohibition against refoulement to which the domestic withholding statute corresponds. *Id.* at 413–14. Although the practical import of the distinction between a “well founded fear of persecution” and a “clear probability of persecution” is minor, the Court’s refusal to adopt the treaty standard placed U.S. jurisprudence at odds with international refugee law, and it remains so to this day. See Fitzpatrick, *supra* note 6, at 8–9.

149. *Cardoza-Fonseca*, 480 U.S. at 449.

150. *Id.* at 445–46.

151. The malleability of this distinction is borne out by its subsequent application in *Aguirre-Aguirre* and *Negusie*. See *infra* notes 221–25 and accompanying text.

152. *Cardoza-Fonseca*, 480 U.S. at 446.

153. *Id.* at 448.

applies a standard to particular facts, filling “any gap left, implicitly or explicitly, by Congress.”¹⁵⁴ If an issue can be defined as a question of statutory construction, “the judiciary is the final authority . . . and must reject administrative constructions which are contrary to clear congressional intent.”¹⁵⁵ The majority distinguished *Chevron* because it involved an agency’s complex policy judgment about how to fill a statutory gap, not a pure question of statutory construction.¹⁵⁶

The second significant aspect of the Court’s opinion in *Cardoza-Fonseca* is its use of treaty interpretation principles to determine the meaning of undefined Convention language. Specifically, the Court discerned the relevant standards under the Convention by consulting statements of the drafters of the provision, the documents adopting it,¹⁵⁷ and the views of “scholars who have studied the matter.”¹⁵⁸ It relied on the UNHCR *Handbook*, recognizing it as an important guide in defining U.S. obligations under the Protocol.¹⁵⁹ Significantly, the Court described its interpretive methodology and use of the Protocol as an “ordinary canon[] of statutory construction.”¹⁶⁰ Justice Blackmun wrote a short concurrence in which he proclaimed that the Court had not only construed the asylum statute in light of the Protocol but had also ruled on the appropriate interpretive sources and methodology that the BIA should apply.¹⁶¹ He emphasized the Protocol’s “rich history of interpretation in international law and

154. *Id.* (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

155. *Id.* at 447–48 (quoting *Chevron*, 467 U.S. at 843 n.9).

156. *See id.* at 445 & n.29, 446–48 (quoting extensively from *Chevron*); *see also* *Negusie v. Holder*, 129 S. Ct. 1159, 1172 n.4 (2009) (Stevens, J., concurring in part and dissenting in part) (discussing the Court’s clear rejection of Justice Scalia’s position in *Cardoza-Fonseca*).

157. *Cardoza-Fonseca*, 480 U.S. at 438 (citing the United Nations, Econ. & Soc. Council, *Report of the Ad Hoc Committee on Statelessness and Related Problems*, 39, U.N. Doc. E/1618, E/AC.32/5 (Feb. 17, 1950)).

158. *Id.* at 439–40, 440 n.24 (citing GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 22–24 (1983); GRAHL-MADSEN, *supra* note 112, at 181).

159. *Id.* at 438–39 (citing OFFICE OF THE UNHCR, *supra* note 81). The Court found that “the Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform,” and observed that “[i]t has been widely considered useful in giving content to the obligations that the Protocol establishes.” *Id.* at 439 n.22 (citing use of the *Handbook* by lower courts and the BIA). The Court cautioned, however, that the *Handbook* does not have independent force of law or bind the executive. *Id.*

160. *Id.* at 449. The Court found the interpretation of the Protocol—along with the plain language and legislative history of the Refugee Act—“compelling, even without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.” *Id.*

161. *Id.* at 450–52 (Blackmun, J., concurring).

scholarly commentaries” that “should be significant in the agency’s formulation” of the relevant standard alongside any relevant domestic sources.¹⁶² Lower courts should be applying the same canons of statutory construction identified in *Cardoza-Fonseca* when interpreting statutes that incorporate international treaties. As the cases discussed in the previous Part demonstrate, however, lower courts have rarely used *Cardoza-Fonseca* as a methodological guide.¹⁶³

Finally, the Court gave lower courts license to look to the legislative history of the Refugee Act to determine whether Congress expressed an intention about the statute’s meaning that was contrary to its plain language.¹⁶⁴ In determining congressional intent, the Court considered “particularly compelling . . . the abundant evidence of an intent to conform the definition of ‘refugee’ and our asylum law to the United Nations Protocol”¹⁶⁵ and concluded that “[i]t is thus appropriate to consider what the phrase ‘well-founded fear’ means with relation to the Protocol.”¹⁶⁶ This largely overlooked aspect of the majority opinion arguably provides support for lower courts to resolve, under the first step of *Chevron*, any “pure question[s] of statutory construction”¹⁶⁷ concerning a Refugee Act provision in conformity with clear congressional intent to comply with the Convention.¹⁶⁸

Although the Court’s decisions since *Cardoza-Fonseca* have blurred *Chevron*’s limitations and diluted the significance of the Convention, the key principles established in *Cardoza-Fonseca*

162. *Id.* at 451.

163. *See supra* Part I.B.2.

164. *Cardoza-Fonseca*, 480 U.S. at 432 n.12 (stating that even if the language of a statute appears clear on its face, courts should nevertheless look to the statute’s legislative history to determine whether there is “‘clearly expressed legislative intention’ contrary to that language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses” (quoting *United States v. James*, 478 U.S. 597, 606 (1986))).

165. *Id.* at 432; *see also id.* at 436 (“[I]t is clear from the legislative history of . . . the entire 1980 Act . . . that one of Congress’ primary purposes was to bring United States refugee law into conformance with the [Protocol].”); *id.* at 437 (“The Conference Committee Report, for example, stated that the definition was accepted ‘with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol.’” (quoting S. REP. NO. 96-590, at 20 (1980))).

166. *Id.* at 437.

167. *Id.* at 446.

168. Despite the significance attributed to the Protocol, it was not the first interpretive source that the Court considered—it first examined the plain language of the statute, *id.* at 430–31, and then the history of a prior asylum-related provision, *id.* at 433–36. The Court also examined a prior version of the Refugee Act that Congress did not adopt. *Id.* at 441–43.

remain instructive for lower courts. Indeed, in its subsequent decisions in *Aguirre-Aguirre* and *Negusie*, the Court made deliberate efforts to indicate the consistency of those opinions with *Cardoza-Fonseca* by distinguishing it in some respect.

B. *Aguirre-Aguirre: A Mixed Methodology Message*

In *Aguirre-Aguirre*, a unanimous Supreme Court significantly retreated from *Cardoza-Fonseca*'s engagement with the Convention. It deferred to the BIA's questionable construction of an exception to eligibility for withholding of removal, reiterating that *Chevron* applies to decisions of the attorney general (and those delegated to the BIA) concerning the INA.¹⁶⁹

In the wake of *Cardoza-Fonseca*, it seemed that the nexus between domestic asylum provisions and an established body of international law would render interpretation of those statutory provisions a question of pure statutory construction not entitled to *Chevron* deference. The Court's opinion in *Aguirre-Aguirre*, however, revealed that the gap-filling–statutory construction distinction was highly malleable and capable of redefinition.¹⁷⁰ The Court deferred to the BIA because the agency was “giv[ing] ambiguous statutory terms ‘concrete meaning through a process of case-by-case adjudication.’”¹⁷¹

Aguirre-Aguirre concerned the definition of a “serious nonpolitical crime” that, if committed before arriving in the United States, would render a noncitizen ineligible for withholding of removal under INA § 243(h)(2)(C).¹⁷² This provision mirrors Article 1F(b) of the Convention.¹⁷³ The BIA held that the provision applied to *Aguirre-Aguirre*, defining a “serious nonpolitical crime” based on

169. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424–25 (1999). The Court also reiterated its earlier observation that judicial deference is especially appropriate in the immigration context because foreign-relations concerns are implicated. *Id.* at 425 (citing *INS v. Abudu*, 485 U.S. 94, 110 (1988)).

170. See *infra* notes 171–72, 177–78, 182 and accompanying text; cf. *Cardoza-Fonseca*, 480 U.S. at 455 (Scalia, J., concurring) (objecting to, as inconsistent with *Chevron*, the majority's conclusion that pure questions of statutory construction are for the courts, not the agencies, to decide, “since in *Chevron* the Court deferred to the [EPA]'s abstract interpretation of the phrase ‘stationary source’”).

171. *Aguirre-Aguirre*, 526 U.S. at 425 (quoting *Cardoza-Fonseca*, 480 U.S. at 448).

172. *Id.* at 418.

173. See Convention Relating to the Status of Refugees, *supra* note 1, 19 U.S.T. at 6264, 189 U.N.T.S. at 156.

a balancing test that it created in an earlier case.¹⁷⁴ Without reference to *Chevron*, the Ninth Circuit rejected the BIA's test.¹⁷⁵ It held that because Congress intended the nonpolitical crimes exception to be consistent with Article 1F(b) of the Convention, the BIA should have considered additional factors enumerated in the UNHCR *Handbook*.¹⁷⁶ In its very brief opinion, the Ninth Circuit did not cite to any other treaty interpretation sources apart from the *Handbook*.

The Supreme Court held that the Ninth Circuit erred in failing to analyze the BIA's decision within the *Chevron* framework.¹⁷⁷ Ironically, the Court reiterated its conclusion from *Cardoza-Fonseca* that "'one of Congress' primary purposes' in passing the Refugee Act was to implement the principles agreed to in the [Protocol]."¹⁷⁸ The Court observed that the basic withholding provision "parallels Article 33," as well as the nonpolitical-crimes exception to Article 33 under Article 1F(b).¹⁷⁹ The Court faulted the Ninth Circuit, however, for rejecting the BIA's standard based entirely on the UNHCR *Handbook*, citing to *Cardoza-Fonseca*'s dictum, which stated that although the *Handbook* might provide "guidance in construing the provisions added to the INA by the Refugee Act," it was not independently binding.¹⁸⁰

The Court made no attempt to determine the meaning of "serious political crime" in Article 1F(b) under international law. Instead of locating the UNHCR's position within a broader international jurisprudential context, it simply concluded that because the *Handbook* was not directly binding on U.S. courts, it could not constrain the BIA's interpretation of the corresponding domestic statute.¹⁸¹ Though the Court found that Congress intended to implement the Convention and that the statute and Article 1F(b)

174. The BIA's test required a balancing of the criminal character of the noncitizen's acts against their political nature. *Aguirre-Aguirre*, 526 U.S. at 422–23 (citing *In re McMullen*, 19 I. & N. Dec. 90, 97–98 (B.I.A. 1984)).

175. See *Aguirre-Aguirre v. INS*, 121 F.3d 521, 523–24 (9th Cir. 1997) (noting the BIA's errors of law and remanding the case to the BIA to correctly apply the law for determination of *Aguirre-Aguirre*'s eligibility for withholding of deportation), *rev'd*, 526 U.S. 415 (1999).

176. *Id.* at 523.

177. *Aguirre-Aguirre*, 526 U.S. at 424.

178. *Id.* at 427 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987)).

179. *Id.*

180. *Id.*

181. See *id.* at 427–28 ("[The *Handbook*] is not binding on . . . United States courts. . . . [T]he BIA's determination that § 1253(h)(2)(C) requires no additional balancing of the risk of persecution rests on a fair and permissible reading of the statute.").

were congruent, it curiously determined that the BIA's construction was permissible under *Chevron* based on the text and structure of the domestic statute alone.¹⁸²

Aguirre-Aguirre's cryptic, ill-reasoned conclusion has been used by advocates both for and against reliance on the Convention. On the one hand, the Court did not take issue with the Ninth Circuit's holding that it was "bound to apply the Protocol in decisions regarding the withholding of deportation."¹⁸³ It affirmed the *Handbook's* interpretive significance,¹⁸⁴ reiterated congressional intent to implement the Protocol and Article 33,¹⁸⁵ and referenced (albeit opaquely) another state party's construction of Article 1F(b) in support of the BIA's construction.¹⁸⁶ On the other hand, *Aguirre-Aguirre's* disengagement with the Convention gave ammunition to government attorneys¹⁸⁷ and comfort to lower court judges¹⁸⁸ inclined

182. *Id.* at 428.

183. *Aguirre-Aguirre v. INS*, 121 F.3d 521, 523 (9th Cir. 1997), *rev'd*, 526 U.S. 415 (1999).

184. The Court restricted its criticism of the Ninth Circuit to its apparent treatment of the *Handbook* as independently binding on U.S. courts. *Aguirre-Aguirre*, 526 U.S. at 427–28. It found that other *Handbook* considerations identified by the Ninth Circuit were in fact consistent with the BIA's test. *See id.* at 428–31 (noting that the *Handbook's* consideration of the proportionality of the criminal acts to their objectives, as well as the political necessity of the acts, is consistent with the BIA's test).

185. *Id.* at 427.

186. Perplexingly, the Court followed its conclusion with a citation to, and quote from, a decision of the U.K. House of Lords that supported the BIA's construction. *Id.* at 428 ("[T]he crime either is or is not political when committed, and its character cannot depend on the consequences which the offender may afterwards suffer if he is returned." (quoting *T. v. Sec'y of State for the Home Dep't*, [1996] A.C. 742 (H.L.) 769 (appeal taken from Eng.))). The Court neglected to mention that the House of Lords was interpreting Article 1F(b). Read generously, the Court may have been indicating that the BIA's interpretation was permissible *because* it was also consistent with at least one reading of Article 1F(b), which the Court considered the most compelling of the various sources interpreting the treaty provision. This is doubtful, however, given the lack of explanation as to why that reading, and not the construction set out by the UNHCR, was the better interpretation of the Convention, and why the Court failed to reference any other treaty interpretation sources.

187. *See, e.g., Yusupov v. Att'y Gen.*, 518 F.3d 185, 205 (3d Cir. 2008) ("[This Court] defer[s] to most of the Attorney General's interpretation of the national security exception to mandatory withholding of removal."). In *Ismoil Samadov's* case, which was consolidated with that of *Yusupov*, the petitioner argued that the court should construe the national security exception to asylum consistently with the symmetrical Convention provision, interpreted in light of the history of the treaty, the jurisprudence from states parties, and the views of the UNHCR. Brief of Petitioner at 26–44, *Samadov v. Gonzales*, 518 F.3d 185 (3d Cir. 2008) (No. 06-3160), 2006 WL 6210305. Government counsel described petitioner as insisting that the UNHCR's opinion is "binding on both U.S. courts' and the Attorney General's interpretation of INA provisions," observing that the *Aguirre-Aguirre* Court "rejected a similar argument claiming that the UNHCR Refugee Handbook controls domestic application of asylum law." Brief for Respondent at 34–35, *Samadov*, 518 F.3d 185 (No. 06-3160), 2008 WL 5737676. Government

to defer to expansive agency constructions of government powers, unmoored from any Convention limitations.¹⁸⁹

C. *Negusie*: Orlando Ventura's "Ordinary Remand Rule" Obfuscates Cardoza-Fonseca's Chevron Step One Boundaries

The Court most recently considered the relationship between *Chevron* deference and congressional intent to implement the Convention in *Negusie*. In *Negusie*, the Court remanded to the BIA based ostensibly on the application of *INS v. Orlando Ventura*'s "ordinary remand rule" requiring remand to the BIA to construe the statute in the first instance.¹⁹⁰ The majority opinion and Justice Stevens's partial concurrence are significant, however, for their treatment of congressional intent and the boundaries of *Chevron*'s two steps.¹⁹¹

The legal issue in *Negusie* was relatively straightforward. The case concerned the INA's "persecutor bar,"¹⁹² under which a person is not eligible for asylum¹⁹³ or withholding of removal¹⁹⁴ if the person had

counsel further characterized petitioner's argument for construction consistent with the Convention as "leav[ing] domestic law altogether," arguing against petitioner's proposed construction on the basis that "international law does not, and cannot, trump Congressional enactments." *Id.* at *31–32.

188. *See, e.g.*, Oral Argument at 11:31, *Yusupov*, 518 F.3d 185 (No. 06-3160), available at <http://www.ca3.uscourts.gov/oralargument/audio/06-3160SamadovvAttyGen.wma> (questioning counsel for the petitioner on the implications of *Aguirre-Aguirre*, asking, "If the Attorney General, who, after all, is an officer of the United States . . . If this is where he comes down on, why do I have to look at the U.N. Handbook?").

189. Some lower courts treat the *Handbook* as a proxy for the Convention, citing *Aguirre-Aguirre* in support of the outright rejection of proposed constructions of asylum provisions based on the Convention when the *Handbook* is the only international source cited. *See, e.g.*, *Toen Lik Tan v. Att'y Gen.*, 221 F. App'x 168, 171 (3d Cir. 2007) ("Tan frames this as a legal argument, apparently based on the fact that the IJ did not discuss the 'cumulative harm theory' as set forth in the [*Handbook*]. The UNHCR Handbook, however, 'is not binding on the INS or American courts.' Thus Tan has failed to raise a legal issue." (citation omitted) (quoting *Abdulai v. Ashcroft*, 239 F.3d 542, 553 (3d Cir. 2001))). In fairness, this may also be the result of the manner in which counsel who do not draw on interpretive sources beyond the *Handbook* frame Convention-based arguments.

190. *Negusie v. Holder*, 129 S. Ct. 1159, 1164 (2009) (citing *INS v. Orlando Ventura*, 537 U.S. 12, 16–17 (2002) (per curiam)).

191. *See id.* at 1163–64; *id.* at 1172 (Stevens, J., concurring in part and dissenting in part).

192. The persecutor bar was enacted as part of the Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 102, 107 (codified as amended at 8 U.S.C. § 1253(h) (2006)).

193. *See* 8 U.S.C. § 1158(b)(2)(A)(i) (barring any noncitizen who has persecuted others from being granted asylum in the United States).

194. *See id.* § 1231(b)(3)(B)(i) (barring withholding of removal for any noncitizen who has persecuted others).

participated in the persecution of others.¹⁹⁵ The question before the Court was whether the persecutor bar applied to individuals who engaged in persecution under coercion or duress.¹⁹⁶ Although the exact language of the persecutor bar does not appear in the Convention, the statute's legislative history indicates that Congress intended it to comport with principles underlying Article 1F(a) of the Convention.¹⁹⁷ As the briefs filed by amici curiae reflected, leading refugee scholars agree that "the text, purpose, and history of the Convention . . . demonstrate that conduct performed under duress" does not exclude a person from the benefit of nonrefoulement.¹⁹⁸ Amici also cited to universal consistency with this position among courts of other states parties to the Convention.¹⁹⁹

The Fifth Circuit upheld the BIA decision that the persecutor bar applies regardless of coercion or duress. Its decision was based on the mechanical application of an earlier Supreme Court decision, *Fedorenko v. United States*,²⁰⁰ which concerned a provision of the Displaced Persons Act of 1948 (DPA).²⁰¹ The *Negusie* majority in the Supreme Court held that *Fedorenko* was not controlling because the source of the INA's persecutor bar was the Protocol, not the DPA.²⁰²

195. *See id.* § 1101(a)(42) (defining "refugee" to exclude any noncitizen who has persecuted others).

196. *Negusie v. Holder*, 129 S. Ct. 1159, 1162 (2009).

197. *See, e.g.*, Brief for Scholars of International Refugee Law as Amici Curiae in Support of Petitioner at 11–20, *Negusie*, 129 S. Ct. 1159 (No. 07-499), 2008 WL 2550611 ("The 'persecutor bars' at issue here . . . are inextricably linked to, and must be interpreted in light of, the United States' obligations under [the Protocol]."); Brief Amicus Curiae of the Office of the United Nations High Commissioner for Refugees in Support of Petitioner at 6–9, *Negusie*, 129 S. Ct. 1159 (No. 07-499), 2008 WL 2550609 ("[T]he legislative history demonstrates Congress' clear intent that the bar be consistent with Article 1F(a) of the 1951 Convention, notwithstanding the difference in terminology between the statutory bar and Article 1F(a)."). The House Judiciary Committee amendment (later adopted by the full House) specifically noted that the bar "is consistent with the U.N. Convention (which does not apply to those who, *inter alia*, 'committed a crime against peace, a war crime, or a crime against humanity')." H.R. REP. NO. 96-608, at 10, 18 (1979). The Conference Committee adopted the House version of the withholding statute "with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." H.R. REP. NO. 96-781, at 20 (1980) (Conf. Rep.), *reprinted in* 1980 U.S.C.C.A.N. 160, 161. And the Refugee Act's exceptions to withholding were described as matching "those set forth in the aforementioned international agreements." *Id.*

198. Brief for Scholars of International Refugee Law as Amici Curiae in Support of Petitioner, *supra* note 197, at 20.

199. *Id.*

200. *Fedorenko v. United States*, 449 U.S. 490 (1981).

201. *Negusie*, 129 S. Ct. at 1163 (citing *Fedorenko*, 449 U.S. at 512 n.34 (1981)).

202. *Id.* at 1165–66.

Citing *Aguirre-Aguirre* and *Cardoza-Fonseca*, it again found that “‘one of Congress’ primary purposes’ in passing the Refugee Act was to implement the principles agreed to in the [Protocol].”²⁰³

Applying *Chevron* and the Court’s 2002 decision in *Orlando Ventura*, the majority held in *Negusie* that because the BIA had mechanically applied *Fedorenko*, it should have an opportunity to determine “in the first instance” the legal question of whether the INA’s persecutor bar applies to actions committed under duress.²⁰⁴ In *Orlando Ventura*, the Court held that when statutes place an issue “‘primarily in agency hands,” courts should remand to “giv[e] the BIA the opportunity to address the matter in the first instance in light of its own experience.”²⁰⁵ Linking *Orlando Ventura* and *Chevron*, the majority in *Negusie* determined that the statutory construction issue was placed “in agency hands” because congressional intent was not clear under *Chevron* step one.²⁰⁶

The majority opaquely reasoned that the statute was ambiguous simply because “[t]he parties disagree over whether coercion or duress is relevant . . . [and] there is substance to both contentions.”²⁰⁷ Despite recognizing that the Refugee Act was intended to implement the Convention, the majority did not consider, or even mention, Article 1F or the Convention. Even more curiously, the Court distinguished *Cardoza-Fonseca* on the ground that this was not “a case where it is clear that Congress had an intention on the precise question at issue.”²⁰⁸ But it did not explain why the sources relied upon in *Cardoza-Fonseca*²⁰⁹ did not give rise to the same conclusion of

203. *Id.* at 1166 (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999)).

204. *Id.*

205. *Id.* at 1164 (alteration in original) (quoting *INS v. Orlando Ventura*, 537 U.S. 12, 16–17 (2002) (per curiam)). The majority described *Orlando Ventura*’s remand rule as existing, in part, because statutory ambiguities are delegations of authority to the agency that administers the statute. *Id.* at 1167 (citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)).

206. *Id.* at 1164. Although the Court had already directly applied *Orlando Ventura* in the subsequent case of *Gonzales v. Thomas*, 547 U.S. 183 (2006) (per curiam), it had simply summarily reversed the appellate court’s decision in *Thomas* without explication of its *Chevron* implications. *Id.* at 187 (finding “no special circumstance here that might have justified the Ninth Circuit’s determination of the matter in the first instance” and stating that, “as in *Ventura*, the Court of Appeals should have applied the ‘ordinary ‘remand’ rule”).

207. *Negusie*, 129 S. Ct. at 1164.

208. *Id.* (comparing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448–49 (1987)).

209. The *Negusie* majority cited to the portion of the Court’s opinion in *Cardoza-Fonseca* finding clear congressional intent to conform the statute to the Convention because of “the

clear congressional intent in *Negusie*. Instead, the majority held that petitioner's invocation of concepts of international law "may be persuasive in determining whether a particular agency interpretation is reasonable, but they do not demonstrate that the statute is unambiguous."²¹⁰ This conclusion is particularly perplexing given that the Court's basis for distinguishing *Fedorenko* was that the INA's persecutor bar was intended to implement the Protocol, as opposed to the DPA.²¹¹

Justice Stevens criticized the majority's broadening of the ambit of agency deference as being inconsistent with *Cardoza-Fonseca*.²¹² Articulating the more cogent view, he reasoned that the Court should decide the "narrow legal question" of whether the persecutor bar applies in the context of duress, and "remand for the agency to determine how the persecutor bar applies in individual cases."²¹³ Justice Stevens concluded, based on the statute's legislative history, that the persecutor bar specifically reflects the exclusion under Article 1F(a) of the Convention.²¹⁴ He then determined whether Article 1F(a) was limited to criminally culpable conduct by looking to the UNHCR *Handbook* and the decisions of courts of other states parties to the Convention.²¹⁵ In a conclusion that reinvigorated

plain language of the Act, its symmetry with the United Nations Protocol, and its legislative history." *Id.* at 1164.

210. *Id.* Part of the problem in this case may have been that the Convention argument was somewhat buried in the petitioner's brief among general concepts of criminal and international law, with little space devoted to rigorous analysis of the legislative history related to the Convention or to the clear consensus about the proper interpretation of Article 1F(a). See Brief for Petitioner at 32–35, *Negusie*, 129 S. Ct. 1159 (No. 07-499), 2008 WL 2445504.

211. *Negusie*, 129 S. Ct. at 1165–66.

212. *Id.* at 1170 (Stevens, J., concurring in part and dissenting in part). In particular, Justice Stevens criticized the majority for blurring the distinction between a "pure question of statutory construction for the courts to decide" that we answered in *Cardoza-Fonseca*,²¹² and "a fact-intensive question of the kind we addressed in *Aguirre-Aguirre*," which demanded remand to the BIA. *Id.* at 1173. Although Justice Stevens acknowledged that the distinction was "subtle," his characterization of the "serious non-political crime" standard at issue in *Aguirre-Aguirre* as a fact-intensive inquiry, not a question of pure statutory construction, is logically difficult to understand. *Id.* at 1171. Nevertheless, he is correct that there is no logical basis for classifying the evidentiary standard for "well-founded fear of persecution" as a pure issue of statutory construction in *Cardoza-Fonseca*, but characterizing the requisite mental state for the persecutor bar as an issue for case-by-case determination by the BIA in *Negusie*.

213. *Id.* at 1173.

214. *Id.* at 1175 (citing H.R. REP. NO. 96-781, at 20 (1980) (Conf. Rep.), reprinted in 1980 U.S.C.C.A.N. 160, 161; H.R. REP. NO. 96-608, at 18 (1979)).

215. *Id.* at 1175 ("When we interpret treaties, we consider the interpretations of the courts of other nations, and we should do the same when Congress asks us to interpret a statute in light

Cardoza-Fonseca's broad determination of congressional intent, Justice Stevens stated that "Congress' effort to conform United States law to the standard set forth in the U.N. Convention and Protocol . . . underscores that Congress did not delegate the question presented by this case to the agency."²¹⁶ As discussed in the following Parts, lower courts should adopt this approach and cabin the import of the majority's holding to achieve the conformity between domestic law and U.S. obligations under the Protocol that Congress intended. Several paths exist for doing so, both within and beyond the traditional *Chevron* doctrine.

III. ACHIEVING FIDELITY TO CONGRESSIONAL INTENT AND U.S. INTERNATIONAL OBLIGATIONS: A PATH THROUGH *CHEVRON*

Even after a quarter century of widespread application, the contours of *Chevron* deference remain nebulous with regard to BIA interpretations of the INA's asylum and withholding provisions. Despite the trend toward increasing deference to the BIA, an enduring haziness has left several narrow paths by which lower courts may (and should) reject the BIA's construction of the INA if it is inconsistent with U.S. obligations under the Protocol.

A. *Restoring Cardoza-Fonseca's Definition of Chevron Step One*

In the narrower of the two available paths, courts may reject a Convention-incompatible construction under *Chevron*'s first step. With few exceptions,²¹⁷ they may find that Congress expressed clear intent that INA asylum provisions be interpreted consistently with U.S. obligations under the Protocol and thus left no gap for the agency to fill.²¹⁸ Applying *Cardoza-Fonseca* as Justice Stevens did in

of a treaty's language." (citing *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226–28 (1996))).

216. *Id.* at 1175.

217. Under the last-in-time rule of statutory construction (mandating that later laws abrogate contrary prior laws), it would be difficult to defend a statutory construction consistently with the Convention in the limited (highly problematic) instances in which the language of a particular statute is expressly inconsistent with the Convention. *But see* Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319, 325–26 (2005) (describing unanimous criticism of the last-in-time rule within the legal academy, including the argument by some that treaties should hold superior status to all federal statutes).

218. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 & n.12, 433 (1987).

his concurrence in *Negusie*,²¹⁹ courts may treat many apparent textual ambiguities in the Refugee Act as pure issues of statutory construction that may be resolved by reference to the Convention instead of by delegation to the BIA.²²⁰ The Court's decisions in *Negusie* and *Aguirre-Aguirre* certainly impose obstacles, because the legal questions in those cases were held not to be issues of pure statutory construction. But both decisions nevertheless purported to leave *Cardoza-Fonseca*'s holding and case-by-case/statutory construction dichotomy intact. Both explicitly distinguished the statutory construction questions at issue from the question in *Cardoza-Fonseca*,²²¹ albeit unconvincingly: it is difficult to identify any logical difference between the evidentiary standard for "well founded fear of persecution" at issue in *Cardoza-Fonseca* and the requisite mental state for the persecutor bar at issue in *Negusie*²²² or the criteria for defining a "serious political crime" at issue in *Aguirre-Aguirre*.²²³ Indeed, Justices Stevens and Breyer found the two issues analogous in *Negusie*.²²⁴ The Court's failure in *Negusie* and *Aguirre-Aguirre* to identify any persuasive legal or logical basis for its distinctions suggests there is room to analogize most Refugee Act statutory construction questions to the "pure question of statutory construction" in *Cardoza-Fonseca*,²²⁵ which the Supreme Court has continued to explicitly affirm as the relevant benchmark and the critical first step of the *Chevron* analysis.

Relatedly, courts may distinguish *Aguirre-Aguirre* and *Negusie* on the basis of a particular provision's plain language, its symmetry with the Protocol's language, and its legislative history.²²⁶ Indeed,

219. *Negusie*, 129 S. Ct. at 1170–72 (Stevens, J., concurring in part and dissenting in part).

220. *See id.*; *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."); *see also* Coyle, *supra* note 39, at 663 (defining a "borrowed treaty rule" under which "courts should presume that the text of a statute that incorporates language or concepts from a treaty should be read to conform to the meaning of the text of the source treaty, regardless of whether the statute is ambiguous" with this presumption rebuttable only by "compelling evidence that Congress intended a different result").

221. *See Negusie*, 129 S. Ct. at 1167 (majority opinion); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424–25 (1999).

222. *See Negusie*, 129 S. Ct. at 1172 (Stevens, J., concurring in part and dissenting in part).

223. *See id.* at 1173.

224. *See id.* at 1170–73.

225. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

226. The Supreme Court and at least one appellate court have considered symmetrical language "one of the strongest indicators that Congress intended to incorporate the

courts seeking to distinguish *Negusie* may benefit from the Court's failure to identify any particular basis on which it distinguished the clarity of congressional intent in *Cardoza-Fonseca* from the clarity of congressional intent in *Negusie*. Alternately, *Negusie*'s holding may be confined to cases like *Orlando Ventura*, in which the BIA had not yet construed the relevant statutory provision in the first instance, as opposed to cases in which courts are reviewing the BIA's construction of a particular provision.

B. *Chevron Step Two and Other Canons of Statutory Construction*

In cases in which a court is unwilling or unable to determine that a particular Refugee Act provision reflects clear congressional intent to implement a parallel provision of the Convention, it may nevertheless deny deference to a Convention-incompatible BIA construction by applying other canons of statutory construction—either directly or under the second step of *Chevron*.

As an initial matter, courts may invoke the rule of lenity²²⁷ or the principle of constitutional avoidance²²⁸ to read immigration statutes in a manner that, although not explicitly rights-protective, frequently accords with U.S. obligations under the Convention.²²⁹ Indeed, the

understanding of the Protocol developed under international law into the U.S. statutory scheme.” *Yusupov v. Att’y Gen.*, 518 F.3d 185, 204 n.32 (3d Cir. 2008) (citing *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 180 & n.36 (1993), and *Cardoza-Fonseca*, 480 U.S. at 429, 432, 437, in support of its observation that “[t]he adoption of essentially identical language [in the nonrefoulement provision of Refugee Act of 1980] to that contained in article 33 of the [Convention] . . . is one of the strongest indicators that Congress intended to incorporate the understanding of the Protocol developed under international law into the U.S. statutory scheme”). In some cases, the lack of a direct relationship between the text of Article 1F and the persecutor bar in *Negusie* may be a basis on which to distinguish that case, though this approach risks undermining congruence arguments in other cases in which the statutory language may not be identical to that of the Convention.

227. The rule of lenity is a “longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.” *Cardoza-Fonseca*, 480 U.S. at 449 (citing *INS v. Errico*, 385 U.S. 214, 225 (1966); *Costello v. INS*, 376 U.S. 120, 128 (1964); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).

228. Under this canon of statutory construction, ambiguities in a statute are read to avoid constitutional doubt. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 689–90, 697 (2001) (interpreting a statute to require a reasonable limit on the amount of time an alien can be detained to avoid the constitutional issue implicated by indefinite detention).

229. *See generally* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 564 (1990) (discussing the application of the constitutional avoidance canon and resultant “phantom constitutional norms” that have developed in immigration decisions, and observing that “phantom norms produce results that are much more sympathetic to aliens than the results that

Supreme Court has given the constitutional avoidance canon precedence over *Chevron* deference.²³⁰

Alternately, courts may find a Convention-incompatible BIA construction unreasonable under the second step of *Chevron* because it is inconsistent with general congressional intent to bring U.S. immigration law into conformity with the Convention, even if that intent is not perceived as sufficiently clear on the face of a particular provision to warrant deference.²³¹ A court could also find the interpretation unreasonable by applying the canon of statutory interpretation that presumes that acts of Congress are consistent with U.S. treaty obligations and, absent a clear contrary statement by Congress, should be interpreted as such.²³² More broadly, it could apply the centuries-old *Charming Betsy* principle, which requires that an act of Congress be construed so as not to conflict with international law unless no other construction is fairly possible.²³³

would follow from the interpretation of statutes in light of the expressly applicable constitutional immigration law based on plenary power”).

230. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574–75 (1988).

231. This approach has been proposed by commentators in other areas of law. *See, e.g.*, Alex O. Canizares, *Is Charming Betsy Losing Her Charm? Interpreting U.S. Statutes Consistently with International Trade Agreements and the Chevron Doctrine*, 20 EMORY INT’L L. REV. 591, 641 (2006) (arguing that in international trade cases, if a statute is ambiguous, the court should turn to relevant international trade law in inquiring into the reasonableness of an agency construction under *Chevron*’s second step).

232. The BIA has directly applied this principle to the construction of asylum provisions. *See In re Q-T-M-T-*, 21 I. & N. Dec. 639, 660 (B.I.A. 1996) (“Domestic law may supersede international obligations only by express abrogation or by subsequent legislation that irrevocably conflicts with international obligations.” (citing *Chew Heong v. United States*, 112 U.S. 536, 538 (1884); *Reid v. Covert*, 354 U.S. 1, 18 (1957))). The BIA has held that in relation to asylum provisions, “Congress has not expressed any intention of renegeing on the international obligations assumed through accession to the 1967 Protocol via the Refugee Act of 1980, nor has Congress articulated any desire to curtail refugee protections beyond the limitations set out in the Protocol.” *Id. But see Sukwanputra v. Gonzales*, 434 F.3d 627, 632 n.3 (3d Cir. 2006) (deciding a one-year asylum bar did not violate the Supremacy Clause even though it explicitly limited asylum, which is inconsistent with Article 34 of the Convention).

233. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987) (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”); *see also Weinberger v. Rossi*, 456 U.S. 25, 29–30, 32–33 (1981) (looking to international law in interpreting a statute prohibiting employment discrimination against U.S. citizens on military bases overseas unless permitted by the treaty); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (looking to the law of nations in determining statutory construction of the Jones Act in a maritime tort case); *Chew Heong*, 112 U.S. at 539–40 (interpreting an immigration statute so as to not conflict with the treaty right of Chinese aliens to enter the United States).

International law in this case would include both the Protocol and the nonrefoulement obligation under customary international law.²³⁴

In *Negusie*'s case, for example, if the BIA were to reach the same interpretation on remand, a reviewing court could reject that interpretation as unreasonable under *Chevron* step two. In light of its inconsistency with international law,²³⁵ the BIA's interpretation would be unreasonable because (a) it would be inconsistent with congressional intent that U.S. law be interpreted consistently with the scope of the nonrefoulement obligation under the Convention; (b) it would violate the presumption that Congress intended the statute to be interpreted consistent with the nation's treaty obligations under the Protocol; and (c) applying the *Charming Betsy* principle, refugee provisions of the INA should be interpreted, insofar as is possible, consistently with the Convention and with the nonrefoulement obligation under customary international law.

This last proposal is on safer doctrinal ground than it may first appear. Over the past decade, several commentators have grappled with the relationship between *Chevron* and canons of statutory construction, described by Professor Curtis Bradley in 2000 as "one of the most uncertain aspects of the *Chevron* doctrine."²³⁶ In his seminal article on *Chevron* deference and foreign affairs, Bradley concluded that, in general, the *Charming Betsy* canon should not trump *Chevron* deference.²³⁷ He reasoned that if *Charming Betsy* were to trump *Chevron*, "it must be because Congress itself rather than administrative agencies should deliberate on whether to violate international law."²³⁸ Bradley rejected this possibility, concluding that the executive branch's foreign relations expertise—including its knowledge of "international facts"—combined with the president's political accountability to make the executive branch better suited than Congress or the courts to determine a potential conflict with international law.²³⁹ In an important qualification, however, Bradley acknowledged that it may not make sense to apply this conclusion to agencies that do not have the foreign affairs expertise that the

234. See *supra* note 30. A century ago, the U.S. Supreme Court held that customary international law is "part of our [U.S.] law." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

235. See *supra* notes 197–99 and accompanying text.

236. Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 675 (2000).

237. *Id.* at 679.

238. *Id.* at 688.

239. *Id.* at 720–21.

president or State Department have, or that do not have the political accountability that derives from acting as a direct agent of the president.²⁴⁰

Writing in 2007, Professors Eric Posner and Cass Sunstein extended Bradley's position with admitted radical implications.²⁴¹ Observing that the case law remained unsettled, they argued that as a normative matter, courts should permit the executive to interpret ambiguous statutes inconsistently with international law, even outside the traditional *Chevron* context of rulemaking and adjudication of agency-administered statutes.²⁴² They articulated a "consequentialist theory," which explains that courts apply international relations canons because the benefits to U.S. interests outweigh the costs.²⁴³ For example, the *Charming Betsy* canon reflects an assessment that compliance with international law provides a net benefit to the United States because other states protected by the law might otherwise retaliate against the United States, and because compliance with international law might have long-term foreign relations benefits.²⁴⁴ The argument for deference, according to Posner and Sunstein, is that because the executive has greater expertise and accountability than the courts concerning foreign relations,²⁴⁵ it is better positioned to make consequentialist judgments about the risks and value to American interests of interpreting statutes inconsistently with international law.²⁴⁶

These contentions, even if justified, would not undermine the basic thesis of this Article. Most importantly, they concern only executive interpretations made in the absence of clear congressional intent; they do not countermand the conclusion that courts ought to reject Convention-inconsistent interpretations under *Chevron* step one because of clear congressional intent that U.S. asylum provisions be interpreted consistently with the Convention. But even if courts do not find clear congressional intent in a particular provision, three further considerations demonstrate why the Posner-Sunstein contentions do not undercut doctrinal and normative bases for courts'

240. *Id.* at 694–95.

241. Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 *YALE L.J.* 1170, 1177 (2007).

242. *Id.* at 1202–04.

243. *Id.* at 1184–87.

244. *Id.* at 1188–89.

245. *Id.* at 1207.

246. *Id.* at 1227–28.

rejection, under *Chevron* step two, of BIA statutory interpretations that are inconsistent with the Convention.

First, Bradley, Posner, and Sunstein agree that only reasonable executive interpretations deserve deference.²⁴⁷ But they do not consider how reasonableness might intersect with international comity. Recognizing the fundamental connection between U.S. asylum provisions and international refugee law, the Supreme Court confirmed in *Negusie* that—at least in the asylum context—international law “may be persuasive in determining whether a particular agency interpretation is reasonable.”²⁴⁸ This is not the first time courts have recognized international law as a potential basis for rejecting an inconsistent BIA statutory interpretation. In several notable exceptions to the general tendency to disregard international law, the BIA²⁴⁹ and federal courts have applied the *Charming Betsy* canon in immigration appeals,²⁵⁰ including as a basis for construing asylum provisions consistently with the Convention.²⁵¹

247. *Id.* at 1178; *see also* Bradley, *supra* note 236, at 703.

248. *Negusie v. Holder*, 129 S. Ct. 1159, 1164 (2009). In contrast to Justice Scalia’s concurrence, which categorically deferred to the BIA, *id.* at 1170 (Scalia, J., concurring), the majority did not rule that the BIA’s construction should be given deference; it merely concluded that the agency should have the opportunity to interpret the provision in the first instance. *Id.* at 1168 (majority opinion).

249. *See In re Q-T-M-T*, 21 I. & N. Dec. 639, 660 (B.I.A. 1996) (“Courts must strive to interpret domestic legislation in a way that is consistent with international obligations. This could not be more pertinent a principle than it is in the construction now before us, as . . . ‘one of Congress’ primary purposes was to bring United States refugee law into conformance with the [Protocol].’” (second alteration in original) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987)) (citing *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804))).

250. *See, e.g., Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1009 (9th Cir. 2005) (characterizing the *Charming Betsy* doctrine as a “presumption that Congress intends to legislate in a manner consistent with international law”); *United States v. Schiffer*, 836 F. Supp. 1164, 1170 n.4 (E.D. Pa. 1993) (stating that it is a “well-settled rule of statutory construction” that courts should interpret acts of Congress in a manner consistent with international law), *aff’d*, 31 F.3d 1175 (3d Cir. 1994).

251. *See Ali v. Ashcroft*, 213 F.R.D. 390, 405 (W.D. Wash.) (“Because Respondents’ proposed interpretation of the statute may result in persecution or deprivation of life in violation of international law, Petitioners’ proposed construction is preferred as it reconciles the statute with the law of nations.”), *aff’d on other grounds*, 346 F.3d 873 (9th Cir. 2003), *opinion withdrawn*, 421 F.3d 795 (9th Cir. 2005); *see also Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1114 & n.30 (9th Cir. 2001) (“We have reaffirmed [the *Charming Betsy*] rule on several occasions. . . . Although Congress *may* override international law in enacting a statute, we do not presume that Congress had such an intent when the statute can reasonably be reconciled with the law of nations.”).

Second, whatever merit the consequentialist theory might have in relation to international law governing state interests, human rights treaties demand a different calculus. Because the rights regulated are primarily those of individuals rather than states, the decision of whether to comply with international law goes beyond a foreign relations cost-benefit analysis. The next Part explores this issue in greater detail as a substantive concern in relation to the application of the *Chevron* framework to the asylum context.²⁵²

Finally, as Bradley alluded, neither the foreign-relations-expertise nor the political-accountability rationale for deference applies to the BIA and the immigration courts. The next Part explores this issue in detail as well, arguing that the Supreme Court should consider boldly addressing the broader question of whether, in light of the Convention's application and current problems with BIA adjudication, the *Chevron* framework is suitable in the asylum context at all.

IV. BEYOND *CHEVRON*: GETTING PAST REFLEXIVE DEFERENCE TO THE BIA'S INTERPRETATION OF REFUGEE PROVISIONS

A. *The Core Rationales Underpinning Deference*

In *Chevron*, the Court accorded deference to the EPA on several bases: the agency's expertise (in light of the fact that the regulatory scheme is technical and complex, the agency considered the matter in a "detailed and reasoned fashion," and "judges are not experts in the field");²⁵³ political accountability (because the decision involved balancing the conflicting policy interests of economic growth versus environmental objectives²⁵⁴ and "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do");²⁵⁵ and an implied delegation of authority by Congress to agencies to interpret the statutes that they administer.²⁵⁶

252. See *infra* Part IV.B.1.

253. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863, 865 (1984).

254. *Id.* at 863.

255. *Id.* at 866.

256. *Id.* at 843–44; see also *id.* at 865 (considering but not deciding that perhaps Congress was "thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so"); cf. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) ("[A]mbiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion."). See generally William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum*

Courts and commentators have proposed another reasonable rationale for deference: a desire for uniformity in a particular area of administrative law, which can be undermined by conflicting jurisprudence across federal circuits.²⁵⁷ In the immigration sphere, courts have also deferred to BIA interpretations based on the perception that immigration decisions implicate foreign relations and are thus an area of particular executive expertise.²⁵⁸

All of these rationales are legitimate bases for deference in most areas in which agencies are indeed expert and are at some level politically accountable for their policy choices. The realities of immigration agency decisionmaking, however, have proven each of these rationales to be an increasingly unjustifiable basis for agency deference in a growing number of cases. It is no longer possible (if it ever was) to sustain the legal fiction that the BIA is a consistently expert, competent, politically accountable agency that produces a well-reasoned, reliable body of asylum jurisprudence deserving of lockstep deference by federal courts. The *Chevron* framework also raises specific separation-of-powers concerns in the refugee context because, in light of the statute's treaty underpinnings, agency deference allows the executive to redefine the legal boundaries of its conduct with respect to refugees.

B. Problems with the Political-Accountability Rationale and Separation-of-Powers Concerns

The *Chevron* Court viewed the statutory interpretation question as involving “competing views of the public interest,” that were best informed by “the incumbent administration’s views of wise policy.”²⁵⁹ In addition to the general problems with this rationale,²⁶⁰ it is, for substantive and structural reasons, particularly inapplicable in the asylum context.

of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan, 96 GEO. L.J. 1083, 1085–89 (2008) (discussing the reasons and considerations underpinning the Court’s decision in *Chevron*).

257. See Kane, *supra* note 6, at 557–58 (“Because federal agencies practice nationwide, it is preferable to have one legal standard governing that practice, rather than a motley collection of standards that vary based on the happenstance of federal circuit jurisdiction.”).

258. *E.g.*, *INS v. Abudu*, 485 U.S. 94, 110 (1988).

259. *Chevron*, 467 U.S. at 865–66.

260. For example, the *Chevron* Court itself recognized that courts are able to, and do, decide policy questions. *Id.* at 865 (noting that courts sometimes “reconcile competing political interests”); see also Kane, *supra* note 6, at 563–66 (noting problems with the democratic-principle rationale for agency deference).

1. *Substantive Concerns.* Unlike other areas of government regulation, refugee law is by definition not an area in which the executive has unfettered discretion. Congress intended for the INA's asylum provisions to be interpreted in light of the Convention from which they are derived,²⁶¹ not to be informed by a particular administration's political preferences. Indeed, even statutory provisions that appear facially ambiguous were enacted subject to congressional intent "to afford a generous standard for [refugee] protection in cases of doubt."²⁶² This restriction is particularly significant in the area of immigration and border control, in which government power is otherwise considered "plenary."²⁶³

Although some decisions made by immigration officials—such as tourist or business visa grants—may legitimately implicate foreign relations concerns,²⁶⁴ the balancing of competing policy considerations that prompted the Court's deference in *Chevron*²⁶⁵ is "fundamentally at odds with acceptance of international law as a constraint on policy choices and a limit on government freedom to deal as it pleases with individuals possessing rights under international agreements" like the Convention.²⁶⁶ Overlooking this constraint, the Court in *Aguirre-Aguirre* found judicial deference to the executive especially appropriate in the immigration context because of potential foreign relations implications.²⁶⁷ It explained that "[a] decision by the Attorney General to deem certain violent offenses committed in another country as political in nature, and to allow the perpetrators to remain in the United States, may affect our relations with that

261. *Negusie v. Holder*, 129 S. Ct. 1159, 1165–66 (2009).

262. *In re S-P-*, 21 I. & N. Dec. 486, 492 (B.I.A. 1996).

263. *See Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 201 (1993).

264. *Cf. Michael G. Heyman, Immigration Law in the Supreme Court: The Flagging Spirit of the Law*, 28 J. LEGIS. 113, 142 (2002) (arguing that the Court should not treat BIA officials as legitimate formulators of U.S. foreign policy).

265. *Chevron*, 467 U.S. at 865 (deferring to the EPA's interpretation on the basis that "the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests . . . and the decision involves reconciling conflicting policies").

266. Fitzpatrick, *supra* note 6, at 8. *Compare Bradley*, *supra* note 236, at 679–90 (arguing that *Chevron* deference to the executive should trump judicial comity doctrines, but that this should not apply to agencies that do not have foreign affairs expertise justifying the deference), with Posner & Sunstein, *supra* note 241, at 1178–82 (arguing that executive interpretations should be permitted to trump judicial comity doctrines so long as those interpretations are reasonable, even outside the traditional *Chevron* context of rulemaking and adjudication of agency-administered statutes). For a more substantial discussion, see *supra* Part III.B.

267. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (citing *INS v. Abudu*, 485 U.S. 94, 110 (1988)).

country or its neighbors.”²⁶⁸ The Court concluded that “[t]he judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.”²⁶⁹ What the Court failed to recognize in *Aguirre-Aguirre* is that when Congress decided to “bring United States refugee law into conformance” with the nation’s international treaty obligations,²⁷⁰ it foreclosed the executive’s discretion to consider the diplomatic repercussions of compliance with those obligations.²⁷¹ The BIA has itself recognized that although it may be prudent to exercise great caution before condemning acts of another state, “this is not a reason for narrowly applying asylum law.”²⁷² The agency has explained that “[a] decision to grant asylum is not an unfriendly act precisely because it is not a judgment about the country involved, but a judgment about the reasonableness of the applicant’s belief that persecution was based on a protected ground.”²⁷³ The BIA has cautioned against confusing the distinction “between the goals of refugee law (which protects individuals) and politics (which manages the relations between political bodies)” when interpreting domestic asylum provisions.²⁷⁴

A related separation-of-powers concern stems from the distinct nature of refugee law as compared to other areas of government regulation, such as tobacco or emissions standards, in which the government regulates private parties. In the refugee context, deference to the executive’s policy decisions risks preferencing the

268. *Id.*

269. *Id.*

270. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987); *see also supra* note 36.

271. Human rights treaties by definition limit state sovereignty and government power.

272. *In re S-P-*, 21 I. & N. Dec. 486, 493 (B.I.A. 1996).

273. *Id.* at 492.

274. *Id.* at 492–93; *see also* Matthew E. Price, *Politics or Humanitarianism? Recovering the Political Roots of Asylum*, 19 *GEO. IMMIGR. L.J.* 277, 279 & nn.6–8, 280 & nn.9–14, 281 & nn.15–20, 282 (2005) (noting that there is a broader philosophical debate regarding the political versus humanitarian nature of asylum, but observing that when the international community was considering the 1967 Protocol, the U.N. General Assembly made clear that “[t]he grant of asylum by a State . . . is a peaceful and humanitarian act and . . . as such, it cannot be regarded as unfriendly by any other [S]tate” (second alteration in original) (quoting Declaration on Territorial Asylum, G.A. Res. 2312 (XXII), U.N. GAOR, 22d Sess., Supp. No. 16, U.N. Doc. A/6716, at 81 (Dec. 14, 1967))). Treaty interpretation sometimes involves policy choices, particularly when interpretive sources conflict. But because granting asylum is not an unfriendly act against another state, those policy choices are circumscribed and may only be made in the course of the bona fide application of international treaty interpretation principles, including, in the case of refugee law, taking into account the Convention’s rights-protective purpose.

government's interest in maximizing its discretion with respect to immigration over the rights of refugees whom the government bears a burden to protect under international law. Thus, when courts defer under *Chevron* to BIA policy decisions, they invariably accede to the executive's demand for discretion to expel a person from the United States—even though Congress tasked the executive with ensuring that persons qualifying as refugees are not expelled in violation of U.S. international obligations.²⁷⁵ Indeed, international law supplies an international analog to the domestic rule of lenity, requiring that Convention provisions be interpreted in light of the Convention's rights-protective object and purpose.²⁷⁶ Consistent with that purpose, as the Third Circuit recently observed, "Congress intended to allow exceptions to our *nonrefoulement* obligations only in a narrow set of circumstances."²⁷⁷ Thus, when courts defer to expansive BIA interpretations of the INA's exceptions to asylum or withholding of removal, or narrow interpretations of the refugee definition, they allow the executive to redefine the limits of its own statutorily defined power.

These concerns would apply equally to deference to the BIA's direct interpretation of the Convention, if the agency were to engage in such an analysis. Although courts have not articulated a framework for determining the weight given to executive treaty interpretations, Professor Evan Criddle has observed that "U.S. jurisprudence does not support the proposition that deference to executive agencies should *displace* judicial interpretation of ambiguous treaty provisions."²⁷⁸ He argues persuasively that if executive treaty

275. This concern would be alleviated if the executive were to adopt a policy of ensuring that government litigation positions reflect a bona fide interpretation of domestic refugee law consistent with international law. See *infra* Part V.B.2.

276. Federal courts have recognized that when Congress enacted the Refugee Act, it intended to bring U.S. law into conformity with the provisions of the Convention, not just on their face but also as interpreted in light of the Convention's rights-protective purpose. See *Yusupov v. Att'y Gen.*, 518 F.3d 185, 203 (3d Cir. 2008) ("The legislative history of the Refugee Act of 1980 makes clear that Congress intended to protect refugees to the fullest extent of our Nation's international obligations." (emphasis added) (footnote omitted)); *Marincas v. Lewis*, 92 F.3d 195, 198 (3d Cir. 1996) ("[T]he Refugee Act was enacted to fulfill our treaty obligations under the [1967] U.N. Protocol for the benefit of aliens . . . who claim to be fleeing persecution in their homelands." (emphasis added)); *supra* notes 9, 42, 72 and accompanying text.

277. *Yusupov*, 518 F.3d at 204.

278. Evan Criddle, Comment, *Chevron Deference and Treaty Interpretation*, 112 YALE L.J. 1927, 1932 (2003) (citing *O'Connor v. United States*, 479 U.S. 27, 32 (1986)); see also *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) (constraining deference with the caveat that "courts interpret treaties for themselves"); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE

interpretations are entitled to any deference at all, it should be the “persuasiveness” deference standard articulated in *Skidmore v. Swift & Co.*,²⁷⁹ under which the degree of deference would turn upon multiple factors, including “the agency’s relevant expertise, the cogency of the agency’s reasoning, . . . and the interpretation’s potential to promote transnational legal order.”²⁸⁰ Professors Derek Jinks and Neal Katyal have similarly argued that substantial deference to executive treaty interpretations is inappropriate, at least in the “executive-constraining zone”—that is, in the domain of international law made at least in part outside the executive branch that conditions the exercise of executive power.²⁸¹

2. *Structural Concerns.* Structurally, the political accountability rationale fails in the refugee context because neither the BIA nor IJs are actually politically accountable for their decisions.²⁸² Even assuming that the general public could somehow hold the attorney general accountable for the content of BIA decisions under the current immigration adjudication system,²⁸³ there could be no accountability in practice because the procedures and many decisions of the BIA and immigration courts are not publicly available.

UNITED STATES § 326 (1989) (“Courts in the United States have final authority to interpret an international agreement for purposes of applying it as law in the United States . . .”).

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

280. Criddle, *supra* note 278, at 1933–34. Professor Criddle contends that in addition to separation-of-powers concerns, deference to the executive’s domestic-policy-driven interpretation of international treaties would “invite inconsistency between domestic and foreign treaty constructions; draw U.S. treaty law into conflict with international law; and provoke reciprocal, self-serving interpretations by foreign treaty partners.” *Id.* at 1930; *cf.* Bradley, *supra* note 236, at 702 (noting that courts should apply *Chevron* deference to executive treaty interpretation based on the presumption that “United States treatymakers have delegated interpretive power to the executive branch because of its special expertise in foreign affairs”).

281. Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1234 (2007) (responding to and disagreeing with Posner and Sunstein’s proposal to increase deference to the executive); *see also supra* Part III.B.

282. The *Chevron* Court acknowledged that the EPA was not directly accountable to the public either, but it held that the agency was sufficiently accountable because of its ultimate accountability through the executive. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984). Commentators have questioned this proposition, suggesting that no administrative agencies are truly politically accountable. *See, e.g.,* Kane, *supra* note 6, at 570 & nn.277–80, 571 (discussing various commentators’ rationales for arguing that agencies run by unelected civil servants are not politically accountable).

283. It is questionable whether the general public is even aware that the BIA—in contrast to an agency such as the EPA—is an executive body performing the attorney general’s administrative function, rather than an Article III court.

Because most of the decisions that those agencies make—policy related or otherwise—are unpublished, they are structurally insulated from any form of public input at the front end or ballot-box accountability after the fact.²⁸⁴ Ironically, the BIA decision to which the Court deferred in *Aguirre-Aguirre* was unpublished and would have remained secret had Aguirre-Aguirre not appealed to the Ninth Circuit. The relevant public would never have known that a foreign relations policy decision had been made, let alone have been able to influence it or hold someone in the executive branch accountable.

C. Problems with the Agency-Expertise Rationale

1. *Interpretation in a “Detailed and Reasoned Fashion.”* As BIA²⁸⁵ and Immigration Court²⁸⁶ resources have been cut and these bodies have become increasingly stretched, cases in which they consider issues in a “detailed and reasoned fashion”²⁸⁷ are increasingly few and far between. Courts across the country have criticized a number of the BIA’s decisions as poorly reasoned, superficial, ill considered, and betraying a lack of the detailed consideration the *Chevron* Court attributed to administrative agencies.²⁸⁸ Criticism of IJ

284. See *Lagandaon v. Ashcroft*, 383 F.3d 983, 987 n.2 (9th Cir. 2004) (“We have also indicated that nonprecedential BIA decisions might receive less deference than those designated as precedential.”).

285. In 2008, the BIA adjudicated 38,369 cases. COMM’N ON IMMIGRATION, AM. BAR ASS’N, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES: EXECUTIVE SUMMARY, at ES-31 (2010), available at http://www.abanet.org/media/nosearch/immigration_reform_executive_summary_012510.pdf. This remarkably high adjudication rate has come at the expense of a diminished likelihood of identifying IJ error and a lack of unified precedential guidance coming from the BIA. *Id.*

286. *Id.* at ES-28. In 2008, each IJ issued an average of 1,014 decisions—approximately nineteen decisions every week. *Id.* IJs predictably have inadequate time and resources to formulate well-reasoned opinions in many cases, a problem which is compounded by inadequate support staff and law clerks. *Id.* They frequently issue oral decisions without sufficient time to conduct thorough legal research or properly analyze legal and evidentiary issues. *Id.* at ES-30.

287. *Chevron*, 467 U.S. at 865.

288. *Id.*; see also *Ayala v. Att’y Gen.*, 605 F.3d 941, 943, 951 (11th Cir. 2010) (remanding to the BIA because “[t]he decision of the Board is riddled with error” and the BIA and IJ “fail[ed] to render a reasoned decision”); *Haile v. Holder*, 591 F.3d 572, 574 (7th Cir. 2010) (remanding to the BIA for a second time because “the Board’s conclusion [that denationalization alone does not constitute persecution] doesn’t follow from its premise, and unlike a jury an administrative agency has to provide a reasoned justification for its rulings”); *Parlak v. Holder*, 578 F.3d 457, 471, 480 (6th Cir. 2009) (Martin, J., dissenting) (“This record is replete with error”); *Bah v. Mukasey*, 529 F.3d 99, 111 (2d Cir. 2008) (“[W]e are deeply disturbed by what we perceive to be fairly obvious errors in the agency’s application of its own regulatory framework. . . . The claims of the petitioners before us, as set forth below, did not receive the

decisions has sometimes extended beyond allegations of incompetence and ignorance to include personal bias and hostility toward individuals seeking asylum.²⁸⁹ Indeed, in some cases, federal judges have viewed decisionmaking by IJs and the BIA as sufficiently inept as to have “fallen below the minimum standards of legal justice.”²⁹⁰ Although many IJs and BIA members legitimately employ

type of careful analysis they were due.”); *N'Diom v. Gonzales*, 442 F.3d 494, 500 (6th Cir. 2006) (Martin, J., concurring) (observing “the significantly increasing rate at which adjudication lacking in reason, logic, and effort” reaches the federal courts); *Pasha v. Gonzales*, 433 F.3d 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.” (citation omitted)); *Ssali v. Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005) (“This very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner’s] case”); *Grupee v. Gonzales*, 400 F.3d 1026, 1028 (7th Cir. 2005) (noting that the IJ’s unexplained conclusion is “hard to take seriously”); *Zewdie v. Ashcroft*, 381 F.3d 804, 807 (8th Cir. 2004) (“[T]he immigration judge failed to articulate a reasoned analysis based on the record evidence for denying [the petitioner’s] claims.”); *Kourski v. Ashcroft*, 355 F.3d 1038, 1039 (7th Cir. 2004) (“There is a gaping hole in the reasoning of the board and the immigration judge.”); *Galina v. INS*, 213 F.3d 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.” (citations omitted)).

289. See, e.g., *Chen v. U.S. Dep’t of Justice*, 426 F.3d 104, 115 (2d Cir. 2005) (“The IJ’s finding . . . was grounded solely on speculation and conjecture.”); *Wang v. Att’y Gen.*, 423 F.3d 260, 269 (3d Cir. 2005) (“The tone, the tenor, the disparagement, and the sarcasm of the IJ seem more appropriate to a court television show than a federal court proceeding.”); *Dawoud v. Gonzales*, 424 F.3d 608, 610 (7th Cir. 2005) (“The IJ’s opinion is riddled with inappropriate and extraneous comments”); *Sosnovskaia v. Gonzales*, 421 F.3d 589, 594 (7th Cir. 2005) (“The procedure that the IJ employed in this case is an affront to [the petitioner’s] right to be heard.”); *Fiadjo v. Att’y Gen.*, 411 F.3d 135, 154–55 (3d Cir. 2005) (finding that the IJ’s “hostile” and “extraordinarily abusive” conduct toward petitioner “by itself would require a rejection of his credibility finding”); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1054 (9th Cir. 2005) (“[T]he IJ’s assessment of Petitioner’s credibility was skewed by prejudice, personal speculation, bias, and conjecture”); *Korytnyuk v. Ashcroft*, 396 F.3d 272, 292 (3d Cir. 2005) (“[I]t is the IJ’s conclusion, not [the petitioner’s] testimony, that ‘strains credulity.’”); see also Memorandum from Alberto Gonzales, U.S. Att’y Gen., to Members of the BIA (Jan. 9, 2006), available at <http://www.justice.gov/ag/readingroom/ag-010906-boia.pdf> (noting with concern that recent reports have indicated that some IJs “fail to treat aliens appearing before them with appropriate respect and consideration” and acknowledging that the conduct of some IJs “can aptly be described as intemperate or even abusive”).

290. *Morales Apolinar v. Mukasey*, 514 F.3d 893, 897 (9th Cir. 2008) (quoting *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005)). Writing for the majority in *Benslimane*, Judge Richard Posner, one of the most outspoken critics of the BIA on the federal bench, observed that in one year alone, the Seventh Circuit had reversed the BIA in whole or part in a staggering 40 percent of cases, compared with 18 percent of civil cases during the same period in which the United States was the appellee. *Benslimane*, 430 F.3d at 829.

their best efforts under grossly inadequate resources,²⁹¹ the growing judicial skepticism toward Immigration Court and BIA decisions has become so significant that it has been described as an “important—though often overlooked—thread of modern immigration jurisprudence.”²⁹²

2. *BIA’s Expertise Relative to the Courts*. Since the Court held in *Aguirre-Aguirre* that the *Chevron* framework applies to BIA interpretations of the INA,²⁹³ two major structural changes have altered the balance of interpretive expertise such that the BIA’s expertise has diminished as courts of appeals’ expertise has increased. First, various “streamlining procedures” have further reduced the time and resources the BIA is able to devote to individual cases.²⁹⁴ Indeed, courts have questioned whether an IJ decision affirmed without opinion by the BIA through the streamlining process should

291. COMM’N ON IMMIGRATION, *supra* note 285, at ES-28.

292. Adam B. Cox, *Deference, Delegation and Immigration Law*, 74 U. CHI. L. REV. 1671, 1672 (2007); *see also* STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 751–52 (5th ed. 2009) (gathering citations to numerous recent proposals to reform the immigration adjudication system in light of problems with the independence of adjudicators and the quality of decisionmaking); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1639 (2010) (observing that problems with the fairness, accuracy, and consistency of BIA decisionmaking are rooted in “severe underfunding, reckless procedural shortcuts, the inappropriate politicization of the process, and a handful of adjudicators personally ill suited to the task”); Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 303 (2007) (“[V]ery significant differences from one decision maker to the next in the adjudication of asylum cases should be a matter of serious concern to federal policymakers.”); Eliot Walker, *Asylees in Wonderland: A New Procedural Perspective on America’s Asylum System*, 2 NW. J.L. & SOC. POL’Y 1, 2 (2007) (“That the American asylum system has fallen into disrepute is no longer a significantly contested point of debate.”).

293. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424–25 (1999).

294. *See* Cox, *supra* note 292, at 1682 (“[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.”); *see also* Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 11–21 (2006) (noting that the 2002 reforms increased the caseload for immigration courts and made those courts less careful and thorough); Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals’s Summary Affirmance Procedures*, 16 STAN. L. & POL’Y REV. 481, 499–501 (2005) (summarizing the limitations recent streamlining procedures place on the BIA); John R.B. Palmer, Stephen W. Yale-Loehr & 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 GEO. IMMIGR. L.J. 1, 29–32 (2005) (discussing criticism of the procedural changes to the BIA).

be entitled to *Chevron* deference at all.²⁹⁵ Judge Richard Posner, a frequent critic of IJs and the BIA,²⁹⁶ observed that the BIA “is not deploying any insights that it might have obtained from adjudicating immigration cases.”²⁹⁷ In contrast, structural reforms have resulted in an explosion in the number of immigration cases that the courts of appeals consider each year.²⁹⁸ Given these changes, it is not clear that that the BIA retains sufficiently greater expertise than federal courts in the interpretation of the asylum and withholding statutes to justify deference.

3. *Interpretation of International Law.* The BIA especially lacks expertise in the application of formal treaty interpretation principles to determine U.S. obligations under international law.²⁹⁹ As discussed in Part III, treaty interpretation is implicated in the construction of

295. *Smriko v. Ashcroft*, 387 F.3d 279, 289 (3d Cir. 2004). The Third Circuit limited the kinds of BIA decisions entitled to deference. *See id.* at 297 (“If . . . an individual Board member arbitrarily . . . streamlines a case where no Board or binding precedent accepts or rejects an alien’s plausible interpretation of an ambiguous statute, we are then left to interpret the statute without the BIA having provided its *Chevron* deference-entitled ‘concrete meaning’ to an ambiguous statute.”). The Third Circuit explained,

Aguirre-Aguirre . . . did not determine that the opinion of an IJ, when affirmed without opinion by the BIA’s streamlining process, is entitled to *Chevron* deference, and it does not necessary [*sic*] follow that such would be the case. . . . [I]t would seem to be, at the very least, an open question.

Id. at 289 n.6. Although the practice of AWO has declined significantly, short opinions by single members are now the dominant form of decisionmaking. COMM’N ON IMMIGRATION, *supra* note 285, at ES-32.

296. *See Cox*, *supra* note 292, at 1679–80 (“In recent years, Posner has more and more frequently concluded that both the immigration judges . . . and the Board of Immigration Appeals . . . are inept.”).

297. *Mei v. Ashcroft*, 393 F.3d 737, 739 (7th Cir. 2004).

298. *See, e.g., Note, Recent Cases: Immigration Law—Administrative Adjudication—Third and Seventh Circuits Condemn Pattern of Error in Immigration Courts—Wang v. Attorney General*, 423 F.3d 260 (3d Cir. 2005), and *Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir. 2005), 119 HARV. L. REV. 2596, 2596 (2006) (noting that immigration decisions have “swollen in the past five years from three percent to eighteen percent of all federal appeals”); Palmer et al., *supra* note 294, at 44–45 (discussing the surge in petitions for review after March 2002). This increase has not come without cost for federal judges, who have also been faced with a vastly expanded docket. *See, e.g., Gerald Seipp & Sophie Feal, Overwhelmed Circuit Courts Lashing Out at the BIA and Selected Immigration Judges: Is Streamlining to Blame?*, 82 INTERPRETER RELEASES 2005, 2005 (2005) (describing problems arising from the massive increase in the number of immigration cases in 2005).

299. *Cf. Kane*, *supra* note 6, at 521 (arguing that *Chevron* deference to BIA determinations in religious refugee cases is inappropriate because such claims are not “highly technical”). Professor Kane was presumably referring to the assessment of whether particular facts constitute religious persecution under established standards, as opposed to the determination of those standards.

INA asylum and withholding provisions, including those within the expanding category interpreted on a case-by-case basis. Deference to the BIA in these cases has serious jurisprudential implications beyond misconceived interpretations of U.S. immigration law—it risks the BIA’s ill-considered determinations influencing the interpretation of the Convention for all states parties. Or in the alternative, the lack of considered analysis by the BIA risks other states parties marginalizing the jurisprudence of the United States in determining the accepted interpretation of Convention provisions, leaving the task of defining U.S. obligations under the Convention to the judges of foreign courts.³⁰⁰

4. *Uniformity.* Although agencies that decide matters through notice-and-comment rulemaking may achieve relative interpretive consistency, the same is not necessarily true of agencies that rule by adjudication. The immigration courts and the BIA regularly fail to achieve uniformity in their construction of INA provisions over time. Indeed, the authors of an empirical study of IJ determinations across the country described the widespread lack of consistency in the adjudication of asylum claims as “refugee roulette.”³⁰¹ The study found, for example, that Colombian asylum seekers appearing before the Miami immigration court had a 5 percent chance of prevailing before one IJ and an 88 percent chance of prevailing before another.³⁰²

Tied to general frustration with the poor standard of BIA decisionmaking, courts have criticized the agency’s “continually competing and definitionally inconsistent constructions” of asylum provisions³⁰³—though generally as a factor militating against the

300. See *infra* Part V.A.

301. See Ramji-Nogales et al., *supra* note 292, at 302 (“[I]n the very large volume of adjudications involving foreign nationals’ applications for protection from persecution and torture in their home countries, we see a great deal of statistical variation in the outcomes pronounced by decision makers.”).

302. *Id.* at 296.

303. *N-A-M v. Holder*, 587 F.3d 1052, 1060 (10th Cir. 2009) (Henry, J., concurring) (noting that “the BIA’s continually competing and definitionally inconsistent constructions of § 1231 frustrate our function as a reviewing court and threaten the reasonableness of its interpretations”). The BIA’s AWOs and short opinions by single members further undermine its ability to achieve consistency. See COMM’N ON IMMIGRATION, *supra* note 285, at ES-32 to -33 (“The combination of single-member review and lack of detailed decisions has given rise to a dearth of Board precedent and guidance for the immigration courts.”); see also *Perdomo v. Holder*, 611 F.3d 662, 663–64 (9th Cir. 2010) (remanding because the BIA’s construction of “particular social group” was inconsistent with its own opinions in two previous decisions).

reasonableness of a particular BIA interpretation, rather than undermining the application of *Chevron* per se.³⁰⁴

V. TOWARD A MORE INTERNATIONALLY ENGAGED U.S. JUDICIARY

A. *Reclaiming a Seat at the Table*

This Article has, thus far, focused on the argument for looking to international and comparative law in interpreting domestic refugee provisions, and the domestic consequences of courts' failure to do so. There is a broader, less often discussed, problem that goes beyond the failure of U.S. courts to *receive* international law. It is the concomitant failure of U.S. courts to play a leadership role in the *creation* of international law.³⁰⁵

By failing to meaningfully engage in the interpretation of international refugee law, U.S. courts diminish the relevance of their decisions to the interpretation of refugee law by courts of other states parties to the Convention. Justice Ginsburg recently observed that failing to engage foreign decisions had diminished the global influence of the U.S. Supreme Court.³⁰⁶ Indeed, foreign judges have, on numerous occasions, remarked on the provinciality of U.S. judges because of their reluctance to consider foreign and international law compared to their judicial counterparts in other similarly situated democratic countries.³⁰⁷

304. See *N-A-M*, 587 F.3d at 1060 (Henry, J., concurring); see also *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (“[T]he consistency of an agency’s position is a factor in assessing the weight that position is due.”); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (“An agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.” (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981))).

305. Claire L’Heureux-Dubé, *The Importance of Dialogue: Globalization, the Rehnquist Court, and Human Rights*, in *THE REHNQUIST COURT* 234, 234–35 (Martin H. Belsky ed., 2002) (“[A]s courts look *all* over the world for sources of authority, the process of international influence has changed from *reception* to *dialogue*. . . . and dialogue between jurisdictions is increasingly occurring. . . . [O]ne large exception to this general . . . trend. . . . [is t]he United States Supreme Court.”).

306. Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, N.Y. TIMES, Apr. 12, 2009, at A14.

307. Former Chief Justice of the Israeli Supreme Court Aharon Barak observed that “most Justices of the United States Supreme Court do not cite foreign case law in their judgments” and that the U.S. Supreme Court “is losing the central role it once had among courts in modern democracies.” Aharon Barak, *The Supreme Court 2001 Term—Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 27, 114 (2002); see also

Several recent Supreme Court opinions³⁰⁸ citing to foreign law provide reason for new cautious optimism among judges and scholars championing the use of foreign law by the Supreme Court and lower federal courts as part of a broader transnational judicial dialogue.³⁰⁹ Even if that optimism is warranted, however, it does not necessarily extend to lower courts, where most judicial construction of domestic asylum provisions occurs.³¹⁰

Although the failure to consider international and comparative law may have general adverse international consequences for U.S. courts, it creates a concrete jurisprudential problem in the refugee context because of the domestic statute's derivation from, and inextricable link with, a specific international treaty. Thus, in contrast to broader debates about the merits of U.S. participation in transnational judicial dialogue on constitutional or common-law issues, the failure of U.S. judges to engage in a meaningful analysis of the treaty's terms results in an abdication of power to other states to shape the meaning of treaty terms that bind all states parties (including the United States) under international law. At the very least, to legitimately participate in defining international refugee law for other states parties, U.S. courts must overcome the dissonance between the repeated affirmation that Congress intended domestic asylum provisions to be interpreted consistent with U.S. international obligations and the increasingly unwarranted tendency to defer to the BIA's "policy choices."³¹¹

L'Heureux-Dubé, *supra* note 305, at 239–40 (reviewing the Rehnquist Court's international impact and critiquing its provinciality).

308. Supreme Court Justices have looked to foreign precedent in interpreting the U.S. Constitution. See *Graham v. Florida*, 130 S. Ct. 2011, 2033 (2010) (noting the global consensus against sentencing juveniles who did not commit homicide to life without parole); *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005) (acknowledging that international opinion is "overwhelmingly" against the juvenile death penalty); *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003) (noting that other nations have recognized the right of homosexual adults to engage in consensual intimate conduct); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (observing international disapproval of sentencing mentally retarded offenders to the death penalty).

309. See, e.g., Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 490 (2005) (asserting that national courts worldwide engage in a complex dialogue that creates international legal norms).

310. See Zaring, *supra* note 5, at 313–15 (concluding that the increase in federal court citations to foreign sources is largely a product of an increase in the absolute number of opinions and not a greater reliance on foreign sources).

311. See HATHAWAY, *supra* note 70, at 72–73 (noting that the interpretation of human rights treaties should not be directed to advancing the interest of the contracting parties because

It is important to recognize that the participation of U.S. courts in the definition of Convention terms, though invariably of value to U.S. courts, may not always result in the advancement of human rights. Unless courts engage in treaty interpretation in a genuine effort to preserve the international legality of U.S. practice, it may undermine the rights of refugees. The strongest cautionary tale concerning U.S. courts' ability to bend international law to meet executive policy demands remains the Supreme Court's 1993 decision in *Sale v. Haitian Centers Council, Inc.*³¹² Several scholars have argued that the *Sale* Court willfully interpreted Article 33 of the Convention erroneously to allow the forced repatriation of large numbers of Haitian asylum seekers interdicted at sea. This decision was based on interpretations of the Convention's text and drafting history that were not particularly plausible—indeed, some have argued that these interpretations were adopted with an “attitude of calculated cynicism toward international obligation.”³¹³ The UNHCR described the Court's decision as “a setback to modern international refugee law which has been developing for more than forty years.”³¹⁴

The most significant way to minimize the risks inherent in inviting courts to engage in human rights treaty interpretation is by fostering a genuine systemic commitment to compliance with (and awareness of the fragility of) those treaties. In the domain of refugee

these treaties are designed to limit state sovereignty and advance more general goals for the international community).

312. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993). *Sale* concerned the legality of a presidential order to the Coast Guard. *Id.* at 158. The order required the Coast Guard to intercept ships outside U.S. waters that were transporting Haitians to the United States and to forcibly repatriate those passengers to Haiti, without first determining whether they qualified as refugees. *Id.* The court upheld the validity of the order. *Id.* at 159. Because *Sale* was a direct challenge that did not arise in the course of removal proceedings, it did not raise *Chevron* issues and therefore is not discussed at length in this Article.

313. Fitzpatrick, *supra* note 6, at 10; see also Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4, 28 (1995) (criticizing the *Sale* Court's failure to use appropriate treaty interpretation methods); Thomas David Jones, *International Decisions, Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993), 88 AM. J. INT'L L. 114, 122 (1994) (describing the Court's analysis of the Convention in *Sale* as judicial activism that was analytically “flawed in numerous respects”); Louis Henkin, *Notes from the President*, NEWSLETTER (Am. Soc'y Int'l L., Washington, D.C.), Sept.–Oct. 1993, at 1, 7–8 (criticizing *Sale* as an “eccentric, highly implausible” interpretation of a treaty).

314. *Haitian Asylum-Seekers: Hearing Before the Subcomm. on International Law, Immigration, and Refugees of the H. Comm. on the Judiciary*, 103d Cong. 335 (1994). The UNHCR observed that *Sale* was “contrary to the views of the UNHCR's Executive Committee that refugees should not be refused entry to a country where they are seeking asylum, and that asylum seekers rescued at sea should always be admitted, at least on a temporary basis.” *Id.*

law, two of the most significant obstacles to constructive judicial engagement in treaty interpretation can be addressed with greater ease than is generally supposed. These obstacles are, first, the perception by U.S. courts that international law is indeterminate and not capable of systematic interpretation and, second, the tendency of government lawyers to take litigation positions that are incompatible with international law out of fear of intrusion on executive power.

B. Challenges Can Be Overcome

1. *Domestic Courts and the Perception of Indeterminacy.* Despite the risk of courts manipulating international law, in general the formal and rule-oriented nature of treaty interpretation is intended “to generate dependable and rights-regarding results.”³¹⁵ But federal judges often perceive that if the meaning of a Convention provision is not clear on its face, then it is indeterminate or not amenable to systematic interpretation.³¹⁶ Indeed, instead of viewing apparent ambiguity in treaty language as an invitation to interpret the treaty, many judges view it as a legitimate basis for setting international law aside in favor of more familiar domestic sources of statutory interpretation.³¹⁷ This concern is overblown and stems from a lack of familiarity with international law and treaty interpretation principles, and the dearth of resources and expertise to conduct the relevant research.

Federal courts are as capable as their foreign counterparts of analyzing the meaning of ambiguous treaty provisions in light of the treaty’s object and purpose and in the context of the treaty’s drafting history and subsequent interpretation by states parties, scholars, and the UNHCR.³¹⁸ Indeed, when U.S. law is dependent on an international treaty, courts have sometimes been more receptive to (and capable of) examining the treaty’s purpose and its interpretation by other states parties than they have been in relation to questions of constitutional or common law.³¹⁹ Most recently, for example, most of

315. HATHAWAY, *supra* note 70, at 48.

316. *See supra* text accompanying notes 129–30.

317. *See supra* notes 125–28 and accompanying text.

318. For a discussion of treaty interpretation principles that have been recognized by U.S. courts, see *supra* Part I.A.4.

319. *See, e.g.,* Hamdan v. Rumsfeld, 548 U.S. 557, 626–36 (2006) (considering international sources to interpret the meaning of various provisions of the Geneva Conventions); Air France v. Saks, 470 U.S. 392, 404 (1985) (“[W]e ‘find the opinions of our sister signatories to be entitled to considerable weight.’” (quoting Benjamins v. British European Airways, 572 F.2d 913, 919

the Supreme Court (including Justice Scalia)³²⁰ demonstrated its ability and willingness to grapple with the interpretation of the undefined term “rights of custody” under the Hague Convention on the Civil Aspects of International Child Abduction³²¹ during oral argument in an international child custody case.³²² Argument focused on the purpose of the treaty, the circumstances surrounding its passage, and its interpretation by other states parties.³²³ The Eleventh Circuit has been similarly guided by the treaty in interpreting the same phrase, observing that “in applying the Hague Convention, ‘we must look to the definition of rights of custody set forth in the Convention and not allow our somewhat different American concepts of custody to cloud our application of the Convention’s terms.’”³²⁴ There is nothing peculiar to the Refugees Convention that makes it more difficult to interpret using ordinary principles of treaty interpretation.

In many cases, courts can only fulfill their role of reviewing BIA construction of domestic asylum and withholding provisions by first establishing the meaning of treaty provisions with which Congress

(2d Cir. 1978)); *N-A-M v. Holder*, 587 F.3d 1052, 1062 (10th Cir. 2009) (Henry, J., concurring) (“We can also benefit from reference to international law, as it reveals how other tribunals have interpreted the exact same text. . . . [T]he broad consensus, even among opponents of its use in constitutional law cases, supports its use when determining how other signatories on a treaty interpret that treaty.”).

320. Although dissenting in *Hamdan*, Justice Scalia has supported the use of foreign jurisprudence in treaty interpretation on other occasions. *See, e.g.*, *Olympic Airways v. Husain*, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting) (criticizing the majority because their “decision stands out for its failure to give any serious consideration to how the courts of our treaty partners have resolved the legal issues before us” and noting specifically that “[w]ithin the past year, appellate courts in both England and Australia have rendered decisions squarely at odds with today’s holding”).

321. *Hague Convention on the Civil Aspects of International Child Abduction*, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89.

322. *See* Transcript of Oral Argument at 3–8, *Abbott v. Abbott*, 130 S. Ct. 1983 (2010) (No. 08-645), 2010 WL 97480.

323. *See generally id.* Justice Sotomayor queried whether “anything in the history of the negotiation and passage of the [treaty] . . . reflect[ed] what the U.S.’s position was on this particular issue.” *Id.* at 27. Several Justices queried about the intention of the drafters and signatories to the Convention. *Id.* at 38, 55–56. Even Justice Scalia, one of the Court’s most vocal opponents to citing foreign law in the constitutional context, examined the positions of the treaty’s other signatory countries, observing that “the purpose of a treaty is to have everybody doing the same thing.” *Id.* at 43–44. Although appearing to value consistency over giving effect to the purpose of the treaty, Justice Scalia responded to counsel’s suggestion that domestic law may remedy the situation with the retort that “[i]f these local remedies were effective, we wouldn’t have a treaty.” *Id.* at 49.

324. *Hanley v. Roy*, 485 F.3d 641, 646–47 (11th Cir. 2007) (quoting *Furnes v. Reeves*, 362 F.3d 702, 711 (11th Cir. 2004)) (internal quotation marks omitted).

intended domestic legislation to comply. But as a practical matter, the interpretive sources for the Convention are not always easy to locate. International legal research can be a time-consuming exercise—and one which federal judges (and their clerks) may not be trained to undertake.³²⁵ Thus, the level to which courts engage in treaty analysis depends heavily on the extent to which counsel for asylum seekers (and more often *amicus curiae*) brief the courts on the Convention and its interpretive sources.³²⁶ The task of interpreting international sources would also be made easier by systemic judicial training in this area.

2. *Overcoming Reactive Government Litigation Positions.* A second concern is that DHS attorneys—and on appeal, attorneys in the Department of Justice’s Office of Immigration Litigation (OIL)—frequently adopt litigation positions that are inconsistent with international refugee law, apparently motivated by a desire to maximize executive power and discretion.³²⁷ Those litigation positions have significantly contributed to the BIA interpreting domestic asylum provisions inconsistently with U.S. obligations under international law. Whether out of instinctive deference to the government or motivated by other concerns, IJs and the BIA frequently adopt the government’s litigation position regardless of its inconsistency with international law. In a recent case in which the BIA upheld the IJ’s decision, for example, one circuit judge observed

325. Much has changed since Joseph L. Kunz wrote *A Plea for More Study of International Law in American Law Schools*, 40 AM. J. INT’L L. 624 (1946), which lamented that the political science departments of most American universities taught international law, but their law schools did not. *Id.* at 624. Although the overwhelming majority of U.S. law schools now teach international law, very few require students to take it as part of a law degree.

326. From personal experience, attorneys are often fearful of introducing too much complexity into arguments based on the Convention, lest judges avoid the subject altogether as either too hard or too foreign. It is precisely this oversimplification—for example, advocating a particular interpretation based only on the views of the UNHCR *Handbook*—that has caused judges to reject international legal sources as irrelevant or categorically inferior to BIA determinations. See *supra* notes 323–24 and accompanying text. It also exposes the UNHCR’s position as *amicus curiae* to easier marginalization, and makes its briefing task more difficult.

327. See OIL, U.S. Dep’t of Justice, *Where O’ Where Has the Eleventh Circuit Gone?*, IMMIGR. LITIG. BULL., June 2010, at 3, 3 (analyzing the “declining percentage of published asylum-related wins” for the government in the Eleventh Circuit to enable OIL attorneys to achieve “greater success”—defined as a greater percentage of government victories—in future asylum appeals); see also *Kang v. Att’y Gen.*, 611 F.3d 157, 167 (3d Cir. 2010) (expressing distress that OIL pursued its appeal of the IJ’s finding of a likelihood of torture to the BIA and the court of appeals with such zeal that it failed to seek “justice rather than victory”).

that “the IJ could not be bothered to do more than copy and paste swaths of the government’s briefs.”³²⁸

Yet it is apparent that this reactive stance may not be in keeping with the policy preferences and objectives of the current executive with respect to international law—and human rights treaties in particular.³²⁹ In this sense, this apparent hurdle may no longer be as insurmountable as it appeared in previous years. As a new administration rethinks the engagement of the United States with international law and human rights treaties and institutions more broadly³³⁰ and recognizes that “the promotion of human rights cannot be about exhortation alone,”³³¹ it is appropriate for it to examine the approach that its attorneys take with respect to construction of the INA in removal proceedings. Given the number of cases OIL and DHS attorneys handle each year that do not attract high-level scrutiny, the new administration’s goals would be well served by a pragmatic yet transformative policy of ensuring that government

328. *Parlak v. Holder*, 578 F.3d 457, 480 (6th Cir. 2009) (Martin, J., dissenting). Judge Boyce Martin noted the particular perils of this rubber-stamping in the recent “era of paranoid, overzealous, error-riddled, and misguided anti-terrorism and immigration enforcement.” *Id.* at 481.

329. This problem further undermines Posner and Sunstein’s argument that courts should defer to executive decisions interpreting statutes in a manner inconsistent with international law on the basis of the executive’s foreign relations expertise and its political accountability by virtue of its connection with the president. *See supra* text accompanying notes 241–46.

330. In 2009, the United States signed the U.N. Convention on the Rights of Persons with Disabilities, its first human rights treaty in over a decade. Further, when presenting its candidacy for election to the U.N. Human Rights Council in April 2009, it pledged to consider the possible ratification of human rights treaties, including but not limited to, the U.N. Convention on the Elimination of All Forms of Discrimination against Women, which it signed in 1980. *See* Letter from the Permanent Representative of the United States of America to the United Nations, to the President of the General Assembly, at 4–5 U.N. Doc. A/63/831 (Apr. 24, 2009) (presenting the United States’ candidacy for membership in the United Nations Human Rights Council). The legislature has embarked on a similar process; on December 16, 2009, the Senate Judiciary Subcommittee on Human Rights and the Law held its first-ever hearing on U.S. compliance with the nation’s human rights treaty obligations. It received detailed submissions from almost sixty organizations across the country. For copies of the submissions and a transcript, see *The Law of the Land: U.S. Implementation of Human Rights Treaties*, U.S. SENATE (Dec. 16, 2009), <http://durbin.senate.gov/humanRights/treatiesHearing.cfm>. And the U.S. government has actively engaged in the U.N. Human Rights Council’s Universal Periodic Review Process. *See* Statement of the Delegation of the United States of America to the Human Rights Council 15th Session (Sep. 23, 2010) (“Preparing for our own UPR session . . . [w]e conducted unprecedented consultations in more than ten cities across the country, to examine practical human rights issues facing our citizens in a new and novel manner.”).

331. Barack H. Obama, U.S. President, Nobel Lecture: A Just and Lasting Peace (Dec. 10, 2009), available at http://nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html.

litigation positions reflect an interpretation of domestic refugee law that is consistent with international law.

Such a litigation position would accord with the Supreme Court's clear findings over the past three decades that the Refugee Act was intended to conform U.S. immigration law to the nation's obligations under the Protocol. It would also leave government attorneys free to propose interpretations of the Convention contrary to those advocated by asylum seekers, provided they do so as part of a bona fide attempt to comply with international law and that they take into account the BIA's determination a decade and a half ago that Congress intended a presumption in favor of refugee protection in cases of doubt.³³²

CONCLUSION

Interpreting the INA consistently with the Convention will invariably provide a more rights-protective framework than the domestic immigration statute alone. This framework better reflects congressional intent and the United States' international commitment to safeguarding the human rights of people seeking protection from persecution. Consistent with congressional intent, courts may reject BIA constructions of domestic asylum and withholding provisions on the basis that they are inconsistent with the Convention. They may do so despite the *Chevron* doctrine. Under current Supreme Court jurisprudence, courts may find that, absent clear statutory language to the contrary, a construction that is incompatible with international law on the Convention is inconsistent with clear congressional intent to conform domestic refugee law with the nation's obligations under the Protocol and, therefore, is not entitled to deference under *Chevron* step one. Or at a minimum, courts may determine that a construction inconsistent with international law is unreasonable under *Chevron* step two because it violates statutory construction principles assuming consistency with international law and U.S. treaty obligations. Alternately, in light of deficient IJ and BIA decisionmaking processes, the Supreme Court may be encouraged to consider whether the agency expertise and public accountability rationales underpinning *Chevron* can justify deference to those

332. See *In re S-P*, 21 I. & N. Dec. 486, 492 (B.I.A. 1996) ("In enacting the Refugee Act of 1980, Congress sought to bring the Act's definition of 'refugee' into conformity with the United Nations Convention and Protocol Relating to the Status of Refugees . . . Such an approach is designed to afford a generous standard for protection in cases of doubt." (citations omitted)).

agencies at all. More modestly, courts may consider whether problems with those rationales undermine the reasonableness of the BIA's statutory construction under *Chevron* step two in a particular case. Regardless of the path courts take, they have jurisdiction to ensure that U.S. asylum and withholding statutes are interpreted consistently with the letter and spirit of the Convention, as Congress intended.