A FRAMEWORK FOR JUDICIAL REVIEW AND REMAND IN IMMIGRATION LAW

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ABSTRACT

This Article breaks new ground at the intersection of administrative law and immigration law. One of the more important questions in both fields is whether a reviewing court should resolve a legal issue in the first instance or remand that issue to the agency. This Article advances the novel claim that courts should use the modern framework for judicial review of agency statutory interpretations to inform their resolution of this remand question. Then, using this framework, the Article identifies when remand is and is not appropriate in immigration cases. This critical analysis, which urges a departure from conventional academic wisdom, has significant implications for the larger theoretical debate over formalism and functionalism in administrative law.

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INTRODUCTION

Administrative law students and scholars have long wrestled with the complex subject of judicial review of agency statutory interpretations.[1] This topic reached a turning point in 2001. At that time, the Supreme Court explained when an agency's interpretation of a statutory provision is entitled to *Chevron* deference and when it is given *Skidmore* deference.[2] Since then, there is a step-by-step framework that reviewing courts should use to determine how much deference to give to an agency's statutory interpretation.[3]

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1. *See, e.g.*, Michael P. Healy, *Reconciling* Chevron*,* Mead*, and the Review of Agency Discretion: Source of Law and the Standards of Judicial Review*, 19 GEO. MASON L. REV. 1, 1 (2011) ("[T]here have been longstanding questions about the application of the standards for reviewing administrative action."); Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1, 3 (2013) (acknowledging the "decades of prodigious . . . scholarship on judicial review of agency legal interpretations"); John G. Osborn, *Legal Philosophy and Judicial Review of Agency Statutory Interpretation*, 36 HARV. J. ON LEGIS. 115, 118 (1999) (acknowledging "the great bulk of . . . scholarship relating to *Chevron* and judicial review of agency statutory interpretation"); Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 529 (2006) ("Administrative law scholarship is obsessed with the appropriate scope of judicial review of agency decisions."); Peter L. Strauss, *"Deference" is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1144 (2012) ("Administrative law scholars have leveled a forest of trees exploring the mysteries of the *Chevron* approach contemporary judges take to reviewing law-related aspects of administrative action.").

2. *See* United States v. Mead Corp., 533 U.S. 218, 234–35 (2001).

3. *See* Healy, *supra* note 1, at 33 (discussing the framework for judicial review of agency legal interpretations and ultimately "present[ing] a step-by-step approach to the review of agency applications of law"); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skid-

While courts have repeatedly applied this framework when reviewing agency decisions, this Article argues that the framework also plays an important, albeit unappreciated, secondary role in immigration law. Over the past decade, the Supreme Court has decided a series of immigration cases and, in doing so, articulated and applied what has become known as the "ordinary remand rule."[4] This Article analyzes the modern Court's remand jurisprudence and uncovers a significant lesson: If a case turns on the meaning of a statutory provision the Board of Immigration Appeals (BIA) either has not yet interpreted or has interpreted erroneously, the reviewing court should use the framework for judicial review to decide whether to answer the interpretive question in the first instance or remand the issue to the agency. To be sure, the Court has not explicitly referred to the framework for judicial review when deciding whether to remand an unsettled interpretive issue to the BIA. Nevertheless, a close look at the Court's opinions—especially its most recent decision in *Negusie v. Holder*[5]—shows that the framework helps us understand when such a remand is appropriate.

After analyzing how the framework for judicial review plays a key role in the remand context, this Article considers when a reviewing court should and should not remand an unsettled interpretive issue to the BIA. The Supreme Court has already identified one situation in which a reviewing court should ordinarily remand an unsettled interpretive issue to the BIA: when, pursuant to the framework for judicial review, the court determines that the relevant statutory provision is ambiguous and Congress delegated power to the BIA to interpret that provision.[6] In other words, a remand is proper when the BIA's interpretation will be entitled to *Chevron* deference on review.[7] That said, the Court has not decided whether a remand is proper outside this context.

This Article, therefore, picks up where the Supreme Court left off. The Article examines whether a reviewing court should remand an unsettled interpretive issue to the BIA when the agency's interpretation will *not* be entitled to *Chevron* deference on review—either because (1) the relevant statutory provision is *unambiguous* or (2) the relevant statutory provision is ambiguous, but Congress did *not* delegate power to the BIA to interpret that provision. The goal of this exercise is to define the proper balance of power between courts and the BIA when it comes to resolving outstanding statutory interpretation questions. Ultimately, the Article argues that, if a reviewing court faces an unsettled interpretive issue and

more *Standard*, 107 COLUM. L. REV. 1235, 1246 (2007) (discussing "[t]he [d]eference [f]ramework" and recognizing that, in light of *Mead*, "the current regime for judicial review of agency legal interpretations includes both *Chevron* and *Skidmore* as separate standards of review").

4. *See* Negusie v. Holder, 555 U.S. 511, 524 (2009); Gonzales v. Thomas, 547 U.S. 183, 185 (2006) (per curiam); INS v. Ventura, 537 U.S. 12, 18 (2002) (per curiam).

5. 555 U.S. at 516–17.

6. *See infra* Part II.C.(discussing *Negusie*).

7. This, of course, is provided the BIA actually exercises its delegated power.

it determines that the relevant statutory provision is ambiguous, the court should remand the matter to the BIA whether or not Congress delegated lawmaking power to the agency. In other words, a remand is proper if the BIA's interpretation will be entitled to either *Chevron* or *Skidmore* deference on review. This conclusion has significant implications for the larger theoretical debate over formalism and functionalism in administrative law.

This Article proceeds in four Parts. Since this Article argues that the framework for judicial review of agency statutory interpretations plays a critical role in the remand context, Part I takes a step back and articulates the framework and its underlying principles. Part II then examines the Supreme Court's line of immigration decisions regarding the ordinary remand rule, highlighting the important but understated role that the framework for judicial review plays in a court's remand decision. Part III then goes beyond the Court's case law and, using the framework for judicial review, identifies the circumstances under which reviewing courts should and should not remand unsettled interpretive issues to the BIA. In light of this analysis, Part IV outlines the proper balance of power between courts and the BIA when it comes to resolving outstanding statutory interpretation questions. This outline shows that formalist justifications for administrative remands are overstated—indeed, functionalist justifications alone may warrant a remand. In the end, this Article helps define the modern relationship between courts and the BIA.

I. JUDICIAL REVIEW OF AGENCY STATUTORY INTERPRETATIONS

This Article argues that the framework for judicial review of agency statutory interpretations plays an important role in immigration law as reviewing courts decide whether to remand unresolved interpretive issues to the BIA. This Part lays a foundation for that discussion by briefly reviewing *Skidmore v. Swift & Co.*,[8] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[9] and *United States v. Mead Corp*.[10]—the three landmark Supreme Court cases that "function collectively as parts of [the] comprehensive framework for judicial review of administrative interpretations."[11] After examining these cases, including the principles underlying each decision, this Part articulates the resulting framework courts should apply when reviewing agency statutory interpretations.[12]

8. 323 U.S. 134 (1944).
9. 467 U.S. 837 (1984).
10. 533 U.S. 218 (2001).
11. Hickman & Krueger, *supra* note 3, at 1239.
12. *See also* Healy, *supra* note 1, at 33–50 (providing a clear "step-by-step approach to the review of agency applications of law"); Hickman & Krueger, *supra* note 3, at 1239, 1246–50 (discussing "the analytical framework for judicial review of administrative interpretations" that now applies in light of *Skidmore*, *Chevron*, and *Mead*).

A. The Seminal Cases

1. *Skidmore v. Swift & Co.*

The first case that is usually associated with judicial review of agency statutory interpretations is *Skidmore*.[13] There, the interpretive issue was whether employee waiting time constituted "working time" under the overtime pay provisions of the Fair Labor Standards Act.[14] The Administrator of the relevant agency had "set forth his views of the application of the Act under different circumstances in an interpretive bulletin and in informal rulings."[15] The trial court, however, did not consider the Administrator's views in resolving the case and held as a matter of law that waiting time did not constitute working time.[16]

Although the appellate court affirmed the judgment of the trial court,[17] the Supreme Court reversed.[18] In a methodical decision, the Court first noted that the statute was ambiguous because it did not clearly bar waiting time from constituting working time.[19] The Court then said that Congress did *not* delegate lawmaking power to the agency "to determine in the first instance whether particular cases fall within or without the Act."[20] Rather, Congress "put this responsibility on the courts."[21] Nevertheless, the Court recognized that Congress created the Administrator's position and that the Administrator had gained "considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution."[22] Thus, the Court said:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[23]

13. *See* Healy, *supra* note 1, at 4. This is true even though "[t]he case involved private litigation to enforce a federal statute, not the review of agency action as such." Strauss, *supra* note 1, at 1167.
14. Skidmore v. Swift & Co., 323 U.S. 134, 136 (1944).
15. *Id.* at 138.
16. *Id.* at 136, 140.
17. Skidmore v. Swift & Co., 136 F.2d 112, 113 (5th Cir. 1943), *rev'd*, 323 U.S. 134 (1944).
18. *Skidmore*, 323 U.S. at 140.
19. *See id.* at 136–37 (citing Armour & Co. v. Wantock, 323 U.S. 126 (1944)).
20. *Id.* at 137.
21. *Id.* (citing Kirschbaum v. Walling, 316 U.S. 517, 523 (1942)).
22. *Id.* at 137–38.
23. *Id.* at 140.

In the end, the Court remanded the case to the trial court so it could properly consider the Administrator's views.[24]

Ultimately, *Skidmore* makes it clear that when a statute is ambiguous and Congress has *not* delegated lawmaking power to an agency to interpret the statute, "a court must decide how the statute applies to the uncertain circumstance."[25] Nevertheless, in making this determination, the court may consider "the interpretation adopted by the agency that administers the statute."[26] This is "not because the agency's interpretation is formally binding."[27] Instead, the court may consider the agency's interpretation for functional reasons—that is, the agency's experience and expertise "may be useful by providing 'guidance,' as the court itself decides what the statute means when applying the statute in a particular case."[28]

2. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*

For almost four decades, *Skidmore* represented the Supreme Court's leading statement on judicial review of agency statutory interpretations.[29] Then, in 1984, the Court issued its landmark opinion in *Chevron*, establishing a two-step approach for courts to use when reviewing agency decisions.[30] The Court famously said:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether

24. *Id.*

25. Healy, *supra* note 1, at 9 (discussing *Skidmore*).

26. *Id.*

27. *Id.*

28. *Id.* (quoting *Skidmore*, 323 U.S. at 140); *see also* Michael P. Healy, *The Past, Present and Future of* Auer *Deference:* Mead*, Form and Function in Judicial Review of Agency Interpretations of Regulations*, 62 U. KAN. L. REV. 633, 691 (2014) ("*Skidmore* review retains functionalism, because it accounts for the agency's experience and expertise in its consideration of the agency's reasons for its interpretation. The agency's reasons for the interpretation, if they are persuasive because they are grounded in expertise and experience, may provide strong support for the interpretation and would accordingly be persuasive to a court . . . ." (footnote omitted)).

29. *See* Hickman & Krueger, *supra* note 3, at 1236 ("For forty years, the Supreme Court's opinion in *Skidmore v. Swift & Co.* enjoyed prominence as perhaps the Supreme Court's best expression of its policy of judicial deference toward many if not most agency interpretations of law." (footnote omitted)); *id.* at 1239 ("[F]or forty years before *Chevron* was decided, the Supreme Court's opinion in *Skidmore v. Swift & Co.* was a leading expression of the Court's policy toward judicial review of most other administrative interpretations." (footnote omitted)).

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

> the agency's answer is based on a permissible construction of the statute.[31]

The Court then elaborated on these two steps and in doing so, "established the foundations for the modern understanding of judicial review of agency legal interpretations."[32]

The Court explained that at step one the reviewing court must decide whether Congress clearly resolved the relevant interpretive issue.[33] The court makes this decision by "employing traditional tools of statutory construction,"[34] including a consideration of the statute's text[35] and legislative history.[36] If the court "ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[37] But if the court decides that Congress did not clearly resolve the relevant interpretive issue, then the court must proceed to the second step.[38]

The Court explained that at step two a reviewing court must defer to the agency's statutory interpretation.[39] The Court articulated both formalist and functionalist justifications for according deference to agencies.[40] Most significantly, the Court espoused the formalist view that Congress implicitly delegates interpretive power to an agency when it adopts an ambiguous statute.[41] In other words, as the Court later put it, reviewing courts should defer to agencies at step two "because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."[42]

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31. *Id.* (footnotes omitted).
32. Healy, *supra* note 1, at 15.
33. *See Chevron*, 467 U.S. at 843 n.9 (noting that "[t]he judiciary is the final authority on issues of statutory construction").
34. *Id.*
35. *See id.* at 859–62 (reviewing the text of the Clean Air Act).
36. *See id.* at 862–64 (examining the Clean Air Act's legislative history).
37. *Id.* at 843 n.9.
38. *See id.* at 843.
39. *See id.* at 843–44.
40. *See id.* at 843–44, 865–66.
41. *Id.* at 843–44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." (footnote omitted)).
42. Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996) (citing *Chevron*, 467 U.S. at 843–44); *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) ("Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.").

Although the Court's decision to defer to the agency was based almost exclusively on its formalist notion that Congress implicitly delegated interpretive authority to the agency when it adopted an ambiguous statute,[43] the Court also briefly suggested that it should defer for a functionalist reason: the agency had experience and expertise in resolving issues within its sphere of authority.[44] In short, as one scholar put it, "[T]he Court suggested that *Chevron* deference is motivated by the same motivations that animated *Skidmore* deference: agency experience and expertise."[45]

In the end, the Court said that when an agency is entitled to deference at step two, a reviewing court "may not substitute its own construction of a statutory provision."[46] Rather, the court must decide if the agency's interpretation "is based on a permissible construction of the statute."[47] This means the court must uphold the agency's interpretation of the relevant statutory provision as long as it is reasonable.[48]

Ultimately, *Chevron* is famous for its two-step approach to judicial review of agency statutory interpretations.[49] However, much attention

43. *See Chevron*, 467 U.S. at 843–44.

44. *See id.* at 865. Indeed, in saying that the agency's interpretation was "entitled to deference," the Court noted that "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." *Id.* (footnotes omitted). The Court then said Congress may have intentionally wanted the agency to interpret the relevant statutory provision, "thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so." *Id.*

45. Healy, *supra* note 1, at 17–18; *see also* Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1286–87 (2008) ("In *Chevron*, the . . . Court marshaled . . . expertise-based arguments in support of flexible agency administration."); Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 ARIZ. ST. L.J. 87, 100–01 (2009) (claiming that "[f]unctionalism lies at the heart of *Chevron*" because the Court considered "functional, institutional competence justifications" including "agency expertise"); Leading Cases, *Preemption of State Law Enforcement*, 123 HARV. L. REV. 322, 330 (2009) (arguing that "*Chevron* rests on . . . functional arguments," including the notion "that agencies possess the necessary expertise to carry out congressional orders").

46. *Chevron*, 467 U.S. at 844; *see also id.* at 843 n.11 ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.").

47. *Id.* at 843.

48. *See id.* at 844 (stating that, at the second step, a reviewing court must not disturb "a reasonable interpretation made by the administrator of an agency"); *see also* Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 89 (2007) ("[I]f the language of the statute is open or ambiguous—that is, if Congress left a 'gap' for the agency to fill—then we must uphold the Secretary's interpretation as long as it is reasonable.") (citing *Chevron*, 467 U.S. at 842–43).

49. *See, e.g.*, RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO, PAUL M. VERKUIL, ADMINISTRATIVE LAW AND PROCESS § 7.4, at 399 (5th ed. 2009) ("The Court has applied the *Chevron* two-step in over one hundred cases decided since 1984, and circuit courts have applied it in thousands of cases."); Healy, *supra* note 1, at 15 ("The decision is most famous for defining the two-step approach for reviewing agency legal determinations." (footnote omitted)); Hickman & Krueger, *supra* note 3, at 1241 ("The *Chevron* decision is best known for articulating the Court's two-part test for evaluating agency interpretations of law . . . ."); Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, *in* ADMINISTRATIVE LAW STORIES 398, 415 (Peter L. Strauss ed. 2006) ("*Chevron* is most famous . . . [for] the 'two-step' approach to review questions of law . . . ."); Niki R. Ford, Article, *Easy on the* MAYO *Please: Why Judicial Deference Should Not Be Extended to Regulations that Violate the Administrative Procedure Act*, 50 DUQ. L. REV. 799, 820

has also been paid to the Court's formalist view that Congress implicitly delegates interpretive power to an agency when it enacts an ambiguous statute.[50] One pair of scholars has even argued that the "application of compulsory judicial deference to so-called implicit delegations, more than the two-part test, is what made *Chevron* revolutionary."[51] Unfortunately, as these scholars also point out, "*Chevron* did not make clear when exactly courts should presume that Congress delegated interpretive authority to the agency, or concomitantly, when *Chevron*'s framework of controlling deference was appropriate."[52] The Supreme Court attempted to answer these questions seventeen years later in *Mead*,[53] the third and final case to help shape the modern framework for judicial review of agency statutory interpretations.[54]

3. *United States v. Mead Corp.*

Mead determined when an agency's interpretation of a statutory provision is entitled to *Chevron* deference and when it is given *Skidmore* deference.[55] In making this determination, the Court expressed the formalist view that Congress defines the amount of deference reviewing courts owe to an agency's statutory interpretation.[56] With this in mind,

(2012) ("The upshot of *Chevron* is the famous two-part inquiry now ingrained in administrative law . . . .").

50. *See, e.g.*, Melissa M. Berry, *Beyond* Chevron*'s Domain: Agency Interpretations of Statutory Procedural Provisions*, 30 SEATTLE U. L. REV. 541, 563 (2007) ("*Chevron* broadened the scope of mandatory deference from express delegations of interpretive authority to include instances of 'implied delegation' when Congress is silent or leaves language ambiguous in a statute that an agency is charged with administering. In *Chevron*, the Court announced that such statutory gaps and ambiguities are implied delegations requiring deference." (footnote omitted)); Criddle, *supra* note 45, at 1284 ("Arguably the leading rationale for *Chevron* deference is the presumption that Congress delegates interpretive authority to administrative agencies when it commits regulatory statutes to agency administration."); Healy, *supra* note 1, at 16 ("The Court's motivation for granting deference to agencies came from the Court's view that statutory ambiguity means that Congress has delegated interpretive authority to agencies and not courts." (footnote omitted)).

51. Hickman & Krueger, *supra* note 3, at 1242; *see also* Kristen E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1548 (2006) [hereinafter Hickman, *Need for* Mead] ("The more revolutionary . . . aspect of *Chevron* is its call for strong, mandatory deference not only where Congress specifically mandates regulations, but also where Congress implicitly delegates rulemaking authority through the combination of statutory ambiguity and administrative responsibility . . . . This extension of strong judicial deference from explicit to so-called implicit delegations represents a transfer of interpretive power from the judicial branch to administrative agencies. This, more than the two-part test, is the heart of the *Chevron* doctrine." (footnote omitted)); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187, 203 (1992) ("If *Chevron* is a revolutionary case, what makes it so is its apparent hospitality to implied delegations generally, and delegations by ambiguity in particular.").

52. Hickman & Krueger, *supra* note 3, at 1242–43.

53. *See* United States v. Mead Corp., 533 U.S. 218, 229–38 (2001).

54. *See* Healy, *supra* note 1, at 18 (recognizing that *Mead* assists in "defining the modern approach to judicial review of agency legal and discretionary determinations").

55. *See Mead*, 533 U.S. at 234–35.

56. *See id.* ("We agree that a tariff classification has no claim to judicial deference under *Chevron*, there being no indication that Congress intended such a ruling to carry the force of law, but we hold that under *Skidmore* the ruling is eligible to claim respect according to its persuasiveness." (citation omitted)); *see also* Healy, *supra* note 1, at 18 ("[T]he Court reiterated its consistent view that Congress has the authority to define the degree of deference owed to an agency decision."); *id.*

the Court held "that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[57]

The Court then elaborated on these elements, saying that a reviewing court can generally assume Congress expects an agency to act with the force of law when it permits the agency to engage in formal adjudications, notice-and-comment rulemaking, or where there is some other indication that Congress intended to delegate lawmaking power to the agency.[58] The Court also recognized those agency determinations that "are beyond the *Chevron* pale,"[59] such as "interpretations contained in policy statements, agency manuals, and enforcement guidelines."[60] The Court applied these principles to the facts of the case and decided that the agency interpretation at issue should not be afforded *Chevron* deference.[61]

Nevertheless, the Court held that the agency interpretation was entitled to *Skidmore* deference.[62] The Court explained that, as a functional matter, "*Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency."[63] Since the lower courts had not given any deference to the relevant agency interpretation,[64] the Court remanded the case so that those courts could make a "*Skidmore* assessment."[65]

In short, *Mead* was principally a formalist, separation-of-powers-driven decision.[66] Indeed, the Court established that if Congress delegated lawmaking authority to the agency, and the agency interpreted the

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at 21 ("*Mead* reinforced the principle that Congress determines the degree of deference courts owe to agency legal interpretations.").

57. *Mead*, 533 U.S. at 226–27.

58. *See id.* at 227, 229–30.

59. *Id.* at 234.

60. *See id.* (quoting Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000)) (internal quotation marks omitted).

61. *Id.* at 231 ("There are . . . ample reasons to deny *Chevron* deference here. The authorization for classification rulings, and Customs's practice in making them, present a case far removed not only from notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here.").

62. *See id.* at 234–35.

63. *Id.* at 234 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944)).

64. *See id.* at 225–26.

65. *Id.* at 238–39.

66. *See, e.g.*, Mehmet K. Konar-Steenberg, *In Re* Annandale *and the Disconnections Between Minnesota and Federal Agency Deference Doctrine*, 34 WM. MITCHELL L. REV. 1375, 1395 (2008) (arguing that *Chevron* and *Mead* are "about judicial respect for the intent of Congress—in a phrase, separation of powers"); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1061–62 (2011) ("A conventional defense of [the *Mead*] holding . . . is grounded in ideas about the proper functioning of the branches of government.").

relevant provision in an exercise of that authority, then the reviewing court should give *Chevron* deference to the agency's interpretation.[67] If, however, Congress did *not* delegate lawmaking authority to the agency, or the agency's interpretation was *not* made in an exercise of its delegated authority, then the reviewing court should independently interpret the statutory provision.[68] That said, in the latter situation, the reviewing court should give *Skidmore* deference to the agency's interpretation because, as a functional matter, the agency's interpretation may be rooted in its experience and expertise.[69] In the end, since "[t]he *Mead* analysis determines whether the *Chevron* regime or the *Skidmore* regime applies to review of [an] agency decision,"[70] the analysis serves as the heart of what scholars now call "the analytical framework for judicial review of administrative interpretations."[71]

B. The Framework for Judicial Review

When reviewing an agency's statutory interpretation, a court should first decide, pursuant to *Chevron* step one, "whether Congress has directly spoken to the precise question at issue."[72] The court makes this deci-

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67. *See Mead*, 533 U.S. at 226–27. In other words, as Professor Healy has explained:

> *Mead* established . . . that there are two requirements for an agency to be seen as the source of lawmaking power: Congress must have delegated lawmaking power to the agency and the agency must actually have exercised that delegated lawmaking power. The agency must have been able to make law and must have intended to make law.

Healy, *supra* note 1, at 40 (footnote omitted). He then recognized that, if these two requirements are met, "the court accords *Chevron* step-two deference to the agency legal determination." *Id.* at 42.

68. *See* Healy, *supra* note 1, at 19–21. Professor Healy has said that, pursuant to *Mead*, "[a]gency-defined law is not present if either the agency lacked the delegated authority to make decisions with the force of law or the agency did not exercise its delegated lawmaking power." *Id.* at 19 (citing *Mead*, 533 U.S. at 226–27). Professor Healy then pointed out that, in this situation, "the court interprets the statute giving appropriate deference, under the circumstances, to the agency's interpretation, but deciding for itself the meaning of the statute." *Id.* at 21; *see also* John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of* INS v. Ventura, 18 GEO. IMMIGR. L.J. 605, 619 (2004) (stating that if *Mead*'s two "requirements are not met, *Chevron* deference is inapplicable, but *Mead* requires that the court, nonetheless, apply 'some deference' to the agency's judgment as to the meaning of the law, according to its persuasiveness.") (quoting *Mead*, 533 U.S. at 234, in turn citing Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944)).

69. *See supra* notes 62–63 and accompanying text.

70. Healy, *supra* note 1, at 42 n.265; *see also* Hickman & Krueger, *supra* note 3, at 1247 ("*Mead* . . . articulates its own two-part inquiry for discerning which of these two standards of review applies in any given case . . . ."); Magill & Vermeule, *supra* note 66, at 1061–62 ("*Mead* establishes the conditions under which an agency will be eligible for *Chevron* deference. . . . [The case] creates two regimes, one where *Chevron* does not apply and one where it does . . . ."); Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 812 (2002) ("*Mead* . . . emphatically reaffirms that the choice is not between *Chevron* or no deference. If *Chevron* does not apply, courts nevertheless may be required to defer to agency interpretations under *Skidmore*, which applies when the agency has some special claim to expertise under the statute, but its interpretation is not legally binding."); Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553, 1571 n.81 (2014) ("The Court's decision in *United States v. Mead Corp.* confirmed that *Skidmore* deference applies when *Chevron* does not." (citation omitted)).

71. Hickman & Krueger, *supra* note 3, at 1239.

72. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984); *see also* Healy, *supra* note 1, at 33 (stating that a reviewing court should first "[d]etermin[e] . . . [w]hether the [s]tatute [i]tself [c]learly [d]efines the [l]aw").

sion by "employing traditional tools of statutory construction,"[73] including a consideration of the statute's text[74] and legislative history.[75] The court should make this *Chevron* step-one determination up front because "if Congress itself is the source of clear law that conflicts with the agency's interpretation, the law as defined by Congress governs and the contrary agency interpretation must be rejected."[76] Indeed, the *Chevron* Court stated plainly: "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[77] However, if the reviewing court holds that "the statute is silent or ambiguous with respect to the specific issue,"[78] then the court should use "the *Mead* analysis" to decide how much deference to give to the agency's interpretation.[79]

Pursuant to *Mead*, the reviewing court must ask: (1) whether "Congress delegated authority to the agency generally to make rules carrying the force of law,"[80] and (2) whether "the agency interpretation claiming deference was promulgated in the exercise of that authority."[81] This is because these two questions "provide a threshold inquiry to determine which of two potential evaluative standards, *Chevron* or *Skidmore*, applies to . . . [the] case."[82]

If the court determines that Congress delegated lawmaking authority to the agency, and the agency interpreted the relevant statutory provi-

73. *Chevron*, 467 U.S. at 843 n.9.

74. *See id.* at 859–62.

75. *See id.* at 862–64.

76. Healy, *supra* note 1, at 33; *see also* Hickman & Krueger, *supra* note 3, at 1247 ("[A] reviewing court will not defer to an agency under either [*Chevron* or *Skidmore*] if the statute's meaning is clear . . . . Thus, a court can engage in step one analysis before having to use *Mead* to make the choice between *Chevron* and *Skidmore*.").

77. *Chevron*, 467 U.S. at 842–43; *see also id.* at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

78. *Id.* at 843.

79. Healy, *supra* note 1, at 39 ("After the court has determined that the statute is ambiguous regarding the legal issue resolved by the agency, the court must identify the review regime that applies to the agency determination. This is the *Mead* analysis . . . ."); *see also id.* at 39–42 (discussing "the *Mead* analysis" as the second step in his step-by-step framework for judicial review of agency legal interpretations); Hickman, *supra* note 51, at 1600–01 ("*Chevron* and *Skidmore* are the only two deference alternatives and . . . *Mead* offers the appropriate framework for choosing between them . . . ."); Hickman & Krueger, *supra* note 3, at 1247 (recognizing that reviewing courts "use *Mead* to make the choice between *Chevron* and *Skidmore*").

80. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

81. *Id.* at 227; *see also* Merrill, *supra* note 70, at 813 ("The [*Mead*] Court held that a two part inquiry should be undertaken in determining whether *Chevron*-style deference is in order. The court should ask, first, whether Congress has delegated to an agency general authority to make rules with the 'force of law.' If the answer is in the affirmative, the court should then ask whether the agency has rendered its interpretation in the 'exercise of that authority.'" (footnotes omitted) (quoting *Mead*, 533 U.S. at 227)).

82. Hickman & Krueger, *supra* note 3, at 1247; *see also* Garrick B. Pursley, *Avoiding Deference Questions*, 44 TULSA L. REV. 557, 575 n.141 (2009) ("[U]nder *Mead*, the threshold question in the deference inquiry—the decision to apply *Chevron* or reject it in favor of *Skidmore* or independent judicial interpretation—requires determining where Congress intended to vest primary interpretive authority.").

sion in an exercise of that authority, then the reviewing court should give *Chevron* deference to the agency's interpretation.[83] There are multiple justifications for granting *Chevron* deference to an agency under these circumstances, including the formalist view that Congress intended the agency to receive such deference, as well as the functionalist notion that an agency has experience and expertise in resolving issues within its sphere of authority.[84] In the end, according *Chevron* deference to the agency means that the court "must uphold the [agency's] interpretation as long as it is reasonable."[85]

On the other hand, if the reviewing court conducts the *Mead* analysis and determines that Congress did *not* delegate lawmaking authority to the agency, or the agency's interpretation was *not* made in an exercise of its delegated authority, then the court should independently interpret the statutory provision.[86] This is because, in a formal sense, Congress did not intend the agency to receive *Chevron* deference.[87] Nevertheless, the reviewing court should give *Skidmore* deference to the agency's interpretation because, as a functional matter, the agency's interpretation may be rooted in its experience and expertise.[88] Ultimately, according *Skidmore* deference to the agency means the court "follows the agency interpretation only to the extent the court is persuaded by the agency's interpretation."[89]

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83. *See Mead*, 533 U.S. at 226–27.

84. *See supra* notes 44, 66–67 and accompanying text.

85. Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 89 (2007) (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43); *see also Chevron*, 467 U.S. at 844 (stating that, at this second step, a reviewing court must not disturb "a reasonable interpretation made by the administrator of an agency").

Professor Healy has recognized that "accord[ing] *Chevron* step-two deference to the agency legal determination" is akin to "engag[ing] solely in arbitrary or capricious review of the agency determination." Healy, *supra* note 1, at 42. He explains that:

> Step 1 of the analysis has already determined that the statute is ambiguous with respect to the agency's substantive legal decision. This decision is equivalent to holding that the agency has discretion under the statute to reach its substantive decision (because it is not barred by the statute). Moreover, step 2 of the analysis has, we have assumed, yielded a conclusion that the agency has been delegated by Congress and has exercised lawmaking authority with regard to the determination being challenged. The remaining issue relating to the legality of the agency position is, therefore, whether the agency has properly exercised its discretion: the proper exercise of discretion is the subject of arbitrary or capricious review.

Id. at 43. The Supreme Court and other scholars have echoed this point. *See, e.g.*, Judulang v. Holder, 132 S. Ct. 476, 483 n.7 (2011) ("[U]nder *Chevron* step two, we ask whether an agency interpretation is 'arbitrary or capricious in substance.'" (quoting Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct, 704, 711 (2011)) (internal quotation marks omitted); James M. Puckett, *Embracing the Queen of Hearts: Deference to Retroactive Tax Rules*, 40 FLA. ST. U. L. REV. 349, 362 (2013) ("When *Chevron* deference applies, the court's review virtually collapses into arbitrary and capricious review.").

86. *See supra* note 68 and accompanying text.

87. *See supra* notes 66–68 and accompanying text (implicitly making this point).

88. *See supra* notes 62–63 and accompanying text.

89. Healy, *supra* note 1, at 2 n.5 (citing Skidmore v. Swift & Co., 323 U.S. 134 (1944)). With this in mind, multiple scholars have argued that "*Skidmore* deference" is not really deference at all. *See, e.g.*, William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and*

II. UNCOVERING THE FRAMEWORK'S SECONDARY ROLE

In light of *Mead*, lower courts have applied the framework for judicial review of agency statutory interpretations when reviewing agency decisions.[90] Although the framework exists to help reviewing courts determine how much deference to give to an agency's statutory interpretation, this Part argues that the framework also plays an important, albeit unappreciated, secondary role in immigration law.

Since issuing its opinion in *Mead*, the Supreme Court has decided a series of immigration cases and, in doing so, articulated and applied what has become known as the "ordinary remand rule." This Part analyzes the three decisions in this series—*INS v. Ventura*,[91] *Gonzales v. Thomas*,[92] and *Negusie v. Holder*—and uncovers a significant lesson: If a case turns on the meaning of a statutory provision the BIA either has not yet interpreted or has interpreted erroneously, the reviewing court should use the framework for judicial review to decide whether to answer the interpretive question in the first instance or remand the issue to the agency. It is true that the Court has not explicitly referred to the framework for judicial review when deciding whether to remand an unsettled interpretive issue to the BIA. Nevertheless, a close examination of the Court's opinions, particularly its most recent decision in *Negusie*, shows that the framework helps us understand when such a remand is appropriate.

A. INS v. Ventura*: Hinting at the Framework's Relevance in the Remand Context*

The modern Supreme Court first articulated immigration law's ordinary remand rule in *INS v. Ventura*, a decision issued less than eighteen months after *Mead*.[93] In *Ventura*, the BIA had determined that Fredy

Rights-Limiting Legislation, 88 N.Y.U. L. REV. 878, 890 (2013) (observing that *Skidmore* deference "really isn't 'deference' at all"); Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1467 n.155 (2005) ("[T]he phrase *Skidmore* 'deference' is misleading. A court granting *Skidmore* deference does not actually relinquish interpretive power to the agency but recognizes the agency as a kind of expert witness, particularly useful in rendering its own interpretive judgment."); Healy, *supra* note 1, at 46 n.281 ("The text employs the common expression of *Skidmore* deference, even though that expression is a misnomer. A more accurate expression would be *Skidmore* guidance or *Skidmore* persuasion."); Gregg D. Polsky, *Can Treasury Overrule the Supreme Court?*, 84 B.U. L. REV. 185, 198 n.80 (2004) ("Courts have commonly used the phrase '*Skidmore* deference' to refer to the amount of respect accorded agency interpretations under *Skidmore*. This phrase, however, is an oxymoron. . . . [T]he court never technically defers to the agency position under *Skidmore* even if the court ultimately adopts the position; the agency position is mere evidence considered by the court in its attempt to determine the single best interpretation." (citation omitted)); Strauss, *supra* note 1, at 1145 (arguing that the more appropriate phrase would be "*Skidmore* weight" (internal quotation marks omitted)).

90. *See, e.g.*, De Leon-Ochoa v. Attorney Gen., 622 F.3d 341, 348–49 (3d Cir. 2010).

91. 537 U.S. 12 (2002) (per curiam).

92. 547 U.S. 183, 185 (2006) (per curiam).

93. That said, some scholars have argued that the ordinary remand rule can actually be traced to the Supreme Court's early decision in *SEC v. Chenery Corp.* (*Chenery I*), 318 U.S. 80 (1943), which was cited in each of the modern Court's decisions. *See* Walker, *supra* note 70, at 1561-79 ("trac[ing] the remand rule from its *Chenery* origins through the trilogy of Supreme Court immigration adjudication cases in the 2000s that further refined the rule"); Patrick J. Glen, *"To Remand or*

Orlando Ventura, a native and citizen of Guatemala, did not qualify for asylum because any past persecution he suffered in Guatemala was not "on account of a statutorily protected ground."[94]

The Ninth Circuit reversed the BIA's decision, as it held that Ventura had, in fact, suffered "past persecution on account of [an] imputed political opinion."[95] But instead of remanding the case to the BIA at that point, the court "went on to consider an alternative argument that the Government had made before the [agency], namely, that . . . Ventura failed to qualify for protection regardless of past persecution *because conditions in Guatemala had improved to the point where no realistic threat of persecution currently existed*."[96] Although the BIA had not resolved this so-called "changed circumstances" matter,[97] and both parties asked the court to let the agency decide that issue in the first instance,[98] the Ninth Circuit evaluated the Government's argument and rejected it.[99]

The Government then petitioned the Supreme Court for certiorari, arguing the Ninth Circuit erred by resolving the changed circumstances issue on its own rather than remanding that question to the BIA.[100] The Court agreed and summarily reversed the Ninth Circuit.[101]

The Court began its discussion with a formalist, *Mead*-like analysis.[102] Indeed, the Court quickly mentioned that Congress delegated pow-

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Not to Remand": Ventura*'s Ordinary Remand Rule and the Evolving Jurisprudence of Futility*, 10 RICH. J. GLOBAL L. & BUS. 1, 3 (2010) ("This general rule pertaining to remand was enunciated in the administrative context in the *Chenery* decision, and given specific weight in the immigration context by the Supreme Court's 2002 decision in *INS v. Ventura*.").

94. Ventura v. INS, 264 F.3d 1150, 1153 (9th Cir. 2001), *rev'd per curiam*, 537 U.S. 12 (2002). According to the Immigration and Nationality Act, an applicant for asylum must "establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A)." Immigration and Nationality Act § 208(b)(1)(B), 8 U.S.C. § 1158(b)(1)(B) (2012). A refugee is then defined as someone who can establish, among other things, "persecution or a well-founded fear of persecution [in his home country] on account of race, religion, nationality, membership in a particular social group, or political opinion." Immigration and Nationality Act § 101(a)(42).

95. *See Ventura*, 264 F.3d at 1157.

96. *Ventura*, 537 U.S. at 13 (emphasis added). Under the law, an asylum "applicant who has been found to have established . . . past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original [asylum] claim." 8 C.F.R. § 208.13(b)(1) (2013). However, the Government may rebut that presumption if it establishes, by a preponderance of the evidence, that "[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality." 8 C.F.R. § 208.13(b)(1)(i) (2013).

97. *See Ventura*, 537 U.S. at 13 ("[T]he BIA itself had not considered this . . . claim."); *id.* at 15 ("[T]he BIA had not decided the 'changed circumstances' question . . . .").

98. *See id.* at 13 ("[B]oth sides asked that the Ninth Circuit remand the case to the BIA so that it might [consider the changed circumstances issue].").

99. *See id.* at 13–14. The Ninth Circuit held that the evidence in the record—particularly a State Department report regarding human rights in Guatemala—failed to demonstrate a sufficient change in circumstances. Therefore, the court concluded that Ventura was eligible for asylum. *See id.* at 14–15.

100. *See id.* at 14 ("The Government, seeking certiorari here, argues that the Court of Appeals exceeded its legal authority when it decided the 'changed circumstances' matter on its own.").

101. *See id.* ("We agree with the Government that the Court of Appeals should have remanded the case to the BIA. And we summarily reverse its decision not to do so.").

102. *See id.* at 16.

er to "the agency to make the basic asylum eligibility decision here in question."[103] The Court then said that the BIA had not yet had the chance to exercise its delegated power with respect to the changed circumstances issue.[104] The Court said that under these circumstances the Ninth Circuit should not have "intrude[d] upon the domain which Congress has exclusively entrusted to an administrative agency."[105] Rather, it "should have applied the ordinary 'remand' rule"[106] which, according to the Court, provides that, "[g]enerally speaking, a court of appeals should remand a case to an agency for decision *of a matter that statutes place primarily in agency hands*."[107] Therefore, the Court reversed the judgment of the Ninth Circuit and remanded the case so that the BIA could resolve the changed circumstances issue in the first instance.[108]

In sum, *Ventura* was the first case in which the modern Court articulated and applied the ordinary remand rule.[109] The case ultimately stands for the proposition that a reviewing court must ordinarily remand an unresolved and dispositive question to the agency when the agency has the delegated power to decide the issue.[110] Multiple scholars have recognized this as *Ventura*'s holding.[111] What has gone unrecognized, however, is that the Court reached its remand decision by pulling from the heart of the framework for judicial review and conducting a *Mead*-like analysis.[112] To be sure, the Court never cited *Mead*. However, the Court certainly echoed *Mead*'s formalist language when it emphasized that Congress had delegated authority to the BIA to resolve the changed circumstances issue, but the agency had not yet had the opportunity to exercise its delegated power.[113] While no literature has yet alluded to a relationship between *Ventura* and *Mead*, one prominent scholar has acknowledged that the *Ventura* Court based its decision mostly on formalist separation-of-powers principles,[114] especially "congressional

103. *Id.*; *see also* Glen, *supra* note 93, at 15 ("The Supreme Court noted that the Immigration and Nationality Act entrusts to the agency the decision of whether or not an alien is eligible for asylum, and thus the agency has primacy in resolving that issue." (citing *Ventura*, 537 U.S. at 16)).

104. *See Ventura*, 537 U.S. at 17 ("The BIA has not yet considered the 'changed circumstances' issue.").

105. *Id.* at 16 (quoting *SEC v. Chenery Corp.* (*Chenery I*), 318 U.S. 80, 88 (1943)) (internal quotation mark omitted). Similarly, the Court also quoted *Chenery I* by saying that "a 'judicial judgment cannot be made to do service for an administrative judgment.'" *Id.* (quoting *Chenery I*, 318 U.S. at 88).

106. *Id.* at 18.

107. *Id.* at 16 (emphasis added).

108. *See id.* at 18 ("We reverse the judgment of the Court of Appeals for the Ninth Circuit insofar as it denies remand to the agency. And we remand the case for further proceedings consistent with this opinion.").

109. *See supra* note 93 and accompanying text.

110. *See Ventura*, 537 U.S. at 16–17.

111. *See* Glen, *supra* note 93, at 19; Guendelsberger, *supra* note 68, at 636.

112. *See Ventura*, 537 U.S. at 16.

113. *See supra* notes 102–04 and accompanying text.

114. *See* Walker, *supra* note 70, at 1576 (noting that the *Ventura* Court articulated principles that were "grounded in separation of powers"). That said, the *Ventura* Court also supported its decision with functionalist principles. *See Ventura*, 537 U.S. at 17. For example, the Court noted that

delegation to the agency to decide the issues, and the lack of congressional delegation or other source of authority for the judicial actor to decide the issue *de novo*."[115] These same principles, of course, are at the core of the *Mead* decision.[116]

After *Ventura*, it remained to be seen how the Court would apply the ordinary remand rule. Indeed, the case left "considerable room for disagreement as to when remand for further agency review is required."[117] While some commentators viewed *Ventura* as a rather limited decision,[118] others saw the case as having much broader implications.[119] For example, shortly after the *Ventura* decision, Ninth Circuit Judge Alex Kozinski wrote:

> While the Court was careful to limit its ruling to the facts presented, its message to us was clear to anyone with eyes to see: Stop substituting your judgment for that of the BIA; give proper deference to administrative factfinding; and do not adopt rules of law that take away the agency's ability to do its job. In other words, stop fiddling with the agency's decisions just because you don't like the result.
>
> We could, of course, read . . . *Ventura* . . . as limited to the question[] presented in [that] case[]. But this would be a big mistake. . . . The Court . . . gave us a gentle hint that we must revise our mindset on the key question about who's the master when it comes to immigration cases. We must come to understand and accept . . . that "within broad limits *the law entrusts the agency* to make the basic asylum eligibility decision."[120]

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remanding the changed circumstances issue to the BIA would allow the agency to "bring its expertise to bear upon the matter . . . and . . . help a court later determine whether its decision exceeds the leeway that the law provides." *Id.*

115. Walker, *supra* note 70, at 1576. After noting that these "are two distinct Article I separation of powers values," Professor Walker astutely recognized that "[t]hese become Article II values as well, as they intrude on the Executive's responsibility to execute the law." *Id.*

116. *See supra* notes 66–71 and accompanying text (discussing *Mead*).

117. Guendelsberger, *supra* note 68, at 644.

118. *See* Shruti Rana, Chevron *Without the Courts?: The Supreme Court's Recent* Chevron *Jurisprudence through an Immigration Lens*, 26 GEO. IMMIGR. L.J. 313, 350 (2012) ("[S]ome commentators assumed that the Court was merely saying that courts should send back to the agency unresolved factual issues.").

119. *See id.* at 349–50 (noting that "*Ventura* is a brief, rather simple decision with broad implications," before arguing that the Court "significantly tilt[ed] deference toward the agency").

120. Jahed v. INS, 356 F.3d 991, 1007–08 (9th Cir. 2004) (Kozinski, J., dissenting) (emphasis added) (quoting Ventura v. INS, 537 U.S. 12, 17 (2002) (per curiam)). Similarly, in another dissenting opinion issued soon after the *Ventura* decision, Ninth Circuit Judge Stephen Trott wrote:

> Congress has charged the Attorney General, not us, with the primary responsibility for administering the immigration laws. Our assigned limited role is to *review* the workings of the BIA, not to run the INS. When we exceed our authority, separation and allocation of powers in a constitutional sense are clearly implicated. "In this government of separated powers, it is not for the judiciary to usurp Congress' grant of authority to the Attorney General by applying what approximates *de novo* appellate review."

Ramirez-Alejandre v. Ashcroft, 319 F.3d 365, 397 (9th Cir. 2003) (Trott, J., dissenting) (citation omitted) (quoting INS v. Rios-Pineda, 471 U.S. 444, 452 (1985)).

Ultimately, Judge Kozinski's broad, formalist view of *Ventura* prevailed as the Supreme Court kept applying the ordinary remand rule.[121] Notably, in doing so, the Court continued to echo the framework for judicial review of agency statutory interpretations.

B. Gonzales v. Thomas*: Continuing to Echo the Framework in the Remand Context*

Less than four years after *Ventura*, the Supreme Court reapplied the ordinary remand rule in *Gonzales v. Thomas*.[122] There, the BIA had determined that Michelle Thomas and her family, natives and citizens of South Africa, did not qualify for asylum because any past persecution they suffered in South Africa was not on account of the statutorily protected grounds of either race or political opinion.[123]

The Thomases appealed their case to the Ninth Circuit,[124] and the court quickly recognized "that the BIA had not adequately considered the Thomases' claim of persecution because of 'membership in a particular social group, as relatives of Boss Ronnie,'"[125] Michelle's father-in-law "who allegedly held racist views and mistreated black workers at the company at which he was a foreman."[126] While the BIA had not reached the particular social group issue, the Ninth Circuit eventually took the case en banc and held, in the first instance, that "a family may constitute a social group for the purposes of the refugee statutes,"[127] and "that the particular family at issue . . . fell within the scope of the statutory term 'particular social group.'"[128]

The Government again petitioned the Supreme Court for certiorari, arguing that the Ninth Circuit "'erred in holding, in the first instance and without prior resolution of the questions by the' relevant administrative agency, 'that members of a family can and do constitute a "particular social group," within the meaning of' the [Immigration and Nationality] Act."[129] The Court agreed and, once more, summarily reversed the Ninth Circuit.[130]

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121. *See* Rana, *supra* note 118, at 349–53 (tracing the Court's evolving remand jurisprudence); Walker, *supra* note 70, at 1575 (discussing "the evolution of the remand rule"); *see also* Glen, *supra* note 93, at 13–19.

122. 547 U.S. 183, 185 (2006) (per curiam).

123. *See id.* at 184; *see also supra* note 94 (regarding the applicable law on asylum).

124. *See* Thomas v. Ashcroft, 359 F.3d 1169, 1174 (9th Cir. 2004), *aff'd on reh'g sub nom.* Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2005) (en banc), *vacated*, 547 U.S. 183 (2006) (per curiam).

125. *Thomas*, 547 U.S. at 184 (quoting *Thomas*, 359 F.3d at 1177).

126. *Id.*

127. *Thomas*, 409 F.3d at 1187.

128. *Thomas*, 547 U.S. at 184–85.

129. *Id.* at 185 (quoting the Solicitor General's petition for certiorari).

130. *See id.* ("[The Solicitor General] concludes that 'the Ninth Circuit's error is so obvious in light of *Ventura* that summary reversal would be appropriate.' We agree with the Solicitor General." (citation omitted)).

The Court began by saying that "[t]he Ninth Circuit's failure to remand is legally erroneous, and that error is 'obvious in light of *Ventura*,' itself a summary reversal."[131] The Court then quoted heavily from *Ventura*, especially those portions in which it had conducted the *Mead*-like analysis.[132] Indeed, the Court repeated its formalist statement that Congress delegated power to "the agency to make the basic asylum eligibility decision."[133] The Court then said that the BIA had not yet had the chance to exercise its delegated power with respect to the particular social group issue.[134] Therefore, the Court concluded that, "as in *Ventura*, the Court of Appeals should have applied the 'ordinary "remand" rule.'"[135] Thus, the Court reversed the judgment of the Ninth Circuit and remanded the case so the BIA could resolve the particular social group issue in the first instance.[136]

In sum, *Thomas* reaffirmed the principle that a reviewing court must ordinarily remand an unresolved and dispositive question to the agency when the agency has the delegated power to decide the issue.[137] This much is clear from the Court's opinion.[138] What has once again gone unrecognized, however, is that the Court reached its remand decision by conducting an analysis very similar to that required by the framework for judicial review. Indeed, in *Mead*-like fashion, the Court emphasized that Congress had delegated authority to the BIA to resolve the particular social group issue, but the agency had not yet had the opportunity to exercise its delegated power.[139]

Thomas therefore reinforced the notion that when a reviewing court is confronted with a dispositive issue the BIA has not yet had an opportunity to consider, the court should draw on the framework for judicial review and conduct a *Mead*-like inquiry to determine whether Congress delegated authority to the BIA to answer the relevant question. If Congress did delegate such power to the BIA, then *Ventura* and *Thomas* both indicate that the reviewing court should generally remand the unresolved issue to the agency for a decision in the first instance.[140] This is because the ordinary remand rule provides that, "[g]enerally speaking, a court of

131. *Id.*
132. *See id.* at 185–86.
133. *Id.* at 186 (quoting INS v. Ventura, 537 U.S. 12, 16 (2002) (per curiam)) (internal quotation mark omitted).
134. *See id.* ("The agency has not yet considered whether Boss Ronnie's family presents the kind of 'kinship ties' that constitute a 'particular social group.'").
135. *Id.* at 187 (quoting *Ventura*, 537 U.S. at 18).
136. *See id.* ("We grant the petition for certiorari. We vacate the judgment of the Court of Appeals. And we remand the case for further proceedings consistent with this opinion.").
137. *See id.* at 185–87.
138. *See* Glen, *supra* note 93, at 17 (discussing the *Thomas* decision).
139. *See supra* notes 132–34 and accompanying text.
140. *See supra* notes 133–136 and accompanying text.

appeals should remand a case to an agency for a decision *of a matter that statutes place primarily in agency hands*."[141]

After *Thomas*, it remained to be seen whether the Court would continue to echo, or even rely specifically upon, the framework for judicial review in the remand context. The answer to this question came a few years later when the Court directly confronted an unsettled statutory interpretation issue.

C. Negusie v. Holder*: The Framework Prompts the Court to Remand an Outstanding Statutory Interpretation Question*

The Supreme Court issued its most recent decision on the ordinary remand rule in *Negusie v. Holder*. That case centered on a disagreement over how to interpret the Immigration and Nationality Act's (INA's) so-called "persecutor bar,"[142] which provides that "[a]n alien who fears persecution in his homeland and seeks refugee status in this country is barred from obtaining that relief *if he has persecuted others*."[143] The key statutory interpretation question in the case was whether "the persecutor bar applies even if the alien's assistance in persecution was coerced or otherwise the product of duress."[144]

The BIA answered this question in the affirmative.[145] The BIA's interpretation, however, was based on its conclusion that the Supreme Court had already resolved this issue in a previous decision.[146] Similarly, the Fifth Circuit relied on the same Supreme Court precedent to provide the answer to the interpretive question.[147]

The Supreme Court granted certiorari,[148] and held that both the BIA and the Fifth Circuit had misread its precedent "as mandating that an alien's motivation and intent are irrelevant to the issue whether an alien

141. INS v. Ventura, 537 U.S. 12, 16 (2002) (per curiam) (emphasis added).

142. Negusie v. Holder, 555 U.S. 511, 514 (2009) (internal quotation marks omitted).

143. *Id.* at 513 (emphasis added); *see also* Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2012) ("The term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.").

144. *Negusie*, 555 U.S. at 514.

145. *See id.* In other words, the BIA had determined that "an alien's motivation and intent are irrelevant to the issue of whether he 'assisted' in persecution . . . [I]t is the objective effect of an alien's actions which is controlling." *Id.* at 516 (alteration in original) (quoting Fedorenko, 19 I. & N. Dec. 57 (B.I.A. 1984)) (internal quotation marks omitted).

146. *See id.* at 514 ("[T]he BIA followed its earlier decisions that found *Fedorenko v. United States* controlling." (citation omitted)); *see also id.* at 521 ("The BIA deemed its interpretation to be mandated by *Fedorenko* . . . .").

147. *Id.* at 514 ("The Court of Appeals for the Fifth Circuit, in affirming the agency, relied on its precedent following the same reasoning."); *see also id.* at 516 ("[T]he Court of Appeals agreed with the BIA that whether an alien is compelled to assist in persecution is immaterial for persecutor-bar purposes." (citing Fedorenko v. United States, 449 U.S. 490, 512 n.34 (1981)); *id.* at 518 (recognizing that the Fifth Circuit "relie[d] on *Fedorenko* to provide the answer").

148. Negusie v. Mukasey, 552 U.S. 1255 (2008) (granting certiorari), *rev'd sub nom.* Negusie v. Holder, 555 U.S. 511 (2009).

assisted in persecution."[149] The Court explained that, in fact, its precedent "addressed a different statute enacted for a different purpose."[150] Therefore, the Court concluded that its prior decision did "not control the BIA's interpretation of this persecutor bar."[151]

Having determined that the BIA's interpretation of the persecutor bar was erroneous,[152] the Court had to decide whether to resolve the interpretive issue on its own or remand the matter to the agency for a decision in the first instance.[153] Ultimately, as in *Ventura* and *Thomas*, the framework for judicial review allows us to understand the Court's determination.

This Article does not mean to suggest that the Court proceeded in a perfectly systematic manner, deciding first that the BIA botched its interpretation of the persecutor bar and then analyzing the step-by-step framework for judicial review in order to answer the remand question. To be sure, the Court's analysis was more elastic, moving back and forth between a discussion of the BIA's erroneous statutory interpretation and the relevant judicial review cases, particularly *Chevron*.[154] That said, this Article argues that once the Court determined that the BIA's statutory interpretation was flawed, the framework for judicial review essentially led the Court to remand the interpretive issue to the agency.

Indeed, in true framework-for-judicial-review fashion, the Court considered whether the persecutor bar was ambiguous.[155] The Court recognized that "[t]he question is whether the statutory text mandates that coerced actions must be deemed assistance in persecution."[156] On that point, the Court said, "[T]he statute, in its precise terms, is not explicit."[157] The Court then added that Congress did not clearly have "an intention on the precise question at issue."[158] The Court also noted that there was "substance to both [parties'] contentions" as to the meaning of the statute.[159] In short, the Court concluded that the statute was ambiguous

149. *Negusie*, 555 U.S. at 516.

150. *Id.* at 520; *see also id.* at 518–20 (discussing the differences between the Immigration and Nationality Act, at issue in this case, and the Displaced Persons Act of 1948, at issue in *Fedorenko*).

151. *Id.* at 520.

152. *See id.* at 514, 521 (characterizing the BIA's statutory interpretation as an "error"); *see also* Rana, *supra* note 118, at 352 ("[T]he majority of the [*Negusie*] Court decided that the immigration agency and the Fifth Circuit had legally erred by misapplying agency and Supreme Court precedent on a similar issue to resolve the statutory interpretation issues at hand.").

153. *See Negusie*, 555 U.S. at 523.

154. *See id.* at 516–24; *see also* Healy, *supra* note 1, at 27 ("[T]he Court exhibited a great deal of uncertainty in its approach."); *id.* (arguing that the Court's decision "reflected uncertainty regarding the order and content of the analysis determining the applicability of *Chevron* deference").

155. *See Negusie*, 555 U.S. at 517–18.

156. *Id.* at 518.

157. *Id.*

158. *Id.*

159. *Id.* at 517.

with respect to "whether coercion or duress is relevant in determining if an alien assisted or otherwise participated in persecution."[160]

Moreover, while the Court never cited *Mead*,[161] it once again conducted a formalist, *Mead*-like analysis.[162] Indeed, the Court said that Congress delegated power to the Attorney General to administer the INA,[163] and "[t]he Attorney General, in turn, has delegated to the BIA the 'discretion and authority conferred upon the Attorney General by law' in the course of 'considering and determining cases before it.'"[164] Accordingly, the Court recognized that had the BIA interpreted the ambiguous statute in an exercise of its delegated lawmaking authority, its interpretation would have been given *Chevron* deference.[165] But the Court stressed that the BIA had *not* exercised its interpretive authority because it mistakenly assumed that precedent controlled its interpretation.[166]

160. *Id.* Justice Thomas dissented, writing that "the INA unambiguously precludes any inquiry into whether the persecutor acted voluntarily, *i.e.*, free from coercion or duress." *Id.* at 539 (Thomas, J., dissenting). Justice Thomas argued that the majority made "no attempt to apply the 'traditional tools of statutory construction' to the persecutor bar before retreating to ambiguity." *Id.* at 550. Justice Thomas claimed that, in fact, "the traditional tools of statutory interpretation show with 'utmost clarity' that the statute applies regardless of the voluntariness of the alien who participates or assists in persecution." *Id.* at 551 (citation omitted).

161. *See* Healy, *supra* note 1, at 27 (recognizing that the *Negusie* Court proceeded "without any citation to the *Mead* analysis").

162. *See Negusie*, 555 U.S. at 516–17 (majority opinion).

163. *See id.* at 516–17 ("Congress has charged the Attorney General with administering the INA, and a 'ruling by the Attorney General with respect to all questions of law shall be controlling.'" (quoting Immigration and Nationality Act § 103(a)(1), 8 U.S.C. § 1103(a)(1) (2012)); *see also* Guendelsberger, *supra* note 68, at 620 ("Congress has expressly delegated to the Attorney General the authority to administer and enforce the provisions of the Immigration and Nationality Act.").

164. *Negusie*, 555 U.S. at 517 (internal quotation marks omitted); Guendelsberger, *supra* note 68, at 620 ("Although the [BIA] is not created by Congress, the Board exercises authority to interpret the immigration laws on behalf of the Attorney General through a formal adjudicative process.").

165. *See Negusie*, 555 U.S. at 516 ("Consistent with the rule in *Chevron*, the BIA is entitled to deference in interpreting ambiguous provisions of the INA." (citation omitted)); *see also id.* at 517 ("[T]he BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'" (internal quotation marks omitted)). Other courts and scholars have made the same point. *See, e.g.*, Marmolejo-Campos v. Holder, 558 F.3d 903, 909 (9th Cir. 2009) ("The Board's interpretations of the INA made in the course of adjudicating cases before it satisfy the first requirement for *Chevron* deference set forth in *Mead*: the Board, through the Attorney General's delegation, is authorized to promulgate rules carrying the force of law through a process of case-by-case adjudication and, thus, 'should be accorded *Chevron* deference' as it exercises such authority to 'give[] ambiguous statutory terms "concrete meaning."'" (alteration in original) (quoting INS v. Aguirre–Aguirre, 526 U.S. 415, 425 (1999)); Omagah v. Ashcroft, 288 F.3d 254, 258 n.3 (5th Cir. 2002) ("Because the BIA interpreted the INA through formal adjudication, we give its interpretation *Chevron* deference." (citing United States v. Mead Corp., 533 U.S. 218, 226–27 (2001)); Guendelsberger, *supra* note 68, at 620 ("Under *Mead*, the Board's interpretation of the immigration law through formal adjudication is generally subject to *Chevron* deference.").

166. *Negusie*, 555 U.S. at 521 ("The BIA deemed its interpretation to be mandated by *Fedorenko*, and that error prevented it from a full consideration of the statutory question here presented."); *id.* at 522 ("[T]he BIA has not exercised its interpretive authority but, instead, has determined that *Fedorenko* controls. This [is a] mistaken assumption . . . ."); *id.* at 523 ("[T]he BIA has not yet exercised its *Chevron* discretion to interpret the statute in question . . . .").

Therefore, the Court ended up in the same place it had been in both *Ventura* and *Thomas*: a situation in which the BIA had not yet had the chance to exercise power delegated to it from Congress. The Court cited and discussed *Ventura* and *Thomas*,[167] and said those cases "counsel a similar result here."[168] Therefore, the Court once again applied the ordinary remand rule, saying: "Having concluded that the BIA has not yet exercised its *Chevron* discretion to interpret the statute in question, 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'"[169]

The Court then articulated both formalist and functionalist justifications for remanding the unresolved interpretive issue to the BIA.[170] The Court relied primarily on the formalist view that remanding to the BIA was appropriate because "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to *the agency* to fill the statutory gap in reasonable fashion."[171] In other words, the Court emphasized that Congress delegated power to *the agency* to answer the relevant interpretive question. Congress did *not* delegate that power to a court.[172]

The Court also briefly articulated a functionalist principle to support its decision.[173] The Court noted that remanding the unresolved interpretive issue to the BIA would allow the agency to "bring its expertise to bear upon the matter . . . and . . . help a court later determine whether its decision exceeds the leeway that the law provides."[174] In other words, the Court suggested that the BIA has superior expertise in resolving interpretive issues that fall within its sphere of authority.[175] In the end, after setting out these justifications, the Court remanded the case "to the agency for its initial determination of the statutory interpretation question and its application to this case."[176]

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167. *See id.* at 523–24.

168. *Id.* at 524.

169. *Id.* at 523 (quoting Gonzales v. Thomas, 547 U.S. 183, 186 (2006) (per curiam)) (internal quotation marks omitted).

170. *See id.* at 523–24.

171. *Id.* at 523 (emphasis added) (quoting Nat'l Cable & Telecomm'ns Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005)) (internal quotation mark omitted).

172. Justice Scalia echoed this sentiment in his concurrence in *Negusie*, saying that he agreed with the Court's decision to remand because "[i]t is to agency officials, not to the Members of this Court, that Congress has given discretion to choose among permissible interpretations of the statute." *Id.* at 528 (Scalia, J., concurring).

173. *Id.* at 517 (majority opinion).

174. *Id.* at 524 (quoting *Gonzales*, 547 U.S. at 186–87 (internal quotation mark omitted)).

175. The Court also made this point by saying: "When the BIA has not spoken on 'a matter that statutes place primarily in agency hands,' our ordinary rule is to remand to 'giv[e] the BIA the opportunity to address the matter in the first instance *in light of its own expertise*.'" *Id.* at 517 (alteration in original) (emphasis added) (quoting INS v. Ventura, 537 U.S. 12, 16–17 (2002) (per curiam)).

176. *Id.* at 524.

In sum, the *Negusie* Court applied the ordinary remand rule to an unresolved statutory interpretation question.[177] One prominent scholar has accurately characterized *Negusie* as holding: "[I]f a question of interpretation remains with respect to *an ambiguous provision of a statute an agency administers*, the ordinary course is for the court to remand the question to the agency, which Congress has authorized to be the statute's authoritative interpreter."[178] This is clear from the Court's opinion.

That said, an important aspect of the Court's analysis has flown under the radar. Once the Court decided that a dispositive statutory interpretation question remained outstanding, the Court's decision to remand turned on the fact that it had decided that the relevant statutory provision was ambiguous and that Congress delegated power to the BIA to interpret that provision.[179] In other words, as in *Ventura* and *Thomas*, the *Negusie* Court reached its remand decision after conducting an analysis akin to that set out in the framework for judicial review. To be sure, the Court never expressly said it was applying the framework for judicial review in order to answer the remand question. But the Court clearly decided to remand the case to the BIA because the agency had "not yet exercised its *Chevron* discretion to interpret the statute in question"[180]—discretion that the Court determined the agency did, indeed, possess.

In short, when *Negusie* is read in conjunction with *Ventura* and *Thomas*, the Court's lesson for unresolved statutory interpretation issues becomes clear: If a case turns on the meaning of a statutory provision the BIA either has not yet interpreted or has interpreted erroneously, the reviewing court should use the framework for judicial review to decide whether to answer the interpretive question in the first instance or remand the issue to the agency.

III. USING THE FRAMEWORK TO FURTHER DEFINE THE BOUNDARIES OF THE REMAND RULE

The preceding Part discovered that the framework for judicial review of agency statutory interpretations plays an important secondary role in immigration law. Taken together, the Supreme Court cases that define the contours of the ordinary remand rule indicate that when a reviewing court faces an unsettled statutory interpretation question, the court should use the framework to decide whether to resolve the interpretive issue in the first instance or remand the question to the BIA.

Negusie illustrates when a reviewing court's analysis under the framework should ordinarily lead to a remand. Recall that the Court de-

177. *See id.* at 523–24; *see also* Walker, *supra* note 70, at 1578 (recognizing that the *Negusie* Court applied "the ordinary remand rule to questions of statutory interpretation").

178. Walker, *supra* note 70, at 1579 (emphasis added).

179. *See supra* notes 155–169 and accompanying text.

180. *Negusie*, 555 U.S. at 523.

termined that an interpretive issue remained outstanding in the case.[181] The Court had also ascertained that the relevant statutory provision was ambiguous and that Congress had delegated power to the BIA to interpret that provision.[182] Thus, the Court located what Professor Strauss calls "*Chevron* space."[183] This, of course, is "the area within which an administrative agency has been statutorily empowered to act in a manner that creates legal obligations or constraints—that is, its delegated or allocated authority."[184] Since the BIA had not yet acted within its "*Chevron* space," the Court decided that it was appropriate to remand the case to the agency.[185] As the Court put it: "Having concluded that the BIA has not yet exercised its *Chevron* discretion to interpret the statute in question, 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'"[186]

And why is it ordinarily proper for a reviewing court to remand an unresolved interpretive issue to an agency with *Chevron* discretion? *Negusie* indicates that it is for the same formalist and functionalist reasons that a reviewing court defers to an agency when the agency does exercise its *Chevron* discretion.[187] The formalist reason is that Congress delegated lawmaking power to the agency to answer the interpretive question left unresolved by the statute.[188] The functionalist reason is that an agency generally has greater experience and expertise in resolving interpretive issues that fall within its sphere of authority.[189]

Negusie therefore identifies one situation in which a reviewing court should ordinarily remand an unsettled interpretive issue to the BIA: when, pursuant to the framework for judicial review, the court determines that the relevant statutory provision is ambiguous and Congress delegated power to the BIA to interpret that provision. In other words, remand is appropriate when the agency possesses *Chevron* discretion.[190] But suppose that, in considering whether to remand an outstanding statutory interpretation question, a reviewing court determines that the BIA does *not* possess *Chevron* discretion—either because (1) the relevant statutory provision is *unambiguous*, or (2) the relevant statutory provision is ambiguous, but Congress did *not* delegate power to the BIA to

181. *See supra* notes 149–53 and accompanying text
182. *See supra* notes 155–64 and accompanying text.
183. Strauss, *supra* note 1, at 1145 (internal quotation marks omitted).
184. *Id.*
185. *Negusie*, 555 U.S. at 523–24.
186. *Id.* at 523 (quoting Gonzales v. Thomas, 547 U.S. 183, 186 (2006) (per curiam)) (internal quotation marks omitted); *see also* Glen, *supra* note 93, at 3 ("[D]ecisions entrusted to the agency must be made by the agency in the first instance prior to resolution by the courts of appeals. Accordingly, if a decision must turn on a determination that the agency for some reason has not yet made, the courts of appeals should generally remand the matter for determination by the agency in the first instance rather than resolving that issue *de novo* during the appellate process.").
187. *See supra* notes 170–76 and accompanying text.
188. *See supra* notes 171–72 and accompanying text.
189. *See supra* notes 173–75 and accompanying text.
190. *See supra* notes 177–80 and accompanying text.

interpret that provision. Should the reviewing court remand the case to the BIA in either of these situations? Unfortunately, *Negusie* does not answer this question. This is because, as one prominent scholar points out, *Negusie* only established that a reviewing court should remand unsettled "questions of . . . law *when such questions fall within the space delegated to an agency*."[191] *Negusie* did not address whether a remand is appropriate outside this context.

This Part, therefore, picks up where *Negusie* left off and considers whether remand is appropriate in the two situations the Court has not yet confronted. Having established that the framework for judicial review plays a key role in the remand discussion, this Part now uses that framework to identify those instances in which a reviewing court should remand an unresolved interpretive issue to the BIA and those in which the court should answer the question without remanding. Ultimately, the goal of this exercise is to define the proper relationship between courts and the BIA when it comes to resolving outstanding statutory interpretation questions.

A. The First Situation

1. The Problem: The Relevant Statutory Provision is Unambiguous

Suppose that a court is reviewing a decision from the BIA and quickly discovers that the case turns on the meaning of a statutory provision the agency either has not yet interpreted or has interpreted erroneously. Assume further that the court draws on the framework for judicial review in order to decide whether to answer the interpretive question in the first instance or remand the issue to the BIA. The court "employ[s] traditional tools of statutory construction,"[192] including a consideration of the statute's text[193] and legislative history,[194] and, unlike *Negusie*, determines at *Chevron* step one that the relevant statutory provision is clear. Should the court answer the interpretive question on its own or remand the matter to the BIA for a decision in the first instance?

2. The Solution: The Reviewing Court Should Resolve the Interpretive Issue

In this situation, the reviewing court should resolve the interpretive issue on its own. This is because neither formalist nor functionalist justifications warrant remanding the matter to the agency. With respect to formalism, the *Chevron* Court made it clear that, "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, *that intention is the law and*

191. Walker, *supra* note 70, at 1579 (emphasis added).
192. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).
193. *See id.* at 859–62.
194. *See id.* at 862–64.

must be given effect."[195] In other words, the court will have determined that "Congress itself is the source of clear law."[196] Since this obviously means that Congress did not delegate lawmaking power to the agency to interpret the relevant statutory provision,[197] there would be no formalist reason to remand the statutory interpretation question to the agency.[198]

There would also be no functionalist reason to remand the interpretive issue to the BIA. At this point, the reviewing court has already answered the pertinent statutory interpretation question. Therefore, the court should go ahead and "give effect to the unambiguously expressed intent of Congress."[199] Remanding the matter to the agency at this point would serve no purpose other than to see if the agency agrees with the court that the statute is unambiguous. Ultimately, however, it is up to the court to decide whether Congress has clearly defined the law.[200] If the court has already made that determination, then there is no need for the court to waste time and resources by remanding the matter to the agency. After all, the conclusion would be forgone.

Justice Thomas's dissenting opinion in *Negusie* is consistent with the view that a reviewing court need not remand an otherwise outstanding interpretive issue to an agency if the court decides the relevant statutory provision is clear.[201] Recall that, in *Negusie*, the majority held that the BIA had erroneously deemed its interpretation of the INA's persecutor bar to be controlled by Supreme Court precedent and thus, the interpretive issue remained unsettled.[202] Although the majority decided to remand the matter to the agency for a decision in the first instance, Justice Thomas disagreed, writing:

> The majority . . . holds that the INA is ambiguous as to "whether coercion or duress is relevant in determining if an alien assisted or otherwise participated in persecution" and that the agency, therefore, should interpret the statute in the first instance to determine whether it reasonably can be read to include a voluntariness requirement. I

195. *Id.* at 843 n.9 (emphasis added); *see also* Healy, *supra* note 1, at 15 ("When a court determines that Congress has defined the law because of the law's clarity, that law governs." (footnote omitted)).

196. Healy, *supra* note 1, at 33.

197. *Id.* at 40 ("If . . . the statute is determined to be unambiguous at step 1, the agency has no power to define the law.").

198. *See also* Walker, *supra* note 70, at 1570–71 ("[I]f the agency's interpretation fails at the first step, there would be no reason to remand because the statutory provision at issue is unambiguous and the agency would have no discretion to exercise . . . ."); *id.* at 1574 n.100 ("[R]emand is not necessary if the court concludes that . . . the statutory provision is unambiguous and thus the agency has no discretion to exercise (*Chevron* step one).").

199. *Chevron*, 467 U.S. at 842–43.

200. *See id.* at 843 n.9 ("The judiciary is the final authority on issues of statutory construction . . . ."); *see also* Healy, *supra* note 1, at 33 ("[T]he judiciary is the governmental institution that plays the key role in discerning the content of the law that Congress has established."); *id.* at 33–34 ("The judiciary determines the content of the law defined by Congress . . . .").

201. *See* Negusie v. Holder, 555 U.S. 511, 538–54 (2009) (Thomas, J., dissenting).

202. *See id.* at 518–20 (majority opinion).

> disagree . . . . Because the INA *unambiguously* precludes any inquiry into whether the persecutor acted voluntarily, *i.e.*, free from coercion or duress, I would affirm the judgment of the Court of Appeals.[203]

Justice Thomas was not particularly concerned about the BIA's reliance on Supreme Court precedent to interpret the relevant statutory provision.[204] Indeed, Justice Thomas wrote that it was "largely irrelevant whether the BIA properly relied on [Court precedent] in interpreting the statute."[205] This is because, as Justice Thomas succinctly and persuasively put it: "There is no reason to remand the question to the agency when only one construction of the statute is permissible . . . ."[206]

In sum, if a reviewing court faces an unsettled statutory interpretation question, and it determines that the relevant statutory provision is clear, then the court should resolve the interpretive issue in the first instance. After all, neither formalist nor functionalist rationales justify remanding the matter to the BIA in this situation.

B. The Second Situation

1. The Problem: The Relevant Statutory Provision is Ambiguous, But Congress Did *Not* Delegate Lawmaking Power to the Agency

Suppose, once again, that a reviewing court faces an outstanding statutory interpretation question. Assume further that the court draws on the framework for judicial review in order to decide whether to answer the interpretive question in the first instance or remand the issue to the BIA. But, this time, the court determines that the relevant statutory provision is ambiguous and that Congress did *not* delegate power to the BIA to interpret that provision. Professor Guendelsberger has recognized that an example of such an issue—that is, one falling "outside the [BIA's] delegated domain"—would include "the meaning of provisions in state or federal criminal statutes."[207] This is because, although the BIA is charged with interpreting ambiguous provisions of immigration law,[208] "[t]he *courts* are primarily responsible for statutory interpretation of the

203. *Id.* at 539 (Thomas, J., dissenting) (emphasis added) (citation omitted); *see also id.* at 550–51 ("The question before the Court . . . is whether Congress has provided an unambiguous answer in the plain language that is chose to use. Here, . . . the traditional tools of statutory interpretation show with 'utmost clarity' that the statute applies regardless of the voluntariness of the alien who participates or assists in persecution." (citation omitted) (quoting INS v. St. Cyr, 533 U.S. 289, 329 (2001) (Scalia, J., dissenting)).

204. *See id.* at 551 n.4.

205. *Id.* (citation omitted).

206. *Id.*

207. Guendelsberger, *supra* note 68, at 644. Professor Guendelsberger is now a prominent member of the BIA. *See Board of Immigration Appeals Biographical Information*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/eoir/fs/biabios.htm#JohnW.Guendelsberger (last updated Mar. 2015).

208. *See supra* note 165.

criminal grounds of removal, and other questions of law *over which the Board does not exercise primary interpretive responsibility*."[209] Using this example, if a case turns on such an unresolved interpretive issue, it is not immediately clear whether the reviewing court should answer the interpretive question on its own or remand the case to the BIA so it can address the issue in the first instance.

On the one hand, *Mead* established that when an agency lacks law-making authority, the reviewing court must independently interpret the statutory provision.[210] In other words, "the court itself must determine a substantive meaning of the ambiguous statute."[211] Thus, it may seem unnecessary for the court to remand the case to the BIA.

On the other hand, "[i]n reaching its judgment about the substance of the law enacted by Congress, the court may be aided by the agency's experience and expertise to the extent that the court finds them to be helpful and persuasive."[212] As one scholar has said: "This is the core of *Skidmore* deference: the court is interpreting the statute, with the agency offering assistance in understanding what the statute provides."[213] Similarly, another scholar has recognized that "'*Skidmore* weight' addresses the possibility that an agency's view on a given statutory question may in itself warrant respect by judges who themselves have ultimate interpre-

209. Guendelsberger, *supra* note 68, at 649 (emphasis added). Several courts have echoed this point. *See, e.g.*, Ng v. Att'y Gen. of U.S., 436 F.3d 392, 395 (3d Cir. 2006) ("This case turns on a question of pure statutory interpretation. Specifically, we must determine the meaning and application of the term 'crime of violence,' as . . . defined at 18 U.S.C. § 16. . . . 'The BIA's interpretation of 18 U.S.C. § 16 is not entitled to deference by this Court" because, among other things, it is "a federal [criminal] provision outside the INA . . . ." (quoting Singh v. Gonzales, 432 F.3d 533, 538 (3d Cir. 2006))); Patel v. Ashcroft, 401 F.3d 400, 407 (6th Cir. 2005) (recognizing that Congress did not charge the BIA with "interpreting state statutes and federal statutes unrelated to immigration"); Smalley v. Ashcroft, 354 F.3d 332, 336 (5th Cir. 2003) (stating that "the BIA's administrative role" is to "interpret[] . . . federal immigration laws, not state and federal criminal statutes"); Flores v. Ashcroft, 350 F.3d 666, 671 (7th Cir. 2003) (recognizing that Congress did "not delegate any power to the immigration bureaucracy . . . or to the Board of Immigration Appeals" to interpret the meaning of the phrase "crime of violence" under 18 U.S.C. § 16, a federal criminal statute); Garcia-Lopez v. Ashcroft, 334 F.3d 840, 843 (9th Cir. 2003) (noting that the BIA does not administer state criminal statutes), *overruled by* Ceron v. Holder, 747 F.3d 773 (9th Cir. 2014); Omagah v. Ashcroft, 288 F.3d 254, 258 (5th Cir. 2002) ("Determining a particular federal or state crime's elements lies beyond the scope of the BIA's delegated power . . . ."); Francis v. Reno, 269 F.3d 162, 168 (3d Cir. 2001) ("*Chevron* instructs that we accord deference only to the BIA's 'construction of the statute which it administers.' The BIA is not charged with administering 18 U.S.C. § 16, and that statute is not transformed into an immigration law merely because it is incorporated into the INA by § 1101(a)(43)(F). We therefore conclude that the BIA's interpretation of 8 U.S.C. § 16 is not entitled to deference under *Chevron*." (citation omitted) (quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984))); Ming Lam Sui v. INS, 250 F.3d 105, 112–13 (2d Cir. 2001) (stating that the BIA "is not charged with the administration of [state or federal criminal] laws"); Michel v. INS, 206 F.3d 253, 262 (2d Cir. 2000) ("[T]he agency is not charged with the administration of [state or federal criminal] laws.").

210. *See supra* note 68 and accompanying text.

211. Healy, *supra* note 1, at 46.

212. *Id.* at 46–47.

213. *Id.* at 47 n.285.

tive authority."[214] In short, while "[t]he courts are primarily responsible for statutory interpretation of the criminal grounds of removal, and other questions of law over which the Board does not exercise primary interpretive responsibility," those courts may apply "a *Skidmore* measure of deference to the Board's reasoning."[215] Therefore, the court might consider remanding the case so the BIA could help the court determine the meaning of the relevant statutory provision.

Professor Guendelsberger first highlighted this problem ten years ago, shortly after *Ventura*, when he said:

> When the issue not yet addressed by the agency is a purely legal issue, there may be situations in which a court may resolve the question without the need for remand. . . . The remand requirement might . . . be relaxed when the court faces a question of statutory interpretation of an issue determined to be *outside the agency's domain* . . . . Whether the *Mead* reference to *Skidmore* deference in lieu of *Chevron* deference should require a remand to the agency in such a situation *remains unclear*.[216]

While the Court's remand jurisprudence has developed over the last decade, the Court still has not decided the issue raised by Professor Guendelsberger. So, should a reviewing court remand a matter to the BIA when doing so will only allow the agency to provide the court with an interpretation worthy of *Skidmore* deference?

The limited scholarship on point suggests that the answer is no. Professor Guendelsberger, for example, argued that "[f]or issues outside the [BIA's] delegated domain, such as the meaning of provisions in state or federal criminal statutes, the court should be permitted to consider the agency analysis for its persuasive effect under *Mead* and *Skidmore* and *supplement otherwise insufficient agency analysis without the need for remand*."[217] It appears that Professor Guendelsberger was persuaded by

214. Strauss, *supra* note 1 at 1145; *see id.* at 1143 ("'*Skidmore* weight' addresses the possibility that an agency's view on a given statutory question may in itself warrant the respect of judges who are themselves unmistakably responsible for deciding the question of statutory meaning.").

215. Guendelsberger, *supra* note 68, at 649.

216. *Id.* at 636 (emphasis added). Not long after Professor Guendelsberger wrote these words, the Ninth Circuit said it was

> reluctant to rule on the merits of an issue that the BIA has not itself addressed. In *INS v. Ventura*, the Supreme Court instructed that "[g]enerally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands."

Ray v. Gonzales, 439 F.3d 582, 591 (9th Cir. 2006) (alteration in original) (citation omitted) (quoting INS v. Ventura, 537 U.S. 12, 16–17 (2002) (per curiam)). That said, the Ninth Circuit went on to "note that it may be appropriate for us to address the merits of purely legal claims . . . as to which we would not 'intrude upon [a] domain which Congress has exclusively entrusted to an administrative agency.'" *Id.* (alteration in original) (quoting *Ventura*, 537 U.S. at 16) (internal quotation marks omitted).

217. Guendelsberger, *supra* note 68, at 644 (emphasis added).

the formalist notion that, if Congress did not delegate lawmaking power to the BIA, and thus the relevant interpretive issue falls outside the agency's "delegated domain," then the reviewing court has the authority to resolve the issue and should do so in the first instance.[218]

A few other scholars have made passing comments that echo this formalist view. One scholar, for example, has suggested that if, on remand, the BIA will be addressing a matter "*outside* its own institutional purview," then there may be "no compelling justifications for remand and against judicial resolution of the issue in the first instance."[219] Likewise, another scholar has said that "if the [reviewing] court concludes that the agency lacks authority to interpret the statute . . . then only *Skidmore* persuasive deference would apply and arguably there would be no need to remand."[220] In short, the limited scholarship on point suggests that a reviewing court need not remand an unsettled statutory interpretation question to an agency when the issue falls outside the agency's sphere of authority. Rather, these authorities suggest that the court can and should resolve the interpretive matter on its own.

2. The Solution: The Reviewing Court Should Remand the Interpretive Issue

Despite the scholarship to the contrary, a reviewing court should generally remand an unsettled interpretive question to the BIA if the agency's interpretation would be entitled to *Skidmore* deference on review. This is because, although formalist principles do not support a remand in this context, multiple functionalist rationales do warrant a remand.

As an initial matter, it is worth recognizing that the resolution of an interpretive issue may be important even if the issue falls outside the BIA's "delegated domain."[221] For example, the reviewing court's interpretation of a criminal statute may be the key to determining whether a

218. Indeed, in considering whether a reviewing court should remand an unresolved interpretive issue to an agency, Professor Guendelsberger focused on whether the issue fell "within the domain of agency authority delegated by Congress." *Id.* With that in mind, Professor Guendelsberger argued that, "[w]hen the issue involves statutory interpretation within the domain of agency authority delegated by Congress, and the Board's reasoning is insufficient for meaningful review, the court should remand for a reasoned agency decision on the legal point in question." *Id.* In other words, Professor Guendelsberger argued that "the courts should permit the [BIA] to address unresolved issues involving interpretation of the immigration law before examining whether the Board's interpretation is within the leeway permitted by *Chevron* and *Mead*." *Id.* at 649. Interestingly, Professor Guendelsberger made these arguments almost five years *before* the Supreme Court's similar holding in *Negusie*. *See supra* notes 142–80 and accompanying text (discussing *Negusie*).

219. Glen, *supra* note 93, at 46.

220. Walker, *supra* note 70, at 1571; *see also id.* at 1574 n.100 ("[R]emand is not necessary if the court concludes that Congress did not delegate any *Chevron* discretion to the agency . . . ."); *id.* at 1579 ("[T]he ordinary remand rule applies broadly, and the only exceptions should be when there are minor errors as to subsidiary issues that do not affect the agency's ultimate decision, or *when the agency lacks authority to decide the issue*." (emphasis added)).

221. *See* Guendelsberger, *supra* note 68, at 644.

noncitizen should be removed from the United States. If the court makes a mistake in interpreting the statute, the noncitizen could be wrongfully removed or, alternatively, unjustly allowed to remain in the country. Thus, the court should exercise great care in resolving such a significant interpretive matter. With this in mind, a reviewing court should generally remand an unsettled interpretive question to the BIA if the agency's interpretation would be entitled to *Skidmore* deference on review.

To be sure, formalist principles do not justify a remand in this situation. Clearly, if Congress did not delegate power to the BIA to answer the relevant interpretive question, then the reviewing court would have the legal authority to resolve the issue on its own. After all, *Mead* established that when an agency does not possess lawmaking power, the reviewing court is ultimately responsible for independently interpreting the pertinent statute.[222] Since, at the end of the day, the reviewing court will have "to make its own independent judgment about the substance of the congressional enactment,"[223] formalist justifications do not point in the direction of a remand.

Nevertheless, two functionalist rationales warrant a remand in this situation. The first functionalist rationale is that remanding the unsettled interpretive question to the BIA will allow the agency to bring its experience to bear to help the reviewing court determine the substantive meaning of the relevant statute.[224] Thus, if an immigration case turns on the meaning of an ambiguous provision of a criminal statute, and the reviewing court remands the interpretive issue to the BIA, then the agency can use its considerable experience construing criminal statutes to offer an interpretation that the court may find persuasive.

There is no doubt that the BIA has such experience. Although the agency does not receive *Chevron* deference when it construes criminal laws, it "routinely interprets criminal statutes because there are myriad grounds for removal that are based upon a criminal conviction."[225] Indeed, as one prominent scholar has recognized, "the body of law that concerns the impact of criminal activity on noncitizens is now vast."[226] Thus, the BIA must regularly interpret criminal statutes in order to determine whether a noncitizen should be removed from the United States

222. *See supra* note 68 and accompanying text.

223. Healy, *supra* note 1, at 47; *see also id.* at 48 (acknowledging that when Congress does not delegate authority to an agency to resolve an interpretive issue, "the only law is the law that Congress itself defined in the statute; the court is responsible for determining the content of that law"); *id.* at 49 (recognizing that when an agency does not possess delegated power, "the court itself . . . [must] discern the substantive meaning of the ambiguous statute").

224. *See supra* note 212 and accompanying text.

225. Mary Holper, *Specific Intent and the Purposeful Narrowing of Victim Protection Under the Convention Against Torture*, 88 OR. L. REV. 777, 825 (2009).

226. Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 483 (2007).

or face some other adverse immigration consequence.[227] While Congress may not have delegated power to the BIA to interpret ambiguous provisions of criminal statutes,[228] there is no doubt that the agency interprets such provisions on a regular basis.

Still, multiple courts have stressed that the BIA has no "special" or "particular" expertise in interpreting criminal statutes. For example, one court has said the BIA's interpretation of the phrase "crime of violence" in 18 U.S.C. § 16 is not entitled to deference because, "as a federal [criminal] provision outside the INA, it lies beyond the BIA's *special* area of expertise."[229] Similarly, another court has said the "BIA has no *particular* expertise in construing federal and state criminal statutes," and, therefore, the agency's interpretation of such statutes is not afforded deference.[230]

It is true that the BIA has no special or particular expertise in construing ambiguous provisions of criminal statutes. But this criticism appears to relate to formalism and the fact that these interpretive issues fall outside the BIA's congressionally "delegated domain," which is immigration law.[231] And that only explains why the BIA should not receive *Chevron* deference when it interprets an ambiguous provision of a criminal statute. It says nothing about the BIA's ability to persuade a court, pursuant to *Skidmore*, as to the meaning of a statutory provision, given the agency's experience.

Judge Easterbrook's opinion in *Flores v. Ashcroft*[232] helps make the point. In *Flores*, the Seventh Circuit refused to grant *Chevron* deference to the BIA's interpretation of "crime of violence" in 18 U.S.C. § 16.[233] Citing *Mead*, Judge Easterbrook explained:

> *Chevron* deference depends on delegation, and § 16(a) does not delegate any power to the . . . Board of Immigration Appeals. Section 16 is a criminal statute, and just as courts do not defer to the Attorney General or United States Attorney when § 16 must be interpreted in a criminal prosecution, so there is no reason for deference when the same statute must be construed in a removal proceeding. Any delegation of interpretive

227. *See also id.* at 482–83 (discussing the many ways in which "a criminal conviction can damage one's immigration status").

228. *See supra* note 209.

229. Ng v. Att'y Gen. of U.S., 436 F.3d 392, 395 (3d Cir. 2006) (emphasis added) (quoting Singh v. Gonzales, 432 F.3d 533, 538 (3d Cir. 2006)).

230. Rodriguez v. Gonzales, 451 F.3d 60, 63 (2d Cir. 2006) (emphasis added).

231. *See* Guendelsberger, *supra* note 68, at 644.

232. 350 F.3d 666 (7th Cir. 2003).

233. *See id.* at 671 ("[T]he agency's interpretation . . . has no binding effect along *Chevron*'s lines.").

> authority runs to the Judicial Branch rather than the Executive Branch.[234]

That said, Judge Easterbrook expressly recognized that "the agency's interpretation . . . may have *persuasive force*," and he then said, "we must give it *careful consideration*."[235]

It is worth giving "careful consideration" to the BIA's interpretation of an ambiguous provision of a criminal statute because the BIA has experience interpreting such provisions. Thus, if an immigration case turns on such an unresolved interpretive issue, the reviewing court should remand that issue to the BIA so that it can bring its experience to bear and help the court make a more informed judgment about the meaning of the statute.

A second functionalist rationale also justifies a remand in the *Skidmore* situation. That rationale is that allowing the BIA to answer the statutory interpretation question in the first instance will promote uniformity across the circuits. In an immigration removal case, for example, if the BIA construes an ambiguous provision of a criminal statute in the first instance, then all of the circuits will have the benefit of the agency's views. Therefore, each circuit court can consider the agency's interpretation and decide whether it is persuasive. Simply stated, the agency's interpretation "can contribute to an efficient, predictable, and nationally uniform understanding of the law."[236]

It is true that, in the end, some circuits may not find the BIA's interpretation persuasive. Nevertheless, the agency's interpretation will increase the likelihood that the circuits will agree on the meaning of the relevant statutory provision. As one scholar aptly put it, "national uniformity will still be promoted, though not guaranteed, by the courts granting *Skidmore* deference to agency interpretations."[237] At the very least, the BIA's resolution of the interpretive issue in the first instance will foster a uniformity of consideration in which each circuit can reflect on the agency's initial interpretation and determine whether it is persuasive. In short, remanding an unsettled interpretive issue to the BIA for a decision worthy of *Skidmore* deference will not guarantee national uniformity; however, remanding in this situation at least "allows for en-

234. *Id.* (citation omitted) (citing United States v. Mead Corp., 533 U.S. 218 (2001)).

235. *Id.* (emphases added). Ultimately, Judge Easterbrook decided that the agency's interpretation was "not persuasive." *See id.*

236. Strauss, *supra* note 1, at 1146.

237. Herz, *supra* note 51, at 197 n.57. Other scholars have also recognized that granting *Skidmore* deference to an agency's statutory interpretation promotes national uniformity. *See, e.g.*, Hickman & Krueger, *supra* note 3, at 1256 (mentioning, in the context of *Skidmore*, that "courts can promote uniformity of the law and thereby promote the public good by harmonizing judicial interpretations with administrative interpretations").

hanced consistency in the application of statutes."[238] This is obviously a worthy functionalist goal.[239]

In conclusion, a reviewing court should generally remand an unsettled statutory interpretation question to the BIA if the agency's interpretation would be entitled to *Skidmore* deference on review. To be sure, formalist principles do not justify remanding in this context. However, two functionalist rationales do warrant a remand. First, remanding the outstanding interpretive issue to the BIA will allow the agency to bring its experience to bear to help the court determine the substantive meaning of the pertinent statutory provision. Second, remanding the unresolved matter will increase the chances that the circuits will agree on the meaning of the relevant provision.

IV. AN OUTLINE OF THE PROPER BALANCE OF POWER BETWEEN COURTS AND THE BIA

Taken together, the Supreme Court's decisions in *Ventura*, *Thomas*, and *Negusie* teach an important lesson: If a case turns on the meaning of a statutory provision the BIA either has not yet interpreted or has interpreted erroneously, the reviewing court should use the framework for judicial review to decide whether to answer the interpretive question in the first instance or remand the issue to the agency.[240] With this in mind, the previous Part used the framework to identify the circumstances under which reviewing courts should and should not remand unsettled interpretive issues to the BIA.[241] This exercise creates an outline of the proper balance of power between courts and the BIA when it comes to resolving outstanding statutory interpretation questions.

At one end of the spectrum, a reviewing court may draw on the framework for judicial review and decide that the relevant statutory provision is clear. In this situation, the court should answer the interpretive question in the first instance. This is because neither formalist nor functionalist justifications warrant remanding the matter to the BIA.[242]

At the other end of the spectrum, a reviewing court may draw on the framework for judicial review and decide that the relevant statutory pro-

238. Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 WM. & MARY L. REV. 1105, 1118 (2001) (citing Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944)).

239. *See, e.g.*, Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 38 (1994) ("Both the Constitution's framers and the Supreme Court have stressed that the articulation of nationally uniform interpretations of federal law is an important objective of the federal adjudicatory process. Such uniform interpretation serves several laudable goals of a coherent and legitimate judicial system." (footnotes omitted)). For a discussion of the contrasting views on "[t]he importance of uniformity in [the interpretation of] federal law," see Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 LOY. L. REV. 535, 540–44 (2010).

240. *See supra* Part II.

241. *See supra* Part III.

242. *See supra* Part III.A.

vision is ambiguous and that Congress delegated power to the BIA to interpret that provision. In this situation, the BIA possesses *Chevron* discretion. Pursuant to the ordinary remand rule, a reviewing court should generally remand an outstanding statutory interpretation question to an agency with *Chevron* discretion. This is because both formalist and functionalist justifications point in the direction of a remand.[243]

Perhaps the most difficult situation is when a reviewing court draws on the framework for judicial review and decides that the relevant statutory provision is ambiguous, but that Congress did *not* delegate power to the BIA to interpret that provision. In this situation, an initial agency interpretation would be entitled to *Skidmore* deference on review, not *Chevron* deference. Under this circumstance, the reviewing court should generally remand the interpretive issue to the BIA. This is because, although formalist principles do not justify remanding in this context, multiple functionalist rationales do warrant a remand.[244]

In the end, the framework for judicial review is crucial to understanding when a reviewing court should answer an outstanding interpretive question in the first instance and when the court should remand the issue to the BIA. That said, if a reviewing court faces an unsettled interpretive issue, and it determines that the relevant statutory provision is ambiguous, the court may choose not to proceed any further with the framework for judicial review. That is because remand will be the proper course of action whether or not Congress delegated lawmaking power to the BIA. After all, functionalist principles alone justify a remand even if the BIA's interpretation will only be entitled to *Skidmore* deference on review.

On that point, one final note is in order. If functionalist justifications alone warrant a remand in the *Skidmore* context, then the formalist justifications supporting a remand in the *Chevron* context are overstated. In other words, although the Supreme Court has supported the ordinary remand rule with both formalist and functionalist rationales,[245] functionalist principles by themselves can support the rule. After all, as the foregoing analysis has demonstrated, a remand is appropriate even when Congress did *not* delegate lawmaking power to the BIA and, thus, formalist justifications do *not* point in the direction of a remand.

CONCLUSION

There is no doubt that courts should use the framework for judicial review primarily to decide how much deference to give to an agency's statutory interpretation. This Article has demonstrated, however, that the framework also plays an important secondary role in immigration law.

243. *See supra* notes 181–90 and accompanying text (discussing *Negusie*).
244. *See supra* Part III.B.
245. *See supra* notes 167–76 accompanying text (discussing *Negusie*).

Indeed, if an immigration case turns on the meaning of a statutory provision the BIA either has not yet interpreted or has interpreted erroneously, the reviewing court should draw on the framework for judicial review—not to determine how much deference to give to the BIA, but rather to decide whether to answer the interpretive question in the first instance or remand the issue to the agency.

After recognizing that the framework for judicial review plays a valuable role in the remand context, this Article used the framework to identify those instances in which a reviewing court should remand an unresolved interpretive issue to the BIA and those in which the court should answer the question without remanding. Ultimately, the Article argued that, when a reviewing court faces an unsettled interpretive issue, and it decides, pursuant to the framework for judicial review, that the relevant statutory provision is ambiguous, the court should remand the matter to the BIA. This is true whether or not Congress delegated law-making power to the BIA. Thus, a remand is proper if the BIA's interpretation will be entitled to either *Chevron* or *Skidmore* deference on review. In the end, this Article's analysis helps define the modern relationship between courts and the BIA when it comes to resolving outstanding statutory interpretation questions.