ADMINISTRATIVE ADJUDICATION AND THE RULE OF LAW

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INTRODUCTION

Administrative agencies have long played a substantial role in the development of American law. Although historically lawmaking responsibilities were the exclusive province of legislatures and courts, administrative agencies have regularly and substantially participated in the process for nearly a century. Statutory and judge-made rules of deference to administrative lawmaking have ensured that agency-made law is not relegated to junior-partner status, but instead may even control the decisions of ostensibly superior entities (such as the federal courts).[1] Thus, administrative agencies have come to be a major player in the creation of law in the American legal system, and often are responsible for creating the rules that govern important aspects of life and government.

In fulfilling these important lawmaking functions, agencies—unlike courts and legislatures—have typically been empowered to elect between proceeding legislatively (by issuing regulations), or adjudicatively (by creating a new legal rule in the context of an adjudication). Many agencies, particularly in recent decades, have opted to exercise their lawmaking authority primarily or exclusively legislatively through the issuance of regulations.[2] Despite this trend toward legislative lawmaking by administrative agencies, some agencies—most notably the National Labor Relations Board (NLRB) and the Board of Immigration Appeals (BIA or Board)—have continued to use adjudication as the exclusive or predominant means of establishing new legal principles.[3]

1. *See, e.g.*, Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984) (establishing that agency-made law is entitled to deference from the federal courts, where the underlying statute is silent or ambiguous on the issue under consideration, and the agency's interpretation is reasonable).

2. *See* Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 255 (1986) (noting that over the last twenty years, agencies have shifted from using adjudicative lawmaking to legislative lawmaking).

3. *See, e.g.*, Michael J. Hayes, *After "Hiding the Ball" Is Over: How the NLRB Must Change Its Approach to Decision-Making*, 33 RUTGERS L.J. 523, 565 (2001); Peter H.

The use of administrative adjudication as a significant means of agency lawmaking has been the subject of sustained academic critique.[4] In a series of articles spanning more than a half century, academic commentators have argued that agency lawmaking through adjudication suffers from a number of significant drawbacks—including decreased public participation, a lack of prospectivity, lesser transparency or predictability for regulated entities, and a tendency to arise in fact-bound circumstances—which make it inferior to legislative lawmaking by administrative agencies.[5] As a result,

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Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1014 (indicating that the National Labor Relations Board (NLRB) and the Immigration and Naturalization Service (INS) almost exclusively use adjudication to make rules).

4. *See, e.g.*, Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 621–22 (1970); Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 279, 281 (1991) (discussing a growing consensus that legislative lawmaking by administrative agencies is preferable to lawmaking through adjudication, and describing criticism of the NLRB for continuing to adhere to its practice of making law exclusively through adjudication); Milton Handler, *Unfair Competition*, 21 IOWA L. REV. 175, 259–61 (1936) (suggesting that it would be preferable for the Federal Trade Commission to make law through legislative lawmaking rather than through adjudication); William T. Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 DUKE L.J. 103, 103 (noting that the "consensus" is that agency lawmaking via legislation is superior to adjudication); Carl McFarland, *Landis' Report: The Voice of One Crying in the Wilderness*, 47 VA. L. REV. 373, 433–38 (1961) (criticizing agencies' use of adjudication instead of legislative lawmaking to develop policy); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 308–09 (noting the "near-universal" consensus among judges and scholars that legislative lawmaking by administrative agencies is superior to adjudicative lawmaking, and discussing the reasons for this consensus); *see also* David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 972 (1965) (arguing that the distinction between legislative and adjudicative lawmaking by administrative agencies has been overstated, but also noting that legislative lawmaking is superior in a number of contexts). *But cf.* E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1491–92 (1992) (arguing that there are circumstances in which each form of agency policymaking is preferable); Jeffrey J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 FLA. ST. U. L. REV. 529, 550–53 (2005) (same); Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 514–28 (1970) (critiquing the traditional reasons posited for favoring legislative lawmaking by agencies over adjudicative lawmaking).

5. *See* William D. Araiza, *Agency Adjudication, the Importance of Facts, and the Limitations of Labels*, 57 WASH. & LEE L. REV. 351, 372–75 (2000) (asserting the potential for unfair retroactivity that results where an agency relies on adjudicative lawmaking instead of legislative lawmaking); Bernstein, *supra* note 4, at 587–98 (discussing the limitations of adjudicative lawmaking in the context of the NLRB); Grunewald, *supra* note 4, at 278–81 (exploring the reasons why scholars consider legislative lawmaking to be superior to adjudicative lawmaking by administrative agencies); Handler, *supra* note 4, at 259–61 (discussing the reasons why it would be preferable for the Federal Trade Commission to make law through legislative lawmaking, rather than through adjudication); Mayton, *supra* note 4, at 103 (describing the reasons for preferring legislative lawmaking to adjudicative lawmaking); McFarland, *supra* note 4, at 433–38 (same); Pierce, *supra* note 4, at 308–09 (noting the "near-universal" consensus among judges and scholars that legislative lawmaking by administrative agencies is superior to adjudicative lawmaking, and discussing

many authors have contended that agency lawmaking through adjudication should be discouraged in all but very limited circumstances.[6]

In contrast to this rich critical literature, scholars have written very little regarding the potential benefits of agency lawmaking through adjudication.[7] In particular, essentially no scholarship has addressed the "absolute"—i.e., noncomparative—benefits of adjudicative lawmaking by administrative agencies. This tendency to ignore the absolute benefits of adjudicative lawmaking—benefits that might also be achieved through agency legislative lawmaking—is perhaps unsurprising given the literature's largely comparative focus. Nonetheless, it has had important effects, allowing the continuation of the widespread portrayal of adjudicative lawmaking as undesirable and to be avoided or discouraged if at all possible.

Of equal significance, very little of the existing literature has endeavored to empirically assess the comparative benefits and drawbacks of adjudicative lawmaking.[8] Thus, while authors have critiqued such lawmaking from a theoretical perspective, the true nature or extent of the theorized drawbacks remains largely speculative. Similarly, essentially no empirical data regarding potential benefits of adjudicative lawmaking has been gathered.

These limitations of the existing literature—and the corresponding negative view of adjudicative lawmaking they have fostered—have had a number of significant consequences. Most obviously, they have led certain

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the reasons for this consensus); *see also* Elliott, *supra* note 4, at 1491 (noting the general preference for legislative lawmaking among American academics).

6. *See, e.g.*, Bernstein, *supra* note 4, at 621–22; Handler, *supra* note 4, at 259–61; McFarland, *supra* note 4, at 433–38; Pierce, *supra* note 4, at 308; *see also* Mayton, *supra* note 4, at 133–35 (arguing that Congress intended legislative lawmaking to be the sole means of lawmaking available to administrative agencies under the Administrative Procedure Act).

7. A few articles have critiqued the traditional view that legislative lawmaking by administrative agencies is superior to adjudicative lawmaking. These articles have tended to either criticize the assumptions underlying the claim that legislative lawmaking is superior to adjudicative lawmaking or argue that the distinction between legislative or adjudicative lawmaking is exaggerated and that other factors account for the observed deficiencies in agency lawmaking. *See, e.g.*, Elliott, *supra* note 4, at 1491–92; Robinson, *supra* note 4, at 514–26; *see also* William E. Kovacic, *Administrative Adjudication and the Use of New Economic Approaches in Antitrust Analysis*, 5 GEO. MASON L. REV. 313, 320 (1997) (concluding that the Federal Trade Commission could use administrative adjudication to integrate new theories and methods into the resolution of antitrust disputes).

8. *See, e.g.*, Araiza, *supra* note 5, at 372–75 (discussing the advantages of legislative lawmaking over adjudicative lawmaking, without the application of an empirical methodology); Grunewald, *supra* note 4, at 278–79, 281 (same); Handler, *supra* note 4, at 259–61 (same); Mayton, *supra* note 4, at 103 (same); McFarland, *supra* note 4, at 436–38 (same); Pierce, *supra* note 4, at 308 (same); *see also* Bernstein, *supra* note 4, at 620 (arguing in support of the conclusion that legislative lawmaking was preferable to adjudicative lawmaking in the NLRB context, but noting that this conclusion was "based primarily on supposition").

academic commentators to conclude prescriptively that the courts or Congress should restrain use of adjudicative lawmaking by administrative agencies through a variety of means.[9] Perhaps more importantly, they have caused academic commentators to be apathetic, or even appreciative, of real world declines in agencies' creation of legal rules via adjudication. Correspondingly, there is a dearth of critical academic commentary addressing the potential consequences of significant declines in the use of adjudicative lawmaking by administrative agencies.

In this Article, I posit that this apathetic (or sometimes hostile) attitude toward adjudicative lawmaking may not be as unambiguously appropriate as the current literature would seem to suggest. Specifically, I hypothesize that adjudicative lawmaking theoretically has the potential to further a number of important rule-of-law goals. For example, adjudicative lawmaking by administrative agencies theoretically has the capacity to increase consistency in the legal standards applied to individual cases, promote predictability through rule creation, and restrain otherwise arbitrary discretion. Using a case study of the Board of Immigration Appeals—the primary administrative body that has historically been responsible for creating new immigration rules—I examine whether these rule-of-law goals have, in fact, been promoted by administrative adjudication, or are simply theoretical benefits of adjudicative lawmaking.

I ultimately conclude that—judged by rule-of-law standards—there are significant benefits to adjudicative lawmaking by administrative agencies. While adjudicative lawmaking by the BIA has not uniformly succeeded in furthering hypothetical rule-of-law goals, it unquestionably has, in many circumstances, forwarded the hypothesized goals. For example, the BIA has played an important role in developing consistency in the standards applied across the immigration legal system, in furthering predictability in results for individual immigrants, and in restricting otherwise arbitrary exercises of government discretion. Thus, while the Board has not been a perfect actor in furthering rule-of-law goals within the immigration law system, its overall impact has been positive and substantial. While it is plausible that the Board might have achieved even greater benefits through a comparable program of legislative lawmaking, in the absence of that alternative, the elimination of adjudicative lawmaking would have prevented the furthering of important rule-of-law objectives.

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9. *See, e.g.*, Araiza, *supra* note 5, at 396 (arguing for a limited judicial role in policing the use of agency adjudication, where that adjudication would result in retroactivity concerns); Bernstein, *supra* note 4, at 620–21 (contending that the APA already requires the NLRB to engage in legislative lawmaking and that additional legislation may be appropriate to address the unique circumstance of legislative lawmaking by the NLRB); *see also* Mayton, *supra* note 4, at 133–35 (concluding that the APA requires that agencies make rules through legislative lawmaking and not through adjudication).

This conclusion, of course, has significant implications for the historically tepid academic view of adjudicative lawmaking by administrative agencies. At a minimum, it suggests that this view is unwarranted—and is, in fact, dangerous—in cases where a decline in adjudicative lawmaking is unlikely to be accompanied by the creation of a legislative lawmaking program of comparable scope and vigor. Where such comparable substitutes are unlikely to be forthcoming, a reduction in an agency's use of adjudicative lawmaking is likely to have substantial negative effects, which should be cause for concern among academics, the Legislature, and the Judiciary. This concern should, in turn, lead to exploration of how the decline in adjudicative lawmaking can be reversed or arrested. While "exchanges" of increased legislative lawmaking for less adjudication may be cause for lesser concern, they too should be viewed with a critical eye to ensure that the legislative lawmaking program accounts for the range of rule-of-law goals promoted by the eliminated body of adjudicative lawmaking. All of these conclusions differ dramatically from those that result from the traditionally negative academic view of adjudicative lawmaking by agencies.

In Part I of this Article, I discuss the rule-of-law goals that adjudicative lawmaking could theoretically promote and elaborate the specific contexts in which administrative agencies are confronted by opportunities for furthering those goals. Part II briefly introduces the BIA and discusses why the Board was selected as the case study for this Article. Part III discusses the history of adjudicative lawmaking by the BIA, and the extent to which adjudicative lawmaking by the BIA has in fact promoted the posited rule-of-law goals. Finally, I provide general conclusions and address specific prescriptive suggestions that can be made in light of the preceding sections.

Before proceeding, a brief note regarding terminology is in order. Throughout the Article, the term "adjudicative lawmaking" is used to refer to agency lawmaking through adjudication. "Legislative lawmaking" is used to refer to agency lawmaking through the issuance of regulations. (Note that "legislative lawmaking," instead of the traditional administrative law term "rulemaking" or "notice-and-comment rulemaking," has been used in order to avoid conflating the issues of whether a rule was created by the agency and how the rule was created). The term "rule" is used to refer to a legally enforceable standard set forth in either regulations or caselaw, and will not be used in its traditional administrative law sense (i.e., as a synonym for regulations). "Rule-of-law goals" (or "rule-of-law objectives") is used to describe features commonly associated with the "rule of law." Finally, the term "absolute benefits" is used to refer to benefits that might be achieved either through adjudicative lawmaking or

through legislative lawmaking.

I. DEVELOPING THE RULE-OF-LAW FRAMEWORK

Evaluating the absolute benefits of adjudicative lawmaking by agencies presents a significant challenge. The most obvious means of evaluating administrative adjudications—i.e., the substantive outcomes of such adjudications—provides an inherently contestable set of criteria. In virtually every case, different agency stakeholders will possess differing views of the merits of the adjudication's substantive outcomes. Because none of these views is inherently normatively "correct," selecting a neutral set of substantive outcome-based criteria for evaluation is difficult, if not impossible.

Fortunately, there are some relatively "neutral" means by which one can evaluate the goods afforded by agency adjudicative lawmaking. Most notably, rule-of-law goals can be used as a benchmark by which to assess whether adjudicative lawmaking by administrative agencies may have absolute benefits. Although the meaning of "rule of law" is often contested in academic and popular discourse, there is—as discussed at greater length below—a general consensus regarding desirability of a core set of rule-of-law goals. Because this general consensus exists, evaluation of these consensus rule-of-law goals provides a relatively straightforward and unbiased measure of the benefits of agency adjudicative lawmaking. This Article will accordingly focus on an examination of consensus rule-of-law goals as the evaluative measure for agency adjudicative lawmaking.

As set forth below, there are a significant number of rule-of-law goals that might theoretically be promoted by a robust agency program of adjudicative lawmaking. Among other things, agency adjudication should theoretically have the ability to (1) increase consistency in the legal standards that are applied across the legal system, (2) promote predictability for regulated entities through rule creation, and (3) restrict government discretion that might otherwise be entirely unchecked. The reasons why these specific goals are theoretically likely to be promoted by administrative adjudication—as well as the rule-of-law goals that administrative adjudication may not promote—are discussed in turn below.

Before turning to this more in-depth discussion, however, it is necessary to initially identify the consensus goals that will form the basis for the discussion. Because there is significant dissensus among scholars, judges, and members of the public as to what "rule of law" means, it is necessary to specify which rule-of-law criteria will be considered, and which are excluded from the evaluation.

A. The Meaning of "Rule of Law" in Academic and Popular Discourse

As many authors have noted, the rule of law is "an essentially contested concept."[10] No single consensus formulation of the rule of law exists, and indeed there is broad disagreement among scholars and popular users regarding the necessary components of a rule-of-law society.[11] Everything from the predictability of legal norms to the extent of liberalization of the economy and the existence of laws guaranteeing basic substantive human rights is designated by some (but not all) rule-of-law theorists as necessary components of the rule-of-law ideal.[12] This proliferation of rule-of-law understandings unsurprisingly can render meaningful use of the term "rule of law" difficult.

Fortunately, there are some basic components of the rule of law that are generally agreed upon and that can form the basis for a stripped-down "consensus understanding" of the rule of law. These basic components collectively comprise what some authors have referred to as "thin" theories of the rule of law, or what others have referred to as the "instrumental" or "formal" conception of the rule of law.[13] Among other things,[14] these

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10. Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT'L L. 471, 472 (2002); *see also* Mark Bennett, *"'The Rule of Law' Means Literally What It Says: The Rule of Law": Fuller and Raz on Formal Legality and the Concept of Law*, 32 AUSTL. J. LEGAL PHIL. 90, 92 (2007); Margaret J. Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 791 (1989).

11. *See* JOSEPH RAZ, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210–11 (1979); Bennett, *supra* note 10, at 92–95; David Kairys, *Searching for the Rule of Law*, 36 SUFFOLK U. L. REV. 307, 308 (2003); Radin, *supra* note 10, at 781.

12. *See, e.g.*, RAZ, *supra* note 11, at 210–11; Bennett, *supra* note 10, at 92–95; Kairys, *supra* note 11, at 312–13.

13. *See, e.g.*, Joel M. Ngugi, *Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse*, 26 U. PA. J. INT'L ECON. L. 513, 533–35 (2005) (contrasting "formal" and "substantive" conceptions of the rule of law, and describing the elements of each); Peerenboom, *supra* note 10, at 472, 477–79 (characterizing the components of "thin" theories of the rule of law); Radin, *supra* note 10, at 783–85 (describing the components of the instrumental conception of the rule of law); *see also* Benedict Sheehy, *Fundamentally Conflicting Views of the Rule of Law in China and the West and Implications for Commercial Disputes*, 26 NW. J. INT'L L. & BUS. 225, 246–48 (2006) (discussing Peerenboom's thin formulation of the rule of law).

14. There are a number of other consensus criteria which are generally considered to comprise part of thin or "instrumental" theories of rule of law, but which are not particularly helpful in evaluating the role of adjudicative lawmaking, and therefore are not discussed here. For example, agencies' faithfulness in the application of existing legal rules to specific individual cases is important from a rule-of-law perspective, but should not be affected (positively or negatively) by agency lawmaking. *See, e.g.*, LON L. FULLER, THE MORALITY OF LAW 39 (rev. ed. 1977) (identifying agency faithfulness in the application of existing legal rules as an important rule-of-law criteria). Similarly, the independence of adjudicative actors, while an important aspect of most formal conceptions of the rule of law, is not a value that is likely to be impacted by lawmaking by administrative agencies. *See, e.g.*, Ngugi, *supra* note 13, at 535 (identifying the independence of adjudicative actors as an important rule-of-law criteria). For an expanded discussion of these, and other criteria comprising thin or instrumental theories of the rule of law, see Peerenboom, *supra* note 10, at 478–80 and Radin, *supra* note 10, at 783–85.

shared consensus rule-of-law components include principles such as the following:

> (1) The Existence of Rules: Most basically, any system hoping to achieve the ideal of rule of law must have fixed general rules by which individual and government conduct can be judged.[15]
>
> (2) Consistency: The same rules should apply to everyone (including, *inter alia*, all similarly situated litigants and the government).[16]
>
> (3) Limitation of Discretion: Law should meaningfully restrain the discretion of government actors, particularly the discretion of government adjudicators.[17]
>
> (4) Prospectivity: The rules by which conduct is judged should exist prior to the application of those rules, so that the individuals governed by them have the opportunity to conform their conduct to them.[18]
>
> (5) Notice or Publicity: Rules should not be secret or hidden; those who are governed by them should have access to their content.[19]
>
> (6) Stability: The law should be relatively consistent and stable, so as to facilitate the ability of those governed by it to plan for the future.[20]
>
> (7) Predictability: Individuals should be able to know what the law proscribes and order their affairs in accordance with the law.[21]

As is evident from the above listing, these consensus rule-of-law components do not focus on the substantive content of the law, its initial method of creation (democratic versus nondemocratic), or its outcomes. They thus ignore any number of rule-of-law requirements that have been

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15. *See* FULLER, *supra* note 14, at 39; Kairys, *supra* note 11, at 312; Radin, *supra* note 10, at 785; *see also* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 15–16 (1997) (discussing various authors' arguments for why fixed determinate rules are important in a rule-of-law context); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989) (arguing that judges should create definite and broad legal rules in rendering decisions, and discussing the rule-of-law values that are served by this approach).

16. *See* Kairys, *supra* note 11, at 312; *see also* Peerenboom, *supra* note 10, at 478 (noting the importance of having "generally applicable" rules that "treat similarly situated people equally").

17. *See* Kairys, *supra* note 11, at 313 (asserting the rules should limit government actors' conduct); John C. Reitz, *Export of the Rule of Law*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 429, 440, 444–45, 482 (2003) (noting the importance of limiting government discretion in promoting rule-of-law values); Scalia, *supra* note 15, at 1176–87 (arguing that judges should create rules that restrict the discretion of future adjudicators).

18. *See* Peerenboom, *supra* note 10, at 478; Reitz, *supra* note 17, at 440; *see also* FULLER, *supra* note 14, at 39 (identifying retroactive laws as one of the principal evils that can interfere with the rule of law); Ngugi, *supra* note 13, at 535 (same).

19. *See* FULLER, *supra* note 14, at 39; Kairys, *supra* note 11, at 312; Peerenboom, *supra* note 10, at 478; Radin, *supra* note 10, at 785; Reitz, *supra* note 17, at 440.

20. *See* FULLER, *supra* note 14, at 39; Fallon, *supra* note 15, at 8; Peerenboom, *supra* note 10, at 478; Radin, *supra* note 10, at 785; Reitz, *supra* note 17, at 440.

21. *See* Scalia, *supra* note 15, at 1179 (noting the importance of predictability to the rule of law); *see also* Radin, *supra* note 10, at 786 (noting the importance of the "knowability" of the law to conceptions of rule of law).

postulated by thick[22] rule-of-law theorists, including, *inter alia*, the following:

> (1) Democracy: Many thick rule-of-law theories postulate the need for rules to be formulated through some sort of democratic process.[23]
>
> (2) Protections for Human Rights or Other Individual Rights: Most thick rule-of-law theories also specify that societies must have laws that guarantee some collection of basic human and/or individual rights.[24]
>
> (3) Free Market Economic System: Particularly in popular usage, but also in scholarship, the existence of a free market economic system is sometimes postulated as a necessary component of rule of law.[25]

Unsurprisingly, there is no consensus even among thick rule-of-law theorists as to which of these thick components—and in what specific formulation—are necessary to achieve rule of law.[26] Because most thick rule-of-law components are undergirded by contestable value judgments about ideal legal outcomes—as well as ideal political and economic systems—it is difficult, if not impossible, to arrive at a universal thick formulation of rule of law.[27] Indeed, many rule-of-law theorists reject thick rule-of-law elements altogether, on the grounds that such elements preclude the formulation of a coherent and agreed-upon understanding of the rule of law.[28]

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22. "Thick" rule-of-law theories go beyond the instrumental criteria identified above, and postulate that various normative goals are also encompassed within appropriate conceptions of the rule of law; among other normative goals, thick rule-of-law theories often include as necessary components: liberal democratic norms, free market economics, and individual human rights. *See, e.g.*, Bennett, *supra* note 10, at 92–95; Peerenboom, *supra* note 10, at 472; Sheehy, *supra* note 13, at 246–48.

23. *See* Bennett, *supra* note 10, at 94–95 (observing that democracy constitutes a foundational component of certain thick conceptions of the rule of law); Kairys, *supra* note 11, at 312–13 (noting that rule-of-law formulations often include the need for the process to be democratic); Peerenboom, *supra* note 10, at 472 (noting that thick conceptions of the rule of law often include particular forms of government as a necessity for the existence of rule of law); Reitz, *supra* note 17, at 441–42 (same); Sheehy, *supra* note 13, at 246 (noting that certain Western commentators contend that rule of law by definition is limited to liberal democracies).

24. *See* Bennett, *supra* note 10, at 94; Kairys, *supra* note 11, at 313, 322; Ngugi, *supra* note 13, at 537; Peerenboom, *supra* note 10, at 472; Reitz, *supra* note 17, at 441; *see also* Sheehy, *supra* note 13, at 247 (noting that many Western commentators incorporate human rights within their conception of the rule of law).

25. *See* RAZ, *supra* note 11, at 227–28; Peerenboom, *supra* note 10, at 472; Sheehy, *supra* note 13, at 247.

26. *See, e.g.*, Bennett, *supra* note 10, at 92–95; Peerenboom, *supra* note 10, at 485.

27. *See* Ngugi, *supra* note 13, at 538; Peerenboom, *supra* note 10, at 485.

28. *See, e.g.*, RAZ, *supra* note 11, at 210–11; Kairys, *supra* note 11, at 317–19 (arguing that going beyond a minimalist definition of the rule of law makes the term undefinable and incoherent); Peerenboom, *supra* note 10, at 531–33 (noting that in order for rule of law to be a useful concept in evaluating Chinese development, it must be viewed in its thin formulation, without reference to contested thick rule-of-law conceptions); *see also* Reitz, *supra* note 17, at 481–82 (excluding from rule-of-law criteria political economy and democratic values).

For this reason, thick rule-of-law criteria must—at least at this time—be excluded from any consensus-based understanding of the rule of law. Without a common understanding of which thick rule-of-law criteria, if any, properly form the basis for the rule-of-law ideal, it is impossible to rely on such components as neutral criteria for assessment of legal institutions. As such, it is simpler—and preferable for current purposes—to limit consideration to thin or instrumental rule-of-law goals which have been the subject of general agreement among rule-of-law theorists.

For the remainder of this Article, use of the term "rule of law" will be accordingly restricted to consensus-based thin or instrumental rule-of-law goals and will exclude thick (and otherwise non-consensus-based) rule-of-law ideals. As described above, these consensus-based, rule-of-law goals include the importance of (1) the existence of rules, (2) consistency, (3) limitation of discretion, (4) prospectivity, (5) notice or publicity, (6) stability, and (7) predictability.

B. Application of Rule-of-Law Principles to Adjudicative Lawmaking by Administrative Agencies

The question remains: Does adjudicative lawmaking by administrative agencies promote rule-of-law goals? An evaluation of the seven identified consensus-based rule-of-law criteria suggests that adjudicative lawmaking by administrative agencies is indeed likely—at least as a theoretical matter—to promote many of the identified rule-of-law goals. While adjudicative lawmaking also has certain theoretical drawbacks from a rule-of-law perspective, these drawbacks are minor when compared with the likely benefits. Each of the seven consensus rule-of-law criteria is discussed separately below, and the potential benefits or drawbacks of agency adjudicative lawmaking from the perspective of each criterion are identified. These potential benefits and drawbacks form the basis for an empirical evaluation of the hypothesized benefits and drawbacks in Part III.

A note regarding how the inquiry in each category was defined is in order. A number of the identified rule-of-law objectives have multiple connotations, and may overlap for this reason. To the extent possible, each objective is defined discretely, so as to allow for a meaningful and nonrepetitive inquiry. Thus, for example, while stability obviously impacts the predictability of law, consideration of stability is largely omitted in the context of the discussion of predictability, since that rule-of-law goal is assessed as a distinct objective elsewhere.

1. The Existence of Rules

At its most basic, the rule of law requires that fixed legal rules exist, by which individual and governmental conduct can be judged. Several authors

identify this goal (i.e., the creation of legal rules) as perhaps *the* most important of all rule-of-law goals, as it provides the necessary foundation for the existence of many other rule-of-law objectives.[29] For example, Antonin Scalia has argued that the creation of general legal rules is a core component of the rule of law, as it allows for the furtherance of, *inter alia*, predictability in legal outcomes, consistency in the legal norm applied, and equality of treatment of similarly situated individuals.[30] Therefore, creation of legal rules can be seen as a highly important goal from a rule-of-law perspective.

Agency lawmaking through adjudication is, by definition, the process of creating legal rules. An agency does not engage in lawmaking—whether by adjudication or legislative lawmaking—unless it thereby creates a general, binding legal rule.[31] Thus, adjudicative lawmaking by administrative agencies will *by definition* further at least this primary rule-of-law goal. So, rule creation must be counted among the absolute goods which result from adjudicative lawmaking—whether or not it would be a comparative advantage of the adjudicative approach as compared to legislative lawmaking.

There are reasons to believe, however, that adjudicative lawmaking may also have a comparative advantage over legislative lawmaking in furthering the "rules creation" rule-of-law goal. Specifically, as numerous authors have noted, the process of legislative lawmaking is often quite cumbersome, requiring compliance with complex procedural requirements prior to formulating a final rule.[32] Extended litigation following the

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29. *See* FULLER, *supra* note 14, at 39; Kairys, *supra* note 11, at 312; Scalia, *supra* note 15, at 1187; *see also* Fallon, *supra* note 15, at 15–18 (describing the importance of the existence of rules in formalist conceptions of the rule of law).

30. *See* Scalia, *supra* note 15, at 1178–80.

31. *See* MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/law (defining "law" as "rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority"); *see also* Jin Yu Lin v. U.S. Dep't of Justice, 413 F.3d 188, 189–90 (2d Cir. 2005) (declining to afford *Chevron* deference to immigration judge decisions and noting that legal rules must, by definition, be binding outside of the context of their particular circumstance).

32. *See, e.g.*, Elliott, *supra* note 4, at 1493–94 (noting that the legislative lawmaking process has become "ossified" to the point where it is "cumbersome at best"); Grunewald, *supra* note 4, at 319 (noting in the NLRB context that the legislative lawmaking process required substantial investment of time and resources); Pierce, *supra* note 4, at 301–02 (describing the cumbersome procedures that any agency must follow in order to avoid having courts deem its legislative lawmaking "arbitrary and capricious"). These procedural requirements and their focus on public participation are, of course, part of the reason why academics generally favor legislative over adjudicative lawmaking. *See, e.g.*, Pierce, *supra* note 4, at 308; Shapiro, *supra* note 4, at 932. *But cf.* Elliott, *supra* note 4, at 1494 (arguing that the detailed procedural requirements that the courts have imposed on legislative lawmaking efforts make meaningful public participation difficult); Robinson, *supra* note 4, at 514–16 (noting that there may be less participation benefits to legislative lawmaking than other authors have suggested). However, these same rules also may impede rule-of-law goals, insofar as they may lead to the creation of fewer legal rules.

promulgation of a final rule is also not uncommon and often focuses not on the substance of the enacted rule, but instead on agency compliance with these complex procedural requirements.[33] In contrast, a rule an agency creates during the course of adjudication will ordinarily not be subject to rigid procedural requirements, and can typically be appealed only by the individual litigants involved in the proceeding, although it may be challengeable in future individual proceedings.[34] For this reason, it seems highly probable that an agency program of adjudicative lawmaking would result in a larger quantity of "rules" than a comparably resourced legislative lawmaking approach.[35]

Agency adjudication may also lead to increased rule creation by disrupting the inertia that would otherwise result in an agency's failing to promulgate new rules. For example, an agency that has an adjudicative process which may be initiated by third parties (such as the NLRB) or has an independent enforcement arm that prosecutes cases before the agency (such as the Executive Office for Immigration Review, whose cases are prosecuted by the Department of Homeland Security) will routinely find itself in the position of adjudicating cases on an essentially involuntary basis (i.e., being required by regulation or statute to decide cases). Adjudicating these cases will, of course, require the application of existing legal rules and is likely at times to highlight the need for the creation of new or more specific rules. Unlike an agency decision to proceed with legislative lawmaking, which ordinarily lies solely within the agency's discretion, the agency must issue *some* decision in an adjudicated case—

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33. *See, e.g.*, Grunewald, *supra* note 4, at 320 (discussing the extended litigation that followed the NLRB's promulgation of its first legislative rule); Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 273–99 (1987) (describing the crippling litigation, focused on compliance with procedural norms, that the National Highway Traffic Safety Administration faced when it elected to proceed through the promulgation of legislative rules); Pierce, *supra* note 4, at 301 (describing the cumbersome procedures that an agency must follow in order to avoid having its legislative lawmaking be deemed "arbitrary and capricious" by the courts); Schuck & Elliott, *supra* note 3, at 1015 (noting that "between 1975 and 1985 reviewing courts increasingly constrained" legislative lawmaking by administrative agencies by imposing cumbersome procedures).

34. *See, e.g.*, Pierce, *supra* note 4, at 301 (explaining that courts apply less demanding standards to adjudicative lawmaking than to legislative lawmaking, and thus that agencies are increasingly turning to adjudication as a means of lawmaking). Agencies are, of course, required to comply with some procedural requirements in conducting adjudications. These procedural requirements, however, tend to be less onerous than those that are required in order to promulgate a legislative rule, and instead tend to be comparable to the procedural requirements that judicial bodies must follow. *See, e.g.*, 5 U.S.C. §§ 554, 556–558 (setting forth the procedural standards applicable to many administrative adjudications); *see generally* PETER L. STRAUSS, TODD D. RAKOFF & CYNTHIA R. FARINA, ADMINISTRATIVE LAW 322–24 (10th ed. 2003) (describing the factors that determine what specific adjudicative procedures apply in any given administrative adjudication).

35. *See generally* Pierce, *supra* note 4, at 300–01 (attributing a decline in legislative lawmaking by administrative agencies to the comparative ease of adjudicative lawmaking).

whether or not it elects to create a new rule. Therefore, the agency is forced into some kind of action, which may—at least hypothetically—lead it to create a new legal rule, where the agency would otherwise be unlikely to do so.

Adjudicative lawmaking seems highly likely to promote the basic rule-of-law goal of the existence of legal rules. Indeed, as an absolute matter, it is certain that adjudicative lawmaking will further this important rule-of-law goal. Even as a comparative matter, there are a number of reasons for believing that adjudicative lawmaking will be more likely to promote the creation of general legal rules than legislative lawmaking.

2. Consistency

As numerous rule-of-law scholars have observed, consistency is also a critical component of the rule of law.[36] In order to fulfill the rule-of-law objective of consistency, the same rules must be applied to both governmental and nongovernmental actors, and, more generally, to all similarly situated litigants.[37] Consistency is important to achieving rule of law because its presence (or absence) may often critically affect the perceived fairness of a country's legal system—and hence its legitimacy.

Significantly, adjudicative lawmaking is theoretically capable of playing a very positive and important role in furthering the objective of consistency. Largely by virtue of judicially created rules of agency deference (such as *Chevron* deference), adjudicative lawmaking by agencies is—at least theoretically—capable of ensuring that all litigants nationwide are subject to the same legal rule.[38] Since adjudicative lawmaking is entitled to substantial deference under these doctrines, the agency's nationally applicable rules should ordinarily be binding on individual reviewing courts in local jurisdictions, whether or not those courts would agree with the agency's rule as a *de novo* matter.[39] Thus, the

36. *See supra* note 16 and accompanying text.

37. *See, e.g.*, Kairys, *supra* note 11, at 312.

38. Although the rules of deference applicable to administrative agencies have changed over time, the concept that courts should afford some form of deference to administrative lawmaking has long been a fixture of American law. *See* Schuck & Elliott, *supra* note 3, at 1023–24 (describing the history of administrative deference doctrines); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 955 (1992) (noting that canons of construction favoring the adoption of an agency's construction of a statute "as long as the statute is sufficiently ambiguous to admit of that construction" have existed at least since the New Deal); *see also* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984) (setting forth the modern standards for evaluating the appropriateness of deference to many forms of lawmaking by administrative agencies); INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (holding that *Chevron* deference must be afforded to the Board of Immigration Appeals' (BIA) adjudicative lawmaking).

39. *See Chevron*, 467 U.S. at 842–45; *Aguirre-Aguirre*, 526 U.S. at 425; *see also* Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and*

agency often should have the power to impose consistent nationwide rules in the area of law that it administers—a power no other judicial or executive entity, with the exception of the United States Supreme Court, possesses.[40]

Moreover, the power of an agency to impose this type of consistency is in some respects far more significant than the power the Supreme Court possesses. While the Supreme Court very rarely decides questions of substantive administrative law (and thus, very rarely has a consistency-promoting effect on the legal rules applied to those governed by administrative law statutes), administrative agencies typically promulgate multitudinous legal rules.[41] Because courts are supposed, under *Chevron* and other rules of judicial deference, to afford the agency deference wherever it promulgates a binding legal rule, any and all of these multitudinous legal rules should hypothetically have the power to impose nationwide consistency on legal standards.[42] In contrast, absent an agency or Supreme Court decision, the development of these multitudinous legal rules would be left to each United States district court or court of appeals, and could vary significantly across jurisdictions.[43]

Chevron and other agency deference rules are, of course, not perfect tools for the promotion of consistency in the United States legal system. While the federal courts are supposed to defer to agency-created legal rules, there are in all instances limitations to that deference.[44] Thus, one or more of the courts of appeals (or district courts, if applicable) may decline to follow an agency's interpretation if it is facially inconsistent with the applicable congressional statute, or if it is "unreasonable."[45] In addition, there is no guarantee that individual judicial bodies will act responsibly in applying *Chevron* and other doctrines of administrative deference where they disagree with an agency's chosen legal rule.[46] And in the event they

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Judicial Review, 78 TEX. L. REV. 1615, 1630 (2000) (noting that the "principle of judicial deference" helps to minimize the variance among the federal courts in addressing agency interpretations of questions of law).

40. Congress, of course, arguably has the greatest authority and ability of any entity in the United States government to impose rules that are consistent nationwide. However, the areas where administrative agencies have jurisdiction are typically very complex, and are often placed within the jurisdiction of the agency precisely because the legislature cannot properly address all of the relevant legal complexities.

41. Indeed, the Supreme Court hears very few cases of any kind, and thus rarely serves a unifying role in American law. *See, e.g.*, Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 UCLA L. REV. 1193, 1198–99 (1992).

42. *See Chevron*, 467 U.S. at 842–45; *Aguirre-Aguirre*, 526 U.S. at 425.

43. *See generally* Bruff, *supra* note 41 (discussing the problem of decentralized judicial review and the nationwide inconsistency that can result from such decentralization).

44. *See Chevron*, 467 U.S. at 842–45.

45. *See id*.

46. *See generally* Schuck & Elliott, *supra* note 3 (discussing the problem of court faithfulness to deference doctrines and conducting an empirical study of the extent to which

do not, the likelihood of Supreme Court review to rectify the situation is remote (as in the case of the substantive issue itself).[47]

Nonetheless, agency lawmaking—particularly adjudicative lawmaking—seems highly likely to promote the rule-of-law objective of consistency. Because agencies promulgate legal rules to be applied nationwide, and because those rules are entitled to deference, a far greater chance exists that all litigants will be subject to the same rule if the agency has acted than if it has not. While this does not necessarily suggest a comparative benefit of adjudicative lawmaking vis-à-vis legislative lawmaking (except insofar as adjudicative lawmaking may be more likely to lead to increased rule promulgation), it does suggest that adjudicative lawmaking may have a significant absolute rule-of-law benefit.

3. Limitation of Discretion

Among the other significant rule-of-law goals identified by rule-of-law theorists is the placing of meaningful restrictions on government discretion.[48] This rule-of-law goal—like many other rule-of-law goals—is critical to promoting a number of other important rule-of-law objectives. For example, consistency (discussed *supra*) and predictability (discussed *infra*) may be difficult, if not impossible, to achieve where limitless government discretion exists. Indeed, it would be difficult to characterize a legal system as even properly possessing legal rules (the first rule-of-law criteria discussed, *supra*) in the context of limitless government discretion.

Again, there are significant reasons for believing that adjudicative lawmaking by agencies is likely to promote this rule-of-law goal. Statutes often bestow enormous authority on agencies to engage in discretionary decisionmaking—authority which may not (depending on the terms of the statute) be reviewable by judicial authorities.[49] Even in the event that there

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deference doctrines are followed in the federal courts of appeals).

47. *See* Bruff, *supra* note 41, at 1198–99 (noting limitations on the Supreme Court's ability to review the courts of appeals' actions). *But cf.* Gonzales v. Thomas, 547 U.S. 183, 185 (2006) (per curiam) (reversing a circuit court decision that endeavored to decide an immigration legal issue in the first instance, without first remanding to the agency).

48. *See* Peerenboom, *supra* note 10, at 513–14; Reitz, *supra* note 17, at 435, 444–45, 482; *see also* Kairys, *supra* note 11, at 313 (stating rules should limit government, not merely individuals).

49. *See, e.g.*, 5 U.S.C. § 701(a)(2) (2000) (precluding review of agency action that is "committed to agency discretion by law"); *Developments in the Law: Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1395–98 (1983) [hereinafter *Immigration Policy*] (discussing the limited ability of the courts to impose constraints on discretion in the immigration context); Michael G. Heyman, *Judicial Review of Discretionary Immigration Decisionmaking*, 31 SAN DIEGO L. REV. 861, 862–63 (1994) (noting discretion frequently insulates agency decisions from review); *see generally* Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703 (1997) (discussing immigration discretion and limitations on judicial review thereof); Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487 (1983)

is some judicial review available for discretionary agency decisionmaking, such review is typically highly deferential, and may not place meaningful restraints on that decisionmaking.[50] Among other things, courts are rarely empowered to create substantive rules limiting clearly bestowed agency discretion, even where they are able to impose procedural requisites on the agency's discretionary decisionmaking process.[51]

In contrast, the agency itself is subject to no such restrictions. Thus, the agency is perfectly free to adopt (by adjudication or legislative lawmaking) binding standards for the exercise of its discretion. These standards, in turn, would be enforceable against the agency in court, creating meaningful limitations on the agency's discretion.[52] Thus, agencies are perhaps the best-suited governmental entities (aside from Congress) to impose meaningful limitations on discretionary government action.

Of course, this again is not a comparative benefit of adjudicative lawmaking by agencies. An agency could also elect to adopt discretion-constraining rules by legislative lawmaking, with a comparable effect. In addition, because there is no requirement that an agency use its lawmaking powers in this way, there may be some question whether an agency would, in fact, voluntarily elect to restrain its discretion. Nevertheless, constraining its own discretion is at least a theoretically absolute benefit of adjudicative lawmaking.

4. Prospectivity

Prospectivity—i.e., the existence of the rules by which conduct is judged prior to the judging—has similarly been identified by many rule-of-law scholars as an important component of the rule of law.[53] As such scholars have observed, the absence of prospectivity essentially renders it impossible for individuals to plan their conduct in a way that conforms to legal rules.[54] As such, prospectivity is desirable from a rule-of-law perspective because it allows for planning, as well as for consistency and predictability in legal outcomes.[55]

(discussing different forms of administrative discretion and judicial review thereof).

50. *See, e.g.*, 5 U.S.C. § 706 (2000) (setting out general limitations on review of administrative action under the APA); Heyman, *supra* note 49, at 862–64; *Immigration Policy*, *supra* note 49, at 1395–98; *see generally* Kanstroom, *supra* note 49 (discussing limitations on the review of discretionary decisions in the immigration context).

51. *See* Heyman, *supra* note 49, at 894, 908; *Immigration Policy*, *supra* note 49, at 1395–98.

52. *See, e.g.*, Johnson v. Ashcroft, 378 F.3d 164, 172–73 (2d Cir. 2004); Heyman, *supra* note 49, at 880.

53. *See, e.g.*, RAZ, *supra* note 11, at 214; Peerenboom, *supra* note 10, at 478; Radin, *supra* note 10, at 784–86; Reitz, *supra* note 17, at 440.

54. *See, e.g.*, RAZ, *supra* note 11, at 214; Peerenboom, *supra* note 10, at 478, 480; Radin, *supra* note 10, at 784–86.

55. *See, e.g.*, RAZ, *supra* note 11, at 214; Peerenboom, *supra* note 10, at 478, 480;

Unlike many other core rule-of-law objectives, prospectivity does not seem likely to be promoted by adjudicative agency lawmaking, in either an absolute or comparative sense. Indeed, one of the major academic critiques of adjudicative lawmaking by administrative agencies has been its lack of prospectivity—at least vis-à-vis the individual parties involved in the adjudication.[56] In contrast, authors have argued that legislative lawmaking generally results in only prospectively applicable rules.[57] Thus, many authors have posited that administrative adjudication's lack of prospectivity is a major drawback of adjudicative lawmaking.[58]

These critiques of adjudicative lawmaking from a prospectivity perspective, however, may be of less importance than many authors have previously suggested. Adjudicative lawmaking—also known in the judicial context as "common law" lawmaking—is in fact quite common in many systems thought to possess advanced rule-of-law attributes. This is perhaps because adjudicative lawmaking—while it does create some prospectivity concerns in the short term and, in particular, as applied to the individual parties involved in the dispute—does not create a major deviation from the prospectivity norm over the long term. Most individuals will be subject to preexisting rules, and even those parties subject to ostensibly "new" rules created through adjudication will rarely be without forewarning that the new rule was forthcoming.[59]

To the extent that prospectivity concerns do exist, moreover, the differences between agency adjudication and legislative lawmaking likely have been exaggerated. As Professor Glen Robinson observed in his 1970 article *The Making of Administrative Policy*, legislative lawmaking can also create prospectivity concerns, even though it is, in most circumstances, ostensibly applied only prospectively.[60] Because many past actions by

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Radin, *supra* note 10, at 784–86.

56. *See, e.g.*, Araiza, *supra* note 5, at 356, 372–78; Pierce, *supra* note 4, at 308–09; *see also* Shapiro, *supra* note 4, at 933 (discussing the prospectivity argument against adjudicative lawmaking).

57. *See, e.g.*, Araiza, *supra* note 5, at 374; McFarland, *supra* note 4, at 436; *see also* Robinson, *supra* note 4, at 517 (describing the prospectivity critique of adjudicative lawmaking); Shapiro, *supra* note 4, at 933 (analyzing the distinction between legislative lawmaking and adjudication with respect to retroactive application of policy).

58. *See, e.g.*, Araiza, *supra* note 5, at 356; McFarland, *supra* note 4, at 436; Pierce, *supra* note 4, at 308–09; *see also* Robinson, *supra* note 4, at 517 (describing the prospectivity critique of adjudicative lawmaking).

59. Agency "common law," however, is probably somewhat less predictable than judicial common law, since the legislation governing administrative agencies (and judicial constructions thereof) often empowers agencies to make decisions based on pure policy concerns. *See, e.g.*, Araiza, *supra* note 5, at 353.

60. *See* Robinson, *supra* note 4, at 518; *see also* Shapiro, *supra* note 4, at 933–35 (describing the retroactivity concerns that can be raised by legislative lawmaking, and noting that even in the context of agency adjudication, "an agency has the tools to shape its result" to prevent undue retroactivity concerns).

regulated entities may be relevant to—or indeed dispositive of—the entity's compliance with current regulations, the creation of legal rules via legislative lawmaking may also lead to a situation in which an entity's past conduct becomes the basis for a current penalty.[61] Thus, there is less reason for drawing a sharp distinction between legislative and adjudicative lawmaking than many academic scholars have suggested.

Therefore, while there certainly may be some prospectivity concerns that are raised by the use of adjudication as a means of agency lawmaking, these concerns seem relatively attenuated. In particular, it seems unlikely that adjudicative lawmaking by administrative agencies is significantly worse, from a prospectivity perspective, than agency legislative lawmaking.

5. Notice or Publicity

Notice or publicity of existing legal rules is another significant rule-of-law objective.[62] Because individuals can do little to conform their conduct to law without the means for identifying what legal rules exist, notice or publicity is a fundamental requisite for achieving many other rule-of-law goals.[63]

Adjudicative lawmaking likely has both benefits and drawbacks from the perspective of furthering access to the content of legal rules. On the one hand, agency lawmaking via adjudication is far preferable from a rule-of-law standpoint to agency application of unstated *de facto* legal rules. If an agency is, in fact, applying *de facto* legal rules to individual conduct without formally announcing them via adjudication or legislative lawmaking, it is dramatically undermining rule-of-law goals precisely because it does not allow for notice or publicity of its actual standards. Thus, from an absolute standpoint, agency adjudication—if made available in a published format—may well forward notice and publicity goals.

On the other hand, as some authors have noted, rules created via administrative adjudication are rarely as accessible as legislatively promulgated rules.[64] Because an agency typically publishes rules promulgated through adjudication in serial format (i.e., in the order each decision is issued), finding rules on a specific topic may be challenging.[65]

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61. *See supra* note 60.

62. *See, e.g.*, RAZ, *supra* note 11, at 214; Kairys, *supra* note 11, at 312; Peerenboom, *supra* note 10, at 478; Radin, *supra* note 10, at 784–86; Reitz, *supra* note 1717, at 440.

63. *See, e.g.*, RAZ, *supra* note 11, at 214; Radin, *supra* note 10, at 784–86.

64. *See, e.g.*, Bernstein, *supra* note 4, at 582–87; Mayton, *supra* note 4, at 103; Pierce, *supra* note 4, at 308; Reitz, *supra* note 17, at 440; Shapiro, *supra* note 4, at 941.

65. *See, e.g.*, Shapiro, *supra* note 4, at 941; *see generally* Administrative Decisions Under Immigration and Nationality Laws of the United States from 1940 to the Present [hereinafter I. & N. Dec.] (setting forth the BIA's and other administrative immigration bodies' precedential decisions in serial format).

In contrast, rules promulgated via legislative lawmaking are typically ordered by topic, and thus are easier to locate.[66] Similarly, parts of a current adjudicatively created rule may be scattered across multiple agency cases, whereas a legislative regulation is far more likely to consolidate all aspects of the rule.[67]

Thus—while there are likely absolute benefits of adjudicative lawmaking for the purposes of achieving notice and publicity rule-of-law goals—there are also comparative drawbacks of adjudicative lawmaking when viewed from a notice and publicity standpoint.

6. Stability

Numerous scholars identify stability—i.e., the level of change (or lack thereof) in defined legal standards—as an important rule-of-law goal.[68] As such scholars have observed, if legal rules are highly mutable, many of the planning benefits that otherwise flow from the rule of law can go unrealized.[69] Some level of legal stability is, therefore, an important prerequisite to a functional rule-of-law system.

Whether or not adjudicative lawmaking furthers or hinders stability will depend, in large part, on the behavior of the individual agency. An individual agency that issues stable rules via administrative adjudication will promote the objective of stability, whereas an agency that frequently uses adjudication to modify its position evidently will not. Thus, whether adjudicative lawmaking hinders or promotes stability will largely depend on the actions of the individual agency and its use of adjudicative lawmaking authority.

There are reasons to believe, however, that agencies may be more likely than not to make poor use of adjudicative lawmaking authority, insofar as stability values are concerned. For the same reason—i.e., procedural ease—that an administrative agency may be more likely to issue a greater number of rules *en toto* via adjudicative lawmaking, the agency may also be more likely to modify rules that it created via adjudication.[70] Because the costs

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66. *See, e.g.*, Shapiro, *supra* note 4, at 941; *see generally Code of Federal Regulations* (organizing promulgated regulations topically).

67. *See, e.g.*, Bernstein, *supra* note 4, at 582–87; Shapiro, *supra* note 4, at 941.

68. *See, e.g.*, RAZ, *supra* note 11, at 214–15; Fallon, *supra* note 15, at 8; Peerenboom, *supra* note 10, at 478; Radin, *supra* note 10, at 784–86; Reitz, *supra* note 17, at 435–36, 440.

69. *See, e.g.*, RAZ, *supra* note 11, at 214–15; Fallon, *supra* note 15, at 8; Peerenboom, *supra* note 10, at 480; Radin, *supra* note 10, at 784–86; Reitz, *supra* note 17, at 443.

70. *See* Bernstein, *supra* note 4, at 597; *see also* Grunewald, *supra* note 4, at 281 (noting that the NLRB's preference for adjudication creates potential stability concerns); Morrison, *supra* note 2, at 259–60 (noting that the NLRB's tendency to proceed through adjudication had allowed it, during the first five years of the Reagan Administration, to effectuate very substantial modifications of its policies very rapidly).

of modifying a rule are much lower where the rule is promulgated via adjudication, agencies may well be more likely to adopt different positions over time, where they exercise their adjudicative lawmaking authority.[71] For these reasons, adjudicative lawmaking by agencies may hinder the rule-of-law goal of stability.

7. Predictability

Predictability—the ability of regulated parties to know what the law proscribes—is another important component of the rule of law.[72] As with prospectivity and consistency, an absence of predictability can significantly hamper regulated entities' ability to order their affairs consistently with legal principles.[73] Predictability of the law, in the sense of the law's knowability and transparency, is therefore a highly important rule-of-law objective.

Adjudicative lawmaking by administrative agencies theoretically should play an important role in furthering predictability. The laws that agencies are charged with administering almost always include numerous interpretive ambiguities or outright omissions. Indeed, filling these statutory gaps is often one of the primary justifications for the creation of an administrative body. Therefore, until an agency has exercised its "gap-filling" function, the statutes it administers typically include significant areas of ambiguity, which critically limit the predictability of the law from the perspective of regulated entities.

Adjudicative lawmaking and legislative lawmaking are, of course, the two significant ways in which agencies can exercise their gap-filling function. Thus, adjudicative lawmaking theoretically should play an important role from the perspective of regulated entities in increasing predictability. Whenever the agency fills a gap in its organic law using its adjudicative lawmaking power, the ability of the regulated parties to know what the law proscribes is enhanced, thereby promoting predictability.

Indeed, even from a comparative perspective, adjudicative lawmaking seems likely to be superior to legislative lawmaking as a means of promoting predictability. For the many reasons discussed *supra*, administrative agencies may be more likely—at least theoretically—to issue a greater quantity of rules via adjudication than via legislative lawmaking. Since predictability depends critically on the extent to which

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71. *See, e.g.*, Morrison, *supra* note 2, at 259–60. *But cf.* Robinson, *supra* note 4, at 532 (noting that the Federal Communications Commission—which has focused almost exclusively on legislative lawmaking as its preferred mode of lawmaking—has been "accused . . . of vacillation in almost every major area") (internal quotation marks omitted).

72. *See, e.g.*, RAZ, *supra* note 11, at 214; Peerenboom, *supra* note 10, at 478, 480.

73. *See, e.g.*, RAZ, *supra* note 11, at 214; Peerenboom, *supra* note 10, at 478, 480, 497; Reitz, *supra* note 17, at 443.

agencies elect to exercise their lawmaking authority, this increased lawmaking tendency, if accurate, may constitute a comparative advantage of adjudicative lawmaking.

Discrete subsets of regulated entities may also be more likely to receive the benefits of predictable legal rules where an agency engages in adjudicative lawmaking rather than legislative lawmaking. Unlike within the context of legislative lawmaking—which typically focuses on the most overarching common legal issues affecting regulated entities—legal issues that apply to a much smaller subset of regulated entities will organically arise within the context of adjudication.[74] Since the burden of issuing a new rule via adjudication is comparatively quite small, the likelihood that an agency will address these legal issues is almost certainly greater in the adjudicative context than it would be in a legislative lawmaking proceeding.

Therefore, there are significant reasons for thinking that adjudicative lawmaking is likely to promote the rule-of-law goal of predictability, both as an absolute and as a comparative matter.

II. INTRODUCTION TO THE BOARD OF IMMIGRATION APPEALS

A. History of the Board of Immigration Appeals

The Board of Immigration Appeals is the primary appellate entity responsible for reviewing immigration cases within the American legal system. Created by the Attorney General in 1940,[75] the BIA currently issues an astounding 46,000 immigration decisions a year[76]—a far greater number than any other appellate entity.[77] The Board's jurisdiction encompasses the vast majority of major immigration determinations, including appeals from removal determinations,[78] requests for discretionary

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74. *See, e.g.*, Bernstein, *supra* note 4, at 588–89, 591 (observing, but also criticizing, the tendency of adjudicative lawmaking by agencies to deal with more discrete issues).

75. Regulations Governing Departmental Organization and Authority, 5 Fed. Reg. 3502, 3503 (Sept. 4, 1940) (now codified at 8 C.F.R. pt. 90).

76. U.S. Dep't of Justice, Executive Office for Immigration Review, *FY 2005 Statistical Yearbook*, at S2 (2006), *available at* http://www.usdoj.gov/eoir/statspub/fy05syb.pdf (last visited Jan. 17, 2007).

77. In contrast, the federal courts of appeals cumulatively hear approximately 12,000 immigration cases per year. U.S. Courts News Release, Legal Decisions, Legislation & Forces of Nature Influence Federal Court Caseload in FY 2005 (Mar. 14, 2006), *available at* http://www.uscourts.gov/Press_Releases/judbus031406print.html (last visited Apr. 13, 2008). This figure reflects a recent surge in immigration appeals to the federal circuit courts, following the implementation of BIA streamlining procedures. *See generally* John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1 (2005).

78. Prior to 1996, proceedings aimed at removing an alien from the United States were split into two categories—deportation and exclusion. Deportation and exclusion

relief, and asylum applications.[79]

The Attorney General created the Board by regulation, and it therefore has historically been without a statutory basis.[80] Its role in American immigration law, however, has been remarkably stable over the last six and a half decades. Since its creation, the Board has played two major roles within the immigration administrative regime: (1) serving as an appellate body for the review of individual immigration determinations made by lower level immigration officials (including, most notably, immigration judges (IJs));[81] and (2) issuing precedential decisions on issues of immigration law that are binding on other immigration officials within the administrative enforcement and adjudication structure.[82] This latter role—the creation of legal rules via adjudication—will be the primary focus of the analysis in this Article, and therefore merits further discussion.

Regulations promulgated by the Attorney General (AG) grant the BIA authority to issue binding precedential decisions. Under those regulations, which have remained remarkably similar over most of the course of the BIA's sixty-five year history, the AG has delegated immigration lawmaking authority to the Board to exercise when it acts as an appellate body.[83] The regulations do not set specific limits on the Board's ability to issue precedential decisions, leaving to the Board's discretion whether or

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proceedings were replaced with a single category of proceedings—removal—in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). *See* Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546. "Removal" thus incorporates both what was historically termed "deportation" and "exclusion." *See* Evangelista v. Ashcroft, 359 F.3d 145, 147 (2d Cir. 2004).

79. *See* 8 C.F.R. § 1003.1(b) (2007) (detailing the jurisdiction of the BIA). There are a few major types of immigration determinations that are not reviewable by the Board. *See, e.g.*, 8 U.S.C. § 1225(b)(1)(C) (2000) (specifying that expedited removal determinations are generally not subject to administrative review by any entity).

80. *See* Regulations Governing Departmental Organization and Authority, 5 Fed. Reg. 3502, 3503 (Sept. 4, 1940) (now codified at 8 C.F.R. pt. 90); Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29, 30 (1977). The existence of the BIA has since been recognized in various statutory enactments, but has never been formally statutorily mandated. *See, e.g.*, Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 440 (1996).

81. *See* Palmer, *supra* note 77, at 18; Roberts, *supra* note 80, at 34–35. During the very early years of its tenure, the BIA would also sometimes directly adjudicate cases that came with only a tentative decision from lower level officials. *See* Roberts, *supra* note 80, at 34–35.

82. *See* 8 C.F.R. § 1003.1(g) (2007) (setting forth the BIA's authority to make precedential law); *see also* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,880 (Aug. 26, 2002); Palmer, *supra* note 77, at 18.

83. The original regulation expressly delegating precedential decisionmaking authority to the BIA was promulgated in 1952. *See* Delegation of Attorney General's Authority in Certain Actions Under Immigration Laws, 17 Fed. Reg. 4737, 4737–38 (May 24, 1952). A very similar grant of precedential decisionmaking authority remains in effect today. *See* 8 C.F.R. § 1003.1(g) (2007).

not to designate a particular decision as precedential.[84] Precedential decisions of the Board are binding on all "officers and employees of the Department of Homeland Security" and on "immigration judges in the administration of the immigration laws of the United States."[85]

Although other administrative entities within the administrative immigration framework have also historically been empowered to issue precedential decisions in certain areas, the BIA has overwhelmingly been the entity responsible for the development of immigration law via administrative adjudication.[86] The BIA has, until recently, regularly exercised its authority to make law via administrative adjudication, issuing an average of forty-eight precedential decisions a year.[87]

In exercising both its lawmaking and individual review functions, the BIA has historically maintained relative independence from the enforcement wing of immigration administration (historically the Immigration and Naturalization Service (INS), and today the Department of Homeland Security, United States Immigration and Customs Enforcement (ICE)).[88] Unlike other adjudicative entities charged with administering immigration law, the BIA has never formally been a part of the enforcement wing of immigration administration.[89] While the Board's

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84. *See* 8 C.F.R. § 1003.1(g) (2007). All decisions of the BIA are subject to review by the Attorney General, and thus can be reversed if the Attorney General disagrees with the BIA's substantive determination or a decision to designate a decision as precedential. *See id.* § 1003.1(h) (2007). In practice, however, this authority is rarely exercised by the Attorney General, and is almost never exercised simply because of a disagreement regarding the appropriateness of designating a particular decision as precedential.

85. 8 C.F.R. § 1003.1(g) (2007). Prior to the enactment of the Homeland Security Act, INS was the agency responsible for immigration enforcement. INS, like its successor, the Department of Homeland Security (DHS), was bound by the decisions of the BIA. 8 C.F.R. § 3.1(g) (1981).

86. *See generally* I. & N. Dec., *supra* note 65 (reporting all precedential administrative adjudications by immigration bodies, the overwhelming majority of which have been issued by the Board of Immigration Appeals).

87. *See id.* (data on file with author).

88. *See, e.g.*, Catherine Yonsoo Kim, *Revoking Your Citizenship: Minimizing the Likelihood of Administrative Error*, 101 COLUM. L. REV. 1448, 1472–73 (2001); John A. Scanlan, *Asylum Adjudication: Some Due Process Implications of Proposed Legislation*, 44 U. PITT. L. REV. 261, 283 n.99 (1983). *But cf. Immigration Policy*, *supra* note 49, at 1365 (arguing that the theoretical capability of the Attorney General to abolish the BIA "undermines the independence of the Board's judgment"); Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139, 1212 & n.287 (arguing that the BIA has a pro-enforcement bias); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1024 (1998) (noting that the Attorney General, then the chief enforcement officer for immigration laws, determines important features of the BIA, including its membership, size, and jurisdiction).

89. Most strikingly, until 1983, immigration judges—who are the first-level entities to hear many of the cases ultimately appealed to the BIA—were formally housed within the enforcement wing of the immigration bureaucracy. *See* The Committee on Communications and Media Law of the Association of the Bar of the City of New York, *"If It Walks, Talks and Squawks . . ." The First Amendment Right of Access to Administrative Adjudications: A*

decisions remain technically subject to the review and reversal of the AG—historically the head of both the enforcement and adjudicative wings of immigration administration—this authority has in fact been relatively rarely exercised.[90] In 2002, following the enactment of the Homeland Security Act, the AG was divested of responsibility for heading the enforcement wing of immigration administration, leading to a total division of the adjudicative and prosecutorial functions of immigration administration.[91]

While the BIA has maintained a relatively high level of independence from immigration enforcement efforts, it has remained subject to modification or eradication by the AG as a result of its nonstatutory nature. For most of the Board's history, this possibility remained more theoretical than real, as its structure and procedures remained relatively constant.[92] In 1999 and 2002, however, Attorneys General Reno and Ashcroft issued regulations implementing a series of significant reforms known as "streamlining."[93] As set forth below, these streamlining regulations—and in particular the 2002 streamlining regulations issued by Attorney General Ashcroft—mandated major changes in the BIA's method of processing cases. As a result, the 1999 and 2002 regulations have significantly reconfigured both the individual review and adjudicative lawmaking

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Position Paper, 23 CARDOZO ARTS & ENT. L.J. 21, 67 (2005); *see also* Dory Mitros Durham, *The Once and Future Judge: The Rise and Fall (and Rise?) of Independence in U.S. Immigration Courts*, 81 NOTRE DAME L. REV. 655, 658 (2006). In 1983, both the immigration judges, then-known as "special inquiry officers," and the BIA were moved to the newly constituted Executive Office for Immigration Review (EOIR), an entity that was independent of INS, reporting solely to the Attorney General. *See* Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8038, 8040 (Feb. 28, 1983); Durham, *supra* note 89, at 674–75.

90. *See, e.g.*, Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1308 (1986) [hereinafter Legomsky, *Forum Choices*]; Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 375 (2006) [hereinafter Legomsky, *War on Independence*]; Derek Smith, *A Refugee by Any Other Name: An Examination of the Board of Immigration Appeals' Actions in Asylum Cases*, 75 VA. L. REV. 681, 685 (1989) (noting that almost all BIA decisions are administratively final because the Attorney General rarely exercises oversight power). *See generally* I. & N. Dec., *supra* note 65 (reporting all precedential administrative immigration decisions, including all Attorney General decisions overruling the BIA).

91. *See generally* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 401, 451, 456, 471 (2002) (codified as amended at 6 U.S.C. §§ 201, 271, 275 (2000)) (transferring the functions of INS from DOJ to the newly created Department of Homeland Security).

92. *See, e.g.*, Lory Diana Rosenberg, *Lacking Appeal: Mandatory Affirmance by the BIA*, 9-3 BENDER'S IMMIGR. BULL. 1, 2 (2004); *see also* Legomsky, *War on Independence*, *supra* note 90, at 378–79 (noting that before Attorney General Ashcroft, no Attorney General had ever removed a member of the BIA, despite having the authority to do so).

93. *See* Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135, 56,135–36 (Oct. 18, 1999); Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,880–81 (Aug. 26, 2002).

functions of the Board.

1. The 1999 Streamlining Regulations

In October 1999, Attorney General Reno promulgated streamlining regulations in response to a substantial backlog of cases awaiting review by the BIA.[94] Under these regulations, the BIA was authorized to handle a variety of cases in a more streamlined fashion, electing for single-member review of certain categories of cases, and issuing summary affirmances in certain specified circumstances. The most significant reforms delineated in the 1999 regulations included the following:[95]

> (1) Authorizing the Chairman of the BIA to designate categories of cases suitable for single-member (instead of three-member panel) review and to assign such cases to single members of the permanent Board;[96]
>
> (2) Authorizing the single member to which such cases were assigned to affirm the opinion of an IJ without opinion "if the Board [m]ember determines that the result reached in the decision under review was correct; that any errors in the decision were harmless or nonmaterial; and that (A) the issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve the application of precedent to a novel fact situation; or (B) the factual and legal questions raised on appeal are so insubstantial that three-member review is not warranted."[97] A single member who determined that the decision was not appropriate for affirmance without opinion could refer the case to a three-member panel for review and decision;[98] and
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> (3) Authorizing the exercise of the regulations' summary dismissal[99] power by a single member of the permanent Board (summary dismissals were previously allowed, but only by a panel of the Board).[100]

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94. Backlog problems have long plagued the BIA. *See, e.g.*, Roberts, *supra* note 80, at 39 (describing the history of backlogs, including a 1952 backlog in which there were 4,421 cases before the BIA). These problems escalated in the mid-to-late 1990s when the BIA saw a dramatic increase in the number of new appeals and motions filed. *See* Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. at 56,136; Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,878–79.

95. In addition to the major reforms delineated below, the 1999 regulations added two grounds for summary dismissal of appeals and authorized individual Board members (instead of three-member panels) to deal with a variety of procedural or ministerial matters, such as ordering a remand because of a defective or missing transcript. Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. at 56,135–36.

96. *See* Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135, 56,141 (Oct. 18, 1999).

97. *Id.*

98. *Id.*

99. A BIA case subject to "summary dismissal" is dismissed without review on the merits, generally because of a jurisdictional defect. *See* Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. at 56,137.

100. *Id.*

Thus, while the 1999 regulations created the possibility of substantial reforms in BIA procedures, they left discretion for determining the appropriateness of such reforms to the Board itself. The Board Chairman did, in fact, implement the 1999 streamlining regulations to a significant extent, following a "staged" process of implementation from 2000 to 2002.[101] Even following the implementation of the 1999 regulations by the Chairman, however, individual Board members retained—as per the regulations—the discretion to refer streamlined cases to a panel for full-Board review.

2. The 2002 Streamlining Regulations

The 2002 "streamlining" regulations promulgated by Attorney General Ashcroft considerably expanded the streamlining procedures created in 1999 and rendered their implementation mandatory in the vast majority of BIA cases. Among the major changes made by the 2002 streamlining regulations were the following:[102]

> (1) Mandatory assignment of all cases for single-member review, except in certain limited circumstances (such as, *inter alia*, where there is a "need to establish a precedent construing the meaning of laws, regulations, or procedures," or "[t]he need to review a decision by an immigration judge or the Service that is not in conformity with the law or with applicable precedents");[103]
>
> (2) Mandatory affirmance without opinion of IJ decisions where "the Board member determines that the result reached in the decision under review was correct; that any errors under review were harmless or nonmaterial; and that (A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of a novel factual situation; or (B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case;"[104]
>
> (3) Allowing for the issuance of short orders by single members where a case does not fit within the standards for panel review, but is not appropriate for affirmance without opinion;[105]
>
> (4) Implementation of strict timelines for the filing of briefs, for the record on appeal, and for the issuance of decisions by the Board

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101. *See* Palmer, *supra* note 77, at 24–25, for a more comprehensive discussion of this staged implementation process.

102. In addition to the major reforms delineated below, a few more minor changes were also made by the 2002 streamlining regulations. *See generally* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002).

103. *Id.* at 54,903.

104. *Id.*

105. *Id.*

(generally, requiring the issuance of decisions within ninety days of the completion of the record on appeal, where a case is assigned to a single Board member, and within 180 days where assigned to a panel);[106]

(5) Eliminating *de novo* review of IJ factfinding and substituting it with clearly erroneous review;[107] and

(6) Reducing the number of Board members from twenty-three to eleven.[108]

Thus, the 2002 streamlining regulations dramatically expanded the use of single-member and summary "affirmance without opinion" (AWO) review, making both procedures mandatory in the vast majority of cases. The regulations also enacted a number of controversial reforms, such as more than halving the existing membership of the Board and implementing strict timelines for the issuance of BIA decisions.

3. *Effects of the Streamlining Regulations*

The 1999 and particularly the 2002 streamlining regulations mandated substantial changes in the Board's manner of handling its cases. Unsurprisingly, then, the 1999 and 2002 regulations led to major changes in the BIA's execution of both of its primary functions—i.e., the review of individual immigration cases and the issuance of precedential decisions. As set forth below, these changes failed to meet several of the articulated objectives of the Attorney General in issuing the regulations. However, they have allowed the Board to achieve the primary articulated objective of more efficiently disposing of cases.[109]

a. *Individual Appeals*

The effects of the streamlining regulations on the fair, considered disposition of individual appeals by the Board appear to have been disastrous. As numerous commentators have observed, the mandatory single-member, affirmance without opinion system, coupled with the rigid timelines imposed, has led to a markedly more pro-government regime in which egregious errors by IJs are often missed or ignored.[110] In addition,

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106. *Id.* at 54,903–05.

107. *Id.* at 54,902.

108. *Id.* at 54,893.

109. In FY 1999, the year prior to the initial streamlining reforms, the BIA issued approximately 23,000 decisions, and had twenty-three permanent members (amounting to a rate of approximately 1,000 decisions per permanent member per year). In FY 2006, the most recent year for which complete data is available, the BIA issued approximately 41,500 decisions, while having only eleven permanent members, amounting to a rate of approximately 3,772 decisions per permanent member per year. Response to FOIA Request by Executive Office for Immigration Review (Sept. 13, 2006) (on file with author).

110. *See, e.g.*, Eleanor Acer, *Refuge in an Insecure Time: Seeking Asylum in the Post-9/11 United States*, 28 FORDHAM INT'L L.J. 1361, 1387 (2004); Susan Burkhardt, *The Contours of Conformity: Behavioral Decision Theory and the Pitfalls of the 2002 Reforms*

the sheer volume of decisions issued by individual BIA members under the new regime—sometimes exceeding fifty appeals per day—must ensure that many individual appeals do not receive anything but the most cursory review.[111] This deterioration in the quality of individual review at the Board level has led to a striking surge in appeals of BIA decisions to the federal courts of appeals,[112] which has in turn led to a backlog of pending immigration cases at the court of appeals level.[113]

Despite these apparent defects from an individual "fairness" standpoint, the 1999 and 2002 streamlining procedures have uniformly withstood challenges to their validity.[114] In particular, despite numerous due-process- and administrative-law-based challenges to the single-member, affirmance without opinion procedure, the procedure has been upheld in every court of appeals to have addressed such a challenge.[115] Thus, although there is increasing impatience among the courts of appeals with the quality of individual case decisionmaking under the streamlining regulations, they have as a global matter refused to disrupt those regulations.[116]

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of Immigration Procedures, 19 GEO. IMMIGR. L.J. 35, 90–95 (2004); Dorsey & Whitney LLP, *Board of Immigration Appeals: Procedural Reforms to Improve Case Management* 7, 41–47 (2003), *available at* http://www.dorsey.com/files/upload/DorseyStudy ABA_8mgPDF.pdf (last visited July 28, 2008) (noting substantial increase in affirmances that favored the government); Rosenberg, *supra* note 92, at 1.

111. *See* Burkhardt, *supra* note 110, at 94; Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed*, L.A. TIMES, Jan. 5, 2003, at A1; *see also* Salameda v. INS, 70 F.3d 447, 458 (7th Cir. 1995) ("[D]eciding 14,000 cases a year, the Board [of Immigration Appeals] is bound to commit some howlers.").

112. During the relevant time period, most BIA determinations were reviewable in the first instance by federal courts of appeals.

113. *See, e.g.*, Dorsey & Whitney LLP, *supra* note 110, at 39; Durham, *supra* note 89, at 655–57; Aaron Holland, *New BIA Rules Lead to Skyrocketing Rate of Appeal*, 19 GEO. IMMIGR. L.J. 615, 615–17 (2005); Audrey Macklin, *Disappearing Refugees: Reflections on the Canada–U.S. Safe Third Country Agreement*, 36 COLUM. HUMAN RIGHTS L. REV. 365, 404 n.121 (2005); Palmer, *supra* note 77, at 3, 30–32, 88.

114. *See, e.g.*, Batalova v. Ashcroft, 355 F.3d 1246, 1253–54 (10th Cir. 2004); Yu Sheng Zhang v. Dep't of Justice, 362 F.3d 155, 160 (2d Cir. 2004); Albathani v. INS, 318 F.3d 365, 375–79 (1st Cir. 2003); Falcon Carriche v. Ashcroft, 350 F.3d 845, 852 (9th Cir. 2003); Denko v. INS, 351 F.3d 717, 725–30 (6th Cir. 2003); Dia v. Ashcroft, 353 F.3d 228, 238–45 (3d Cir. 2003) (en banc); Georgis v. Ashcroft, 328 F.3d 962, 966–67 (7th Cir. 2003); Khattak v. Ashcroft, 332 F.3d 250, 252–53 (4th Cir. 2003); Mendoza v. U.S. Attorney General, 327 F.3d 1283, 1288–89 (11th Cir. 2003); Soadjede v. Ashcroft, 324 F.3d 830, 832 (5th Cir. 2003).

115. *See, e.g.*, *Batalova*, 355 F.3d at 1253–54; *Zhang*, 362 F.3d at 160; *Albathani*, 318 F.3d at 375–79; *Falcon Carriche*, 350 F.3d at 852; *Denko*, 351 F.3d at 725–30; *Dia*, 353 F.3d at 238–45; *Georgis*, 328 F.3d at 966–67; *Khattak*, 332 F.3d at 252–53; *Mendoza*, 327 F.3d at 1288–89; *Soadjede*, 324 F.3d at 832.

116. *See, e.g.*, Benslimane v. Gonzales, 430 F.3d 828, 828–30 (7th Cir. 2005) and Guchshenkov v. Ashcroft, 366 F.3d 554, 560 (7th Cir. 2004) (exemplifying the types of complaints that have been raised by the courts of appeals following the promulgation of the new streamlining regulations).

b. Precedential Decisions

The streamlining regulations also had a striking effect on the Board's other primary function—the issuance of binding decisions. Interestingly, both the 1999 and 2002 rules cited the need for the Board to focus to a greater degree on the issuance of precedential decisions as one of the major justifications for the promulgation of the rules.[117] Indeed, the need for the Board to be afforded greater time to focus on its role as an expositor of the immigration laws was one of the predominant justifications offered for the implementation of mandatory streamlining procedures in 2002.[118]

In marked contrast to these asserted goals, the number of precedential decisions issued by the Board actually *decreased* dramatically in the years following 1999.[119] In FY 1999, just prior to the issuance of the first set of streamlining regulations, the BIA issued forty-five precedential decisions, a number fairly consistent with its historical practice.[120] During the following three years, the number of precedential decisions issued each year fell to the mid-twenties.[121] In FY 2003, 2004, and 2005, following the issuance of the 2002 streamlining regulations, the number of precedential decisions fell even further, with an all-time low number of precedential decisions—five—being issued in 2004.[122]

These decreases are even more striking when they are considered as a proportion of the total number of cases decided by the BIA.[123] In 1996, shortly before the streamlining reforms were implemented by the Board, approximately 0.256% of BIA appeals resulted in published precedential decisions.[124] This figure—already a tiny fraction of the appeals decided by

117. *See* Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135, 56,136 (Oct. 18, 1999); Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,880 (Aug. 26, 2002); *see also* Philip G. Schrag, *The Summary Affirmance Proposal of the Board of Immigration Appeals*, 12 GEO. IMMIGR. L.J. 531, 534 (1998) (noting that the need for the Board to have greater time to focus on its lawmaking function was one of the predominant justifications for the initial streamlining proposal).

118. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,880.

119. *See* Figure 1, *infra*. Data on file with author. Data on the number of precedential decisions issued by the BIA per fiscal year were collected from Administrative Decisions Under Immigration and Nationality Laws of the United States, which reports all precedential administrative immigration decisions. *See generally* I. & N. Dec., *supra* note 65.

120. *See infra* Figure 1.

121. *Id.*

122. *Id.*

123. *See infra* Figure 2. The proportion of BIA cases raising novel issues of immigration law should not change as a result of the implementation of the streamlining regulations. While other factors (such as the passage of time from the date of major statutory amendments to the immigration laws) could certainly affect this proportion, it seems unlikely that these factors would result in such dramatic declines, or that they would so precisely coincide with the implementation of the streamlining regulations.

124. *See infra* Figure 2. Data on file with author. The proportion of precedential

the BIA—plummeted following the implementation of the 1999 and 2002 streamlining regulations, with 0.066% of BIA appeals resulting in published precedential decisions in 2001 and a mere 0.010% of appeals resulting in published precedential decisions in 2004.[125]

The most recent data available (FY 2006 and FY 2007) suggest that the BIA is again beginning to issue a more significant number of precedential decisions. Nonetheless, the proportion of precedential decisions (and in FY 2006, the number of precedential decisions) issued by the Board remains substantially lower than it was preceding the implementation of the streamlining regulations.[126] Thus, the streamlining reforms continue to adversely affect the BIA's second primary mission as an expositor of the immigration laws, albeit to a lesser extent than immediately following the implementation of those reforms.

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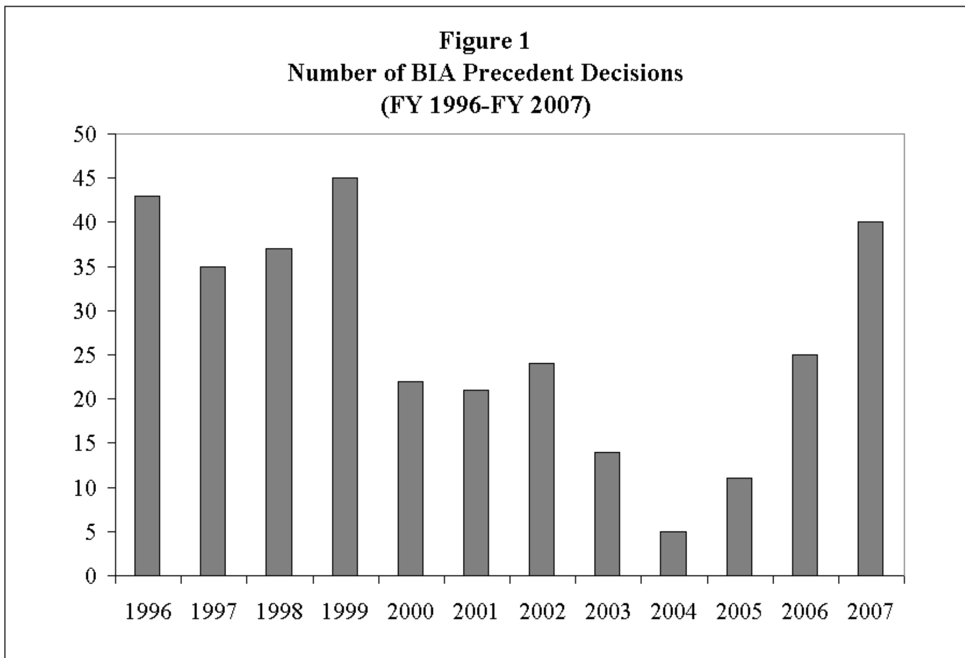
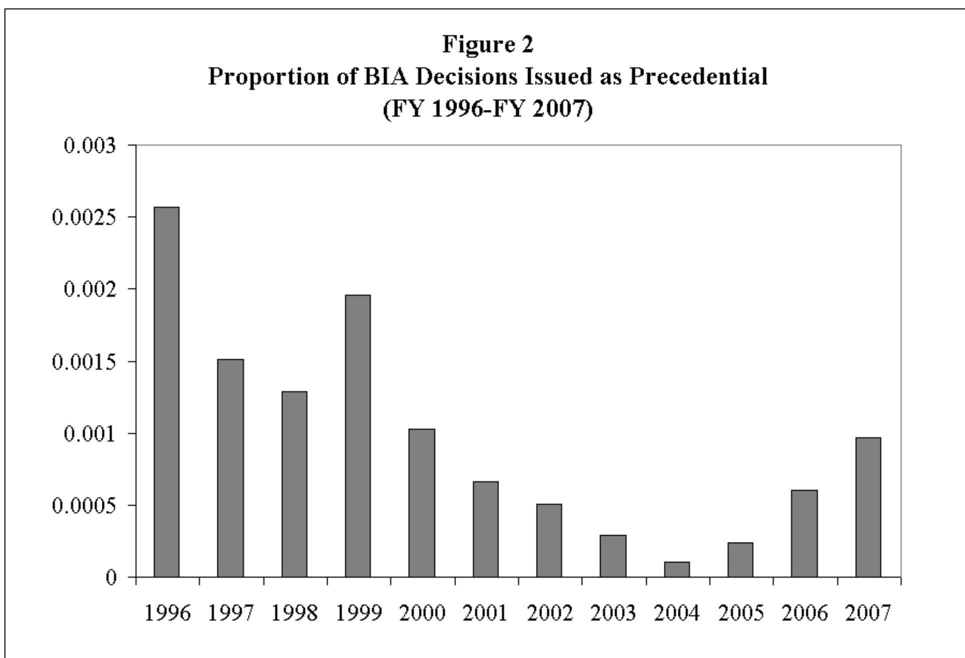
decisions issued by the BIA in a fiscal year was determined by dividing the number of precedential decisions issued by the total number of decisions issued. The total number of decisions issued per year by the BIA was obtained for the years 1996–2005 via a FOIA inquiry to the Executive Office for Immigration Review. *See* Response to FOIA Request by Executive Office for Immigration Review (Sept. 13, 2006) (on file with the author). The total number of decisions issued in 2006 by the BIA was obtained from the EOIR FY 2006 Statistical Yearbook. *See* U.S. Dep't of Justice, Executive Office for Immigration Review, *FY 2006 Statistical Yearbook*, at S2 (2007), *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf (last visited June 1, 2008). Since the EOIR had not, as of the time of the writing of this article, released the total number of BIA decisions decided in FY 2007, only an estimated proportion could be calculated. For the purposes of the estimate, the total number of decisions issued was estimated to be equal to the number issued in 2006.

125. *See infra* Figure 2.

126. *Id.*





The reasons for the BIA's return to a more robust program of adjudicative lawmaking during the two most recent fiscal years are not

fully apparent. However, one factor clearly has played a substantial role. Between FY 2005 and FY 2007, the number of precedential decisions issued by the BIA more than tripled.[127] Remands from the federal circuit courts account for approximately 38% of this increase.[128] Even more striking is that remands from the Second Circuit alone (only one of twelve circuit courts that hear immigration appeals) account for a full 28% of the increase in the numbers of precedential decisions.[129] Thus, increased remands have played a substantial role in reinvigorating the BIA's program of adjudicative lawmaking.[130]

A sampling of circuit court remand decisions reveals that a desire to further rule-of-law goals, like those identified in Part I, often is a motivating factor in such decisions. For example, the Second Circuit has repeatedly noted the importance of consistency in immigration rules—and the unique capability of the BIA to create such consistency across circuits—as a critical factor supporting remand.[131] The Second Circuit has also emphasized the critical role that the BIA can, and should, play as an expert agency in "filling gaps" in the immigration laws.[132] Therefore, it appears that circuit court dissatisfaction with the perceived rule-of-law drawbacks of the BIA's failure to maintain a robust program of adjudicative lawmaking has driven, at least in part, the increase in the number of remands from the circuit courts.

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127. Data on file with author. As noted, *supra* note 119, statistics on the number of precedential decisions issued by the BIA per fiscal year were collected from Administrative Decisions Under Immigration and Nationality Laws of the United States, which reports all precedential administrative immigration decisions.

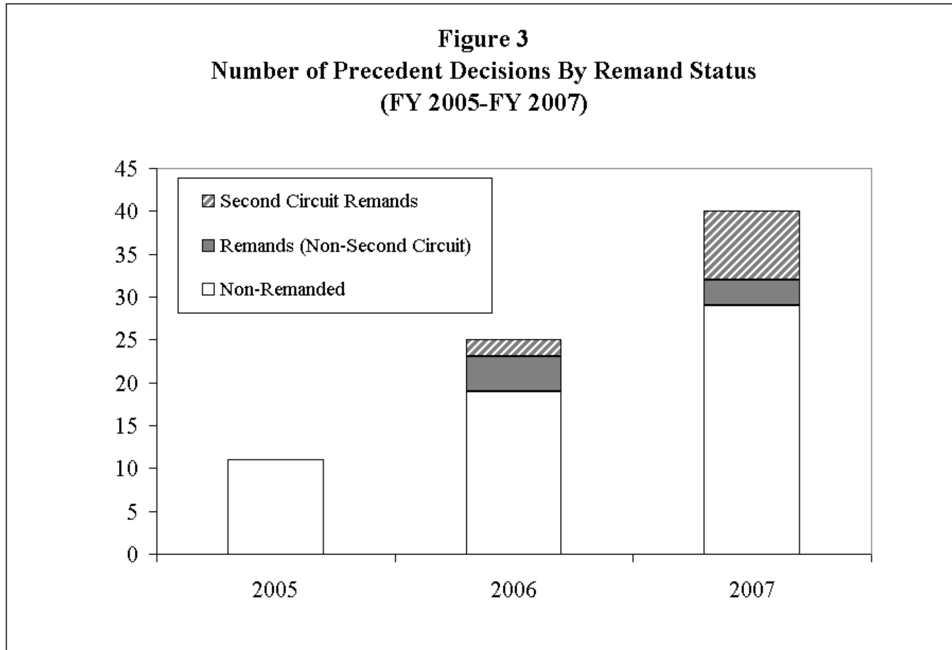
128. *See infra* Figure 3. Data on file with author. The proportion of the increase in precedential decisions attributable to remands was calculated by dividing the increase in the number of remand-based precedential decisions by the overall increase in the number of precedential decisions issued. All BIA decisions during the relevant period were surveyed to determine whether or not they arose as a result of a remand by a circuit court of appeals.

129. *Id.*

130. The reasons why the Second Circuit has been the predominant source of circuit court precedential remands to the BIA are not totally apparent. The Second Circuit does hear a comparatively greater number of immigration appeals than most of the other federal circuits. *See* Admin. Office of the U.S. Courts, *BIA Appeals Remain High in the 2nd and 9th Circuits*, The Third Branch, vol. 37, n.2 (Feb. 2005), *available at* http://www.uscourts.gov/ttb/feb05ttb/bia/index.html (last visited Oct. 9, 2007). However, it hears significantly fewer immigration appeals than the Ninth Circuit, which has nonetheless remanded very few cases to the BIA for rulings on questions of law. *Id.* A review of Second Circuit caselaw suggests that the most plausible explanation for this discrepancy is simply that a number of Second Circuit judges have grown impatient with the BIA's failure to fulfill its role as an expositor of the immigration laws, and have accordingly begun to attempt to force the issue by ordering law-based remands to the Board. *See infra* notes 130–31 and accompanying text.

131. *See, e.g.*, Yuanliang Liu v. U.S. Dep't of Justice, 455 F.3d 106, 116–17 (2d Cir. 2006); Jian Hui Shao v. Board of Immigration Appeals, 465 F.3d 497, 502 (2d Cir. 2006); *see also* Biao Yang v. Gonzales, 496 F.3d 268, 278 (2d Cir. 2007).

132. *See, e.g.*, *Yuanliang Liu*, 455 F.3d at 116–17; *Jian Hui Shao*, 465 F.3d at 502; *see also Biao Yang*, 496 F.3d at 278.



The rise in the number of remands from the circuit courts has clearly played a substantial role in increasing the number of BIA precedential decisions in FY 2006 and FY 2007. However, it leaves 62% of the BIA decision increase unaccounted for.[133] While no other contributing factors are as strikingly apparent, a number of other explanations seem like plausible contributors to the recent rise in precedential decisions.

Most notably, it seems likely that a review of Executive Office for Immigration Review adjudications ordered by Attorney General Gonzales in early 2006—and the modifications to BIA processes that resulted—accounts for at least some of the increase in the number of precedential decisions issued by the Board in FY 2006 and FY 2007.[134] For example, the directive issued by Gonzales upon conclusion of the review in August 2006 expressly indicated that the Board should publish more three-member panel decisions as precedential decisions.[135] Four months later, in December 2006, four additional Board members were added as a result of the review, providing critically needed additional staffing.[136]

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133. *See* Figure 3.
134. *See* Board of Immigration Appeals: Composition of Board and Temporary Board Members, 71 Fed. Reg. 70,855 (Dec. 7, 2006).
135. *Id.*
136. *Id.*

Finally, it seems possible (although there is no clear evidence to support this conclusion) that the February 2005 departure of Attorney General Ashcroft—under whom the number of precedential decisions issued by the Board steadily decreased—played a role in the restoration of the Board's numbers of precedential decisions to more robust levels. Unfortunately, limitations of available data make it impossible to test these hypotheses, and their potential impact on the BIA's increase in adjudicative lawmaking therefore remains purely speculative.

B. Reasons for Selecting the Board of Immigration Appeals as an Adjudicative Lawmaking "Case Study"

The BIA is, in many respects, an ideal administrative entity to serve as a "case study" for the potential benefits and drawbacks of adjudicative lawmaking by administrative agencies. The Board has engaged, for most of its long history, in a robust program of adjudicative lawmaking, contributing substantially to the development of the field of immigration law through its issuance of precedential decisions. Thus, to the extent that there may be absolute benefits of adjudicative lawmaking by administrative agencies, they should be discernable upon examination of the Board's history. Similarly, to the extent that there are characteristic defects of predominantly adjudicative lawmaking bodies, they seem likely to be present in the case of the Board. In contrast, if the theorized benefits or drawbacks are not present in the case of the Board, it seems relatively unlikely that they would be observed elsewhere.

An examination of the Board's history of adjudicative lawmaking also provides an excellent opportunity to explore a relatively understudied area of administrative practice. Despite the BIA's robust history of adjudicative lawmaking, the BIA's role as a precedent-setting body has been the subject of comparatively little scholarship. While specific precedential decisions of the Board or topical areas of Board decisions have sometimes been the subject of scholarly notice, very little attention has been paid as a more global matter to the Board's role as an expositor of immigration law. Thus, this aspect of the Board's role is itself independently worthy of study—an opportunity provided by the instant exploration.

Finally, and most importantly, the BIA is an entity for which the results of the case study will have real meaning. The Board's issuance of precedential decisions—historically a frequent occurrence—recently underwent a dramatic decline. Although this trend has begun to reverse itself, it has only done so under compulsion by the federal circuit courts of appeals (predominantly the Second Circuit). And, there is little reason to believe that the return to higher levels of adjudicative lawmaking would be sustained in the absence of this external pressure. As such, the question of

whether a decline in adjudicative lawmaking matters is one which is clearly of relevance to the Board itself.

While there are many benefits to relying on the BIA as the selected case study for evaluating administrative adjudication, there is at least one theoretical drawback. While the BIA shares many characteristics with other agencies that engage in administrative adjudication, it is relatively unique in a few aspects. Most notably, the BIA—unlike many other administrative agencies that engage in adjudication—does not itself have the option of electing to proceed via legislative lawmaking. Insofar as the Board makes law, it is compelled to do so via administrative adjudication. Thus, the Board may not be entirely characteristic of agencies that engage in adjudicative lawmaking, as it is unable to elect to proceed differently.

This distinction, however, seems unlikely to be highly relevant in the specific context under review. Whether an agency's program of adjudicative lawmaking promotes or hinders the specific rule-of-law goals discussed in Part I is—for the most part—independent of whether the agency has the option of electing to proceed via legislative lawmaking. On the contrary, most of the hypothesized benefits or drawbacks should be unaffected by whether the agency has the option of electing to proceed via legislative lawmaking.

Furthermore, in the contexts where the availability of legislative lawmaking may be relevant—such as a comparative review of the relative benefits of adjudicative lawmaking vis-à-vis legislative lawmaking—the specific structure of the Board should not prove a substantial deterrent to it providing a representative body for review. For most of its long history, the BIA was a constituent component of the Department of Justice (DOJ), which issued immigration regulations via legislative lawmaking. Thus, a point of comparison is available—regulations issued by DOJ—which mirrors in many respects the adjudication/legislative lawmaking dichotomy that exists at other administrative agencies.

There are, therefore, substantial reasons for thinking that the BIA constitutes an excellent case study for this Article. The following section turns to a discussion of whether the BIA has historically hindered or promoted the rule-of-law goals identified in Part I.

III. ANALYSIS

As discussed in Part I, there are seven primary rule-of-law goals that form the foundation for a consensus-based understanding of the rule of law: (1) the existence of rules, (2) consistency, (3) limitation of discretion, (4) prospectivity, (5) notice or publicity, (6) stability, and (7) predictability. Agency lawmaking via adjudication should theoretically promote many of these rule-of-law goals. Therefore, the Board of Immigration Appeals—

with its robust history of adjudicative lawmaking—should, in theory, have historically promoted many of the consensus rule-of-law goals.

Whether these theoretical benefits have been realized requires an in-depth exploration of the content and effects of the BIA's adjudicative lawmaking history. An empirical analysis was therefore conducted of the BIA's precedential decisions, court of appeals level judicial immigration decisions, and immigration regulations.[137] Three years—1952, 1982, and 2002—were selected for consideration and were comprehensively reviewed.[138] Law review articles discussing the history of the BIA were also surveyed for additional pertinent information.

As set forth below, the results of this empirical analysis confirm many of the hypothesized benefits and drawbacks of the BIA's adjudicative lawmaking, but also refute some others. The findings of the analysis vis-à-vis each consensus rule-of-law objective are discussed in turn below.

1. The Existence of Rules

Adjudicative lawmaking by definition contributes to the primary rule-of-law goal of having fixed legal rules by which future cases can be judged. In the case of the BIA, published decisions issued by the Board are, by regulation, binding on all "officers and employees of the Department of Homeland Security" and on "immigration judges in the administration of the immigration laws of the United States."[139] They are also, as a result of judicial decisions, binding on both the BIA itself and, in many instances, the United States Judiciary.[140] Thus, the issuance of precedential decisions by the Board automatically contributes to the rule-of-law objective of "the existence of rules." The Board has historically issued a large number of precedential decisions (approximately forty-eight decisions per year over its sixty-plus year history) and thus has, by definition, contributed substantially to this rule-of-law goal.[141]

The above analysis, however, only addresses the BIA's absolute contribution to furthering the "existence of rules" rule-of-law goal. Certain factors (including most notably the heightened inertia that must be

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137. *See* Appendix: Methodology.

138. *Id.*

139. 8 C.F.R. § 1003.1(g) (2007); *see also supra* note 85.

140. *See, e.g.*, Johnson v. Ashcroft, 378 F.3d 164, 173 (2d Cir. 2004) (holding that the BIA is bound by its own precedents); Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984) (holding that the federal courts are bound by agency lawmaking under many circumstances).

141. Data on file with author. *See supra* note 119 and accompanying text; *see also* Peter Margulies, *Review: Asylum in a New Era*, 14 GEO. IMMIGR. L.J. 843, 844 (2000) (reviewing Deborah E. Anker, LAW OF ASYLUM IN THE UNITED STATES (1999)) (noting that "much of the law relied on daily by practitioners and immigration judges comes from the Board of Immigration Appeals").

overcome in order for an agency to legislatively promulgate a legal rule) suggest that even on a *comparative* level the Board's adjudicative lawmaking approach may be superior to the issuance of regulations in furthering the existence of rules goal.[142] In order to assess whether this hypothesized superiority is correct, a more nuanced analysis is required. As a result, all published Board decisions were surveyed, together with all final immigration regulations issued in the years 1952, 1982, and 2002.[143] The results of this survey are striking and suggest that at least in the promulgation of substantive legal rules, adjudication is generally more likely than legislative lawmaking to lead to increased rule creation.

An initial rough measure of the comparative efficacy of adjudication versus legislative lawmaking as means of rules creation can be provided by comparing the total number of published Board decisions issued in any given year with the total number of immigration regulations issued. As set forth in Figure 4, this rough comparison strongly supports the hypothesis that adjudication is superior to legislative lawmaking as a means of rule creation, with a significantly higher number of adjudications than regulations being issued in each year surveyed.[144]

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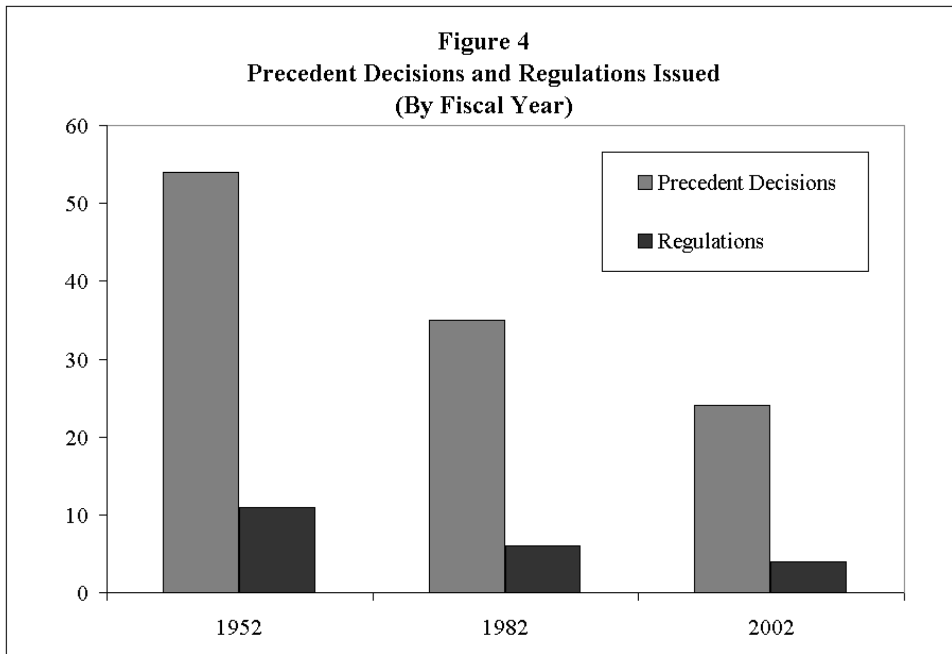
142. It should be noted that "superiority" in this context is intended only to refer to the volume of rules issued. Unfortunately, the comparative quality of the rules issued—also an important consideration—is extremely difficult to empirically test, and therefore has been omitted.

143. *See* Appendix: Methodology.

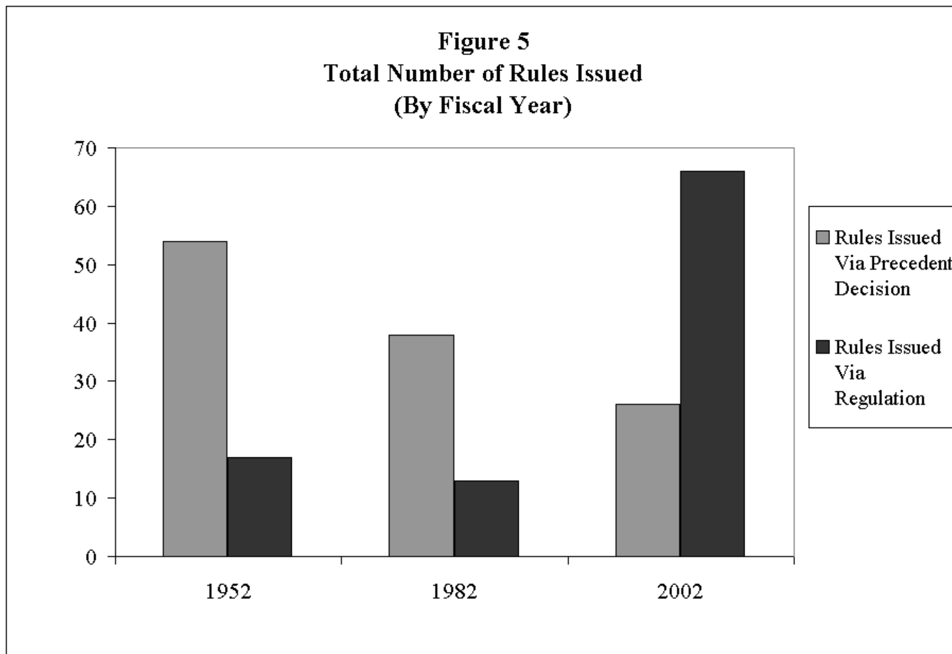
144. *See infra* Figure 4. For all three years, the disparity is statistically significant at the $p<.001$ level.



This rough measure, however, may be misleading, as both a regulation and a precedential decision can serve as the vehicle for creating multiple legal rules. Therefore, each precedential decision or regulation was analyzed in order to assess more specifically the total number of legal rules created by adjudication and by regulation during each year surveyed. For two of the years surveyed (1952 and 1982), the results again strongly suggest that adjudication is superior to legislative lawmaking as a means of rule creation.[145] Interestingly, however, the results are reversed for the final year surveyed (2002), with legislative lawmaking appearing to be the superior method.[146]

145. *See infra* Figure 5. For both years, the observed difference is statistically significant at the $p<.001$ level.

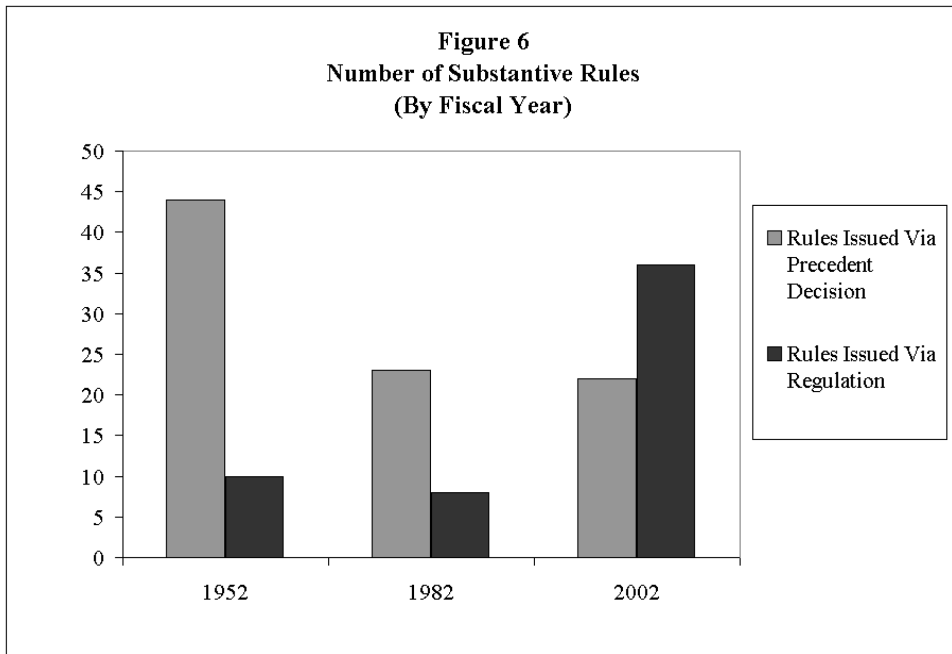
146. *Id*. The result is statistically significant at the $p<.001$ level.



When these results are further broken down to account for the different types of legal rules that can be created by an agency—substantive versus procedural—they suggest an even more nuanced picture. Although the number of substantive rules created by regulation in 2002 still exceed the number created by BIA decision, the difference is no longer statistically significant.[147] In contrast, for the years 1952 and 1982, the BIA issued many more substantive rules than were issued by regulation, at highly statistically significant levels.[148]

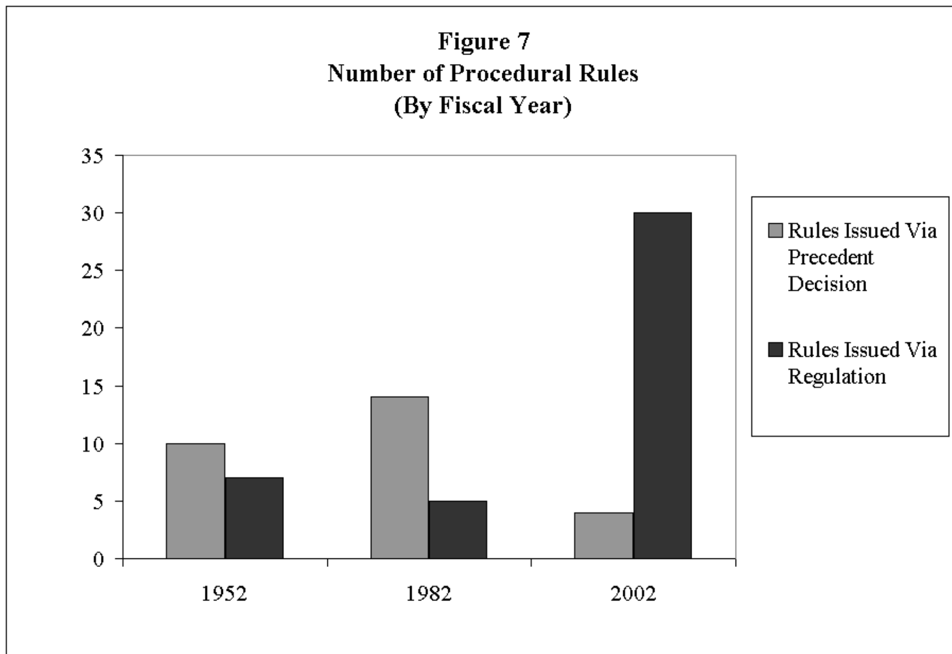
147. *See infra* Figure 6.

148. *Id*. For the year 1952, the observed difference is statistically significant at the $p<.001$ level. For the year 1982, the observed difference is statistically significant at the $p<.01$ level.



The opposite trend is observed for procedural rules—in 1952 the number of procedural rules created via BIA decision is higher than the number issued by regulation, but not at a statistically significant level.[149] The number of BIA-created rules is again higher for 1982, but at a level that barely reaches statistical significance.[150] In 2002, a much higher number of procedural rules were created by regulation than by BIA decision, at a highly statistically significant level.[151]

149. *See infra* Figure 7.
150. *Id.* The result is statistically significant at the $p<.05$ level.
151. *Id.* The result is statistically significant at the $p<.001$ level.



Thus, the data support the conclusion that adjudicative lawmaking is generally more likely than legislative lawmaking to promote the rule-of-law goal of rules creation. The data also reveal, however, that the superiority of adjudicative lawmaking as a form of rules creation may have decreased over time, a result which is consistent with—and is likely causally related to—the new burdens placed on adjudicative lawmaking by the streamlining regulations. Finally, it appears that the type of rule at issue, substantive or procedural, affects both of these observed phenomena. The bias in favor of adjudicative lawmaking appears to be particularly strong in the substantive rule context, perhaps because of the comparative difficulty of issuing substantive regulations. All of these results suggest that adjudicative lawmaking not only promotes an absolute good in the context of this rule-of-law goal, but may in fact be comparatively superior to legislative lawmaking.

2. Consistency

Adjudicative lawmaking by administrative agencies should, hypothetically, be likely to promote the rule-of-law goal of consistency. Supreme Court decisions have mandated that agency lawmaking be afforded deference nationwide. Therefore, such lawmaking theoretically

creates consistent nationwide rules.[152] Whether adjudicative lawmaking in fact creates such rules depends on two factors: (1) whether lawmaking rules are actually issued by the agency; and (2) whether such rules are followed by the federal courts. The BIA has regularly issued a significant number of lawmaking decisions throughout its sixty-year history.[153] Thus, whether or not it has had a positive impact on consistency depends on the extent to which its promulgated rules have been followed by the federal courts.

This issue has been addressed, at least in part, by prior studies of administrative and immigration law, including *To the* Chevron *Station: An Empirical Study of Federal Administrative Law* and *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979–1990*.[154] The results of these studies can provide a helpful starting point for examining the issue of the BIA's impact on nationwide rules consistency. What these results suggest is that reversal of the BIA's rules is fairly rare, and that the BIA thus likely has a significant impact on nationwide rules consistency in the immigration arena.[155] Specifically, the BIA's decisions during the studied time period were subject to only a 10%–12% reversal rate[156] on "substantive law grounds," a category which would include but may not be limited to reversal of BIA precedential rules.[157] Thus, the results of prior studies support the hypothesis that adjudicative lawmaking may often play a significant role in furthering nationwide consistency.[158]

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152. *See, e.g.*, Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984); INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999); *see also supra* note 38 (noting that the rules of administrative deference have changed over time, but that deference has long been a fixture of American administrative law).

153. *See generally* I. & N. Dec., *supra* note 65 (setting forth BIA precedential decisions). Compiled data on file with author.

154. Schuck & Elliott, *supra* note 3; Peter H. Schuck & Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts 1979–1990*, 45 STAN. L. REV. 115 (1992) [hereinafter Schuck & Wang, *Continuity and Change*].

155. *See* Schuck & Wang, *Continuity and Change*, *supra* note 154, at 172 n.277; *see also* Schuck & Elliott, *supra* note 3, at 1043 n.138.

156. The 10%–12% reversal rate was based on a survey of decisions of the federal courts of appeals, where most immigration adjudications are directly appealed.

157. *See* Schuck & Wang, *Continuity and Change*, *supra* note 154, at 172 n.277 (setting forth the substantive law remand rate for all immigration cases studied in *To the Chevron Station*); *see also* Schuck & Elliott, *supra* note 3, at 1014–15 (indicating that there were no immigration regulations in the dataset analyzed). It appears that the substantive law remand category was intended to be a proxy for failure to afford *Chevron* deference. However, this category would also appear to incorporate reversals of nonprecedential substantive rulings by the BIA, which should not be afforded *Chevron* deference, even in theory.

158. *See also* Michael G. Daugherty, *The Ninth Circuit, the BIA and the INS: The Shifting State of the Particular Social Group Definition in the Ninth Circuit and Its Impact on Pending and Future Cases*, 41 BRANDEIS L.J. 631, 642–43 (2003) (noting that the BIA's decisions are important in shaping circuit court precedents in the immigration context since they are generally entitled to deference); Legomsky, *Forum Choices*, *supra* note 90, at 1393; Linda A. Malone, *Beyond Bosnia and* In re Kasinga*: A Feminist Perspective on Recent Developments in Protecting Women from Sexual Violence*, 14 B.U. INT'L L.J. 319, 337 n.137 (1996) (noting the importance of BIA precedential decisions, given the deference

The independent data analysis conducted for this study also strongly supports the conclusion that adjudicative lawmaking plays a substantial role in promoting nationwide consistency. In each of the three years surveyed (1952, 1982, and 2002), BIA rules were rejected by the federal courts *at most* 18% of the time.[159] In two of the three years surveyed, an astounding 100% of BIA rules were left undisturbed.[160] Cumulatively, only approximately 5% of BIA rules were rejected during the three years examined.[161]

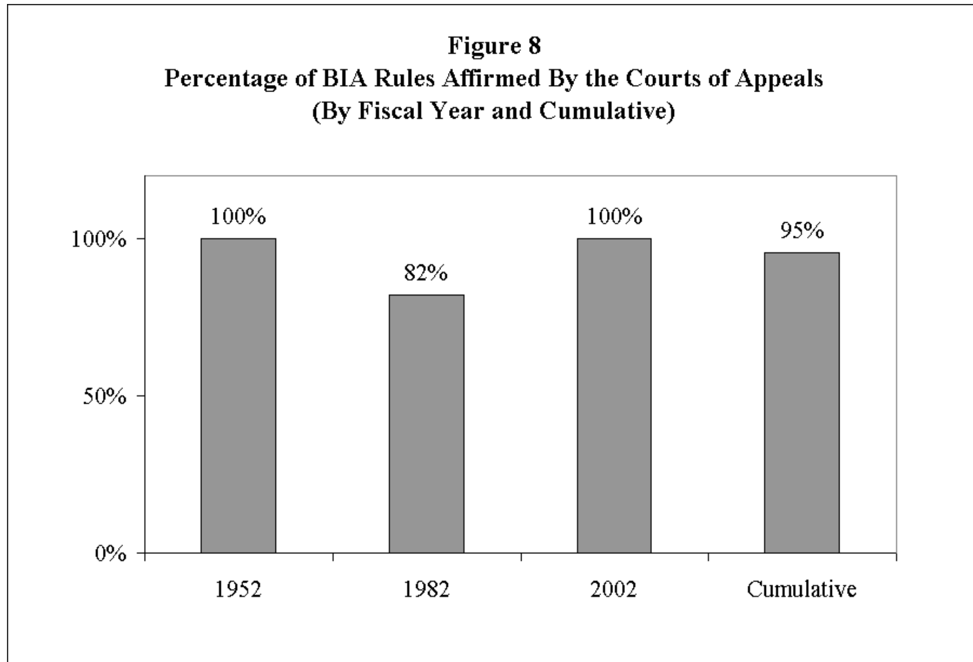

Figure 8
Percentage of BIA Rules Affirmed By the Courts of Appeals
(By Fiscal Year and Cumulative)

These results, moreover, may even underestimate the consistency-promoting effects that adjudicative rule creation is likely to have under the contemporary legal regime. The only year surveyed in which any BIA rules were rejected—1982—preceded the Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), a case that is

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federal courts have generally afforded them); David L. McKinney, *Congressional Intent, the Supreme Court and Conflict Among the Circuits over Statutory Eligibility for Discretionary Relief Under Immigration and Nationalization Act § 212(c)*, 26 U. MIAMI INTER-AM. L. REV. 97, 107 (1995) ("A principal mission of the BIA is to '[e]nsure as uniform an interpretation and application of this country's immigration laws as is possible.'") (citations omitted).

159. *See* Figure 8.
160. *Id.*
161. *Id.*

widely viewed as increasing the level of deference afforded to administrative lawmaking by the federal courts. Moreover, none of the "rule rejecting" decisions examined in the study even mentioned the issue of deference, thus suggesting that the courts may not, in fact, have been applying a deferential standard of review.[162] Both of these factors suggest that the contemporary courts may be even *less* likely to reject adjudicative lawmaking than the study suggests.

Thus, it appears that adjudicative lawmaking may have a significant positive effect on the rule-of-law goal of consistency.[163]

3. Limitation of Discretion

Adjudicative lawmaking may also hypothetically promote the rule-of-law goal of limiting government discretion. Administrative agencies are often bestowed with substantial discretionary authority—authority which is often difficult or impossible for the federal courts to restrict.[164] As such, agencies themselves are uniquely situated to impose discretion-limiting rules on government action. Whether such agencies will in fact do so, however, will depend critically on their willingness to impose limitations on themselves or on a related enforcement agency.

Both a qualitative and a quantitative review of the BIA's caselaw suggest that the BIA has played a highly significant role in limiting otherwise unrestrained government action in the immigration context. Immigration is a notoriously discretionary field, with many statutes leaving critically important substantive determinations largely to the discretion of immigration officials.[165] The BIA has repeatedly created rules that limit the unfettered discretion afforded to immigration officials, thereby ensuring that claims of immigrants are, at a minimum, judged by reference to some objective standards.[166] From an absolute standpoint, it is clear that the

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162. Data on file with author.

163. The BIA itself also appears to believe that enhancing nationwide consistency in the interpretation of the immigration laws is one of its "principal mission[s]." *See In re* Cerna, 20 I. & N. Dec. 399 (BIA 1991) (Appendix) (indicating that "a principal mission of the Board of Immigration Appeals is to ensure as uniform an interpretation and application of this country's immigration laws as is possible," and noting the important role that *Chevron* deference plays in enabling the Board to fulfill this mission).

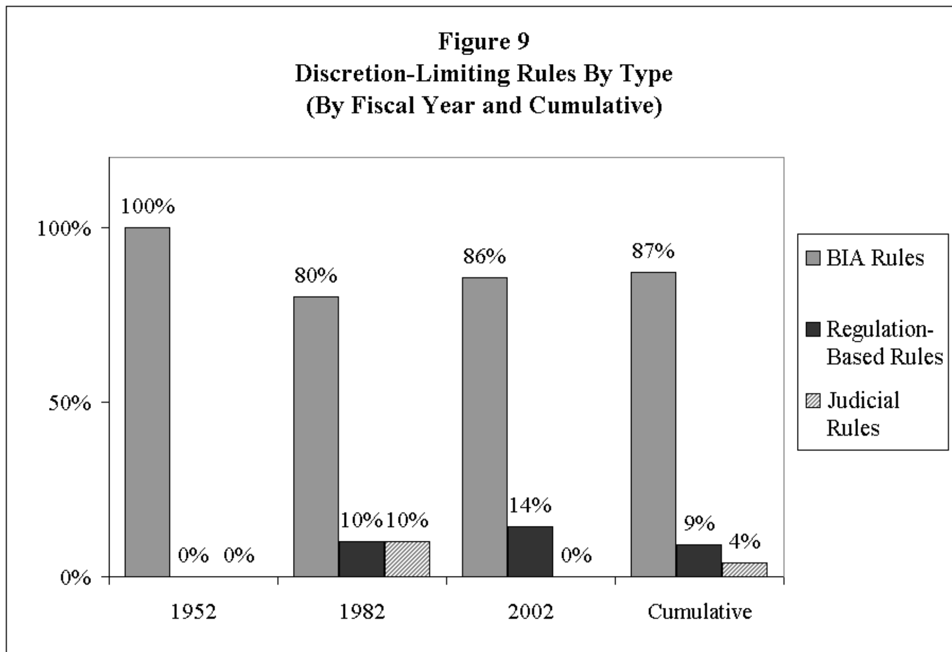
164. *See generally supra* Part I.

165. *See, e.g.*, Heyman, *supra* note 49, at 861; Paul R. Verkuil, *A Study of Immigration Procedures*, 31 UCLA L. REV. 1141, 1205–06 (1984); *see generally* Maurice A. Roberts, *The Exercise of Administrative Discretion Under the Immigration Laws*, 13 SAN DIEGO L. REV. 144 (1975) [hereinafter Roberts, *Administrative Discretion*].

166. *See, e.g.*, Roberts, *Administrative Discretion*, *supra* note 165, at 158, 160; Seth M. Haines, *Rounding Up the Usual Suspects: The Rights of Arab Detainees in a Post-September 11 World*, 57 ARK. L. REV. 105, 130 (2005); Kanstroom, *supra* note 49, at 771–72, 781–801; Roberts, *supra* note 80, at 36; *see also* Margaret H. Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149, 157 n.38 (2004) (noting that in accordance with BIA precedents, INS must provide some

BIA's adjudicative lawmaking has played an important role in promoting the rule-of-law goal of limiting government discretion.

Even from a comparative standpoint, the BIA's adjudicative lawmaking program has been highly significant. An examination of data for the years 1952, 1982, and 2002 demonstrates that BIA discretion-limiting rules formed the basis for discretion-limitation arguments in nearly 87% of cases in which such discretion-limiting arguments were raised.[167] In contrast, regulation-based discretion-limiting rules formed the basis for discretion limitation arguments in only 9% of cases, and judicially based discretion-limiting rules formed the basis for discretion limitation arguments in only 4% of cases.[168]



Even more strikingly, 100% of the cases in which aliens prevailed on the basis of a discretion-limitation argument involved the application of a BIA discretion-limiting rule.[169] Thus, the BIA's adjudicative lawmaking

justification for detaining an individual without bond).

167. *See* Figure 9.

168. *Id.* Because of the relatively low number of rules at issue in each fiscal year, statistical significance was assessed for all fiscal years cumulatively. The results are statistically significant at the $p<.001$ level.

169. Because the number of cases in which aliens prevailed in each year was quite limited (N=3 for 1952, N=2 for 1982, N=3 for 2002), it is impossible to say with statistical significance whether aliens employing a BIA discretion-limiting argument were more or

program appears to have been comparatively far superior to either regulations or judicially imposed standards in truly limiting government discretion.

Finally, it should be noted that BIA-imposed limitations on government discretion may be particularly important in view of recent restrictions imposed on the ability of the federal judiciary to review the discretionary decisions of immigration entities. Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), as amended by the REAL ID Act, federal courts are precluded from reviewing virtually all discretionary determinations in the immigration context.[170] Thus, as to areas of immigration discretion that are unrestricted by statute or by constitution, the federal courts will, at best, be limited to enforcing the BIA's own self-created discretion-limiting rules (or discretion-limiting rules issued by regulation).[171] Such rules therefore are likely to assume even greater stature under the current jurisdictional regime than they have historically possessed.[172]

4. Prospectivity

Adjudicative lawmaking has been specifically criticized for its lack of prospectivity (i.e., the fact that it allows for the creation of legal rules in the context of the case in which they are to be applied).[173] Thus, one might

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less likely to win, as compared with a regulation or judicial-based argument. Because of the small sample sizes at issue, the statistical significance of the results was assessed using a Fisher's Exact test.

170. *See* 8 U.S.C. § 1252(a)(2)(B) (2000); *see also* Kanstroom, *supra* note 49, at 703 (remarking on the "seriously limited judicial review of discretionary immigration decisions" under the two Acts); *see generally* Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the "Rule" of Immigration Law*, 51 Boston College Law School Faculty Papers 161 (2007), *available at* http://lsr.nellco.org/bc/bclsfp/papers/191/ (last visited Sept. 14, 2007) (discussing judicial review of discretionary decisions post-IIRIRA) [hereinafter Kanstroom, *Better Part of Valor*]. The only substantial restriction on this jurisdictional limitation is imposed by the REAL ID Act, which provides that questions of law and constitutional claims remain reviewable by the federal courts. 8 U.S.C. § 1252(a)(2)(B).

171. There is a strong argument that the application of (or more properly the failure to apply) BIA precedential decisions and standards set forth in immigration regulations should be reviewable, regardless of whether those decisions or standards concern discretionary determinations. Nevertheless, some courts prior to the enactment of the REAL ID Act had taken the position that such standards were not, in fact, reviewable. *See generally* Kanstroom, *Better Part of Valor*, *supra* note 170, at 180–89. Following the enactment of the REAL ID Act, there should be little dispute that the application of (or failure to apply) such legal standards are reviewable as questions of law. *See, e.g.*, Johnson v. Ashcroft, 378 F.3d 164, 169 (2d Cir. 2004) (noting that the question of whether the BIA has followed mandatory requirements set forth in its caselaw is a question of law).

172. *See* Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals's Summary Affirmance Procedures*, 16 STAN. L. & POL'Y REV. 481, 500 (2005) (noting the increased importance of the BIA in view of IIRIRA's restrictions on federal court reviewability of discretionary immigration decisionmaking).

173. *See, e.g.*, Araiza, *supra* note 5, at 356.

anticipate that an empirical evaluation would demonstrate that adjudicative lawmaking has a substantial—or at a minimum, noticeable—negative impact on the rule-of-law goal of prospectivity. However, it appears that litigants perceive adjudicative lawmaking as having a minimal impact on prospectivity. This conclusion is consistent with the theoretical observations made in Part I regarding the limitations of many of the prospectivity criticisms of adjudicative lawmaking.

An analysis of federal circuit court decisions issued in 1952, 1982, and 2002 reveals only one case—0.15% of the sample evaluated—that raised a prospectivity challenge to the application of a BIA rule.[174] In contrast, 9.02% of the sample involved prospectivity challenges to the application of federal legislation.[175] No prospectivity challenges were raised to the application of INS/DOJ regulations.[176] While the single challenge to a BIA rule's retroactivity was successful, a single successful challenge (out of all cases analyzed) hardly suggests that adjudicative lawmaking poses a serious threat to the rule-of-law objective of prospectivity.[177]

In addition, a survey of BIA caselaw reveals that the BIA is at least cognizant of the problem of retroactivity, and sometimes makes new rules applicable only prospectively.[178] The BIA is particularly likely to adopt such an approach where the new rule constitutes a true and unexpected departure from prior BIA precedent.[179] While this approach was by no means taken in all cases, it suggests that at least the more extreme cases of retroactivity may be eliminated through the BIA's own use of temporal limitations on newly created rules.[180]

Thus, while prospectivity goals seem unlikely to be promoted by adjudicative lawmaking, they also do not appear to be substantially hindered by such lawmaking.

5. Notice or Publicity

Notice or publicity norms—informing the public of the standards applicable to it—can theoretically be either promoted or hindered by adjudicative lawmaking. Unfortunately, there is no quantitative way of measuring the impact of the BIA's adjudicative lawmaking program on

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174. Data on file with author.
175. Data on file with author.
176. Data on file with author.
177. Data on file with author.
178. *See, e.g.*, *In re* G-C-L-, 23 I. & N. Dec. 359, 361–62 (BIA 2002); *In re* S-H-, 23 I. & N. Dec. 462, 464 (BIA 2002).
179. *See, e.g.*, *In re* G-C-L-, 23 I. & N. Dec. at 361–62.
180. Note, however, that the legitimacy of designating rules developed during administrative adjudication as purely prospective is somewhat in doubt under the Supreme Court's fractured caselaw. *See generally* Araiza, *supra* note 5 (surveying the pertinent caselaw in this area).

notice and publicity. However, a qualitative evaluation suggests that the BIA's adjudicative lawmaking has had a positive impact.

The BIA has always, throughout its history, made its decisions available in a published, accessible format.[181] Thus, on an absolute level, it has promoted notice and publicity by ensuring that many of the legal rules applicable in the immigration context are available to interested constituents. This approach stands in contrast to immigration enforcement (previously INS and today ICE), which is often accused of applying *de facto* or "covert" policies, of which the public has no notice.[182]

On the other hand, it is clear—at least in theory—that notice and publicity norms would be better promoted by a comparable regulation scheme. It is difficult to accurately and precisely cull specific legal rules from over sixty years of BIA caselaw. Moreover, the format in which BIA decisions are issued—by date of issuance—does little to assist in finding all decisions related to a specific topic. A number of tools provided by private entities—including searchable electronic databases and topical summaries of BIA decisions—lessen, but do not eliminate, these difficulties. In contrast, a comparable regulation-based program would be organized topically, allowing for greater ease in determining the applicable legal rule.

In the absence of any such regulations, however, it is clear that the BIA's adjudicative lawmaking serves an important notice and publicity function. Without such adjudicative lawmaking, it is likely that many immigration-related rules would be totally hidden from public view, critically undermining the rule-of-law goals of notice and publicity.

6. Stability

Stability, in theory, could be either promoted *or* hindered by adjudicative lawmaking. However, the comparative ease of adjudicative lawmaking (as compared to legislative lawmaking) suggests that adjudicative lawmaking may be particularly susceptible to reversals of position, thus leading to lesser stability.[183] An examination of legal literature and of BIA caselaw tends to bear out this hypothesis. However, it also suggests that there are often good reasons—reasons that further other rule-of-law goals—for BIA changes of position.

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181. *See generally* Administrative Decisions Under Immigration and Nationality Laws of the United States (setting forth the BIA's precedential decisions). Compiled data on file with author.

182. *See, e.g.*, Michele R. Pistone, *Justice Delayed Is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers*, 12 HARV. HUM. RTS. J. 197, 230–31 (1999) (noting that INS has a *de facto* policy of basing its rate of release of detainees on the availability of detention beds); Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1505 (C.D. Cal. 1988) (finding that INS had a de facto policy of pressuring Salvadorans to accept voluntary departure).

183. *See generally supra* Part I.

Legal literature is replete with criticisms of the BIA for its inconsistency with respect to important issues of immigration policy.[184] As numerous authors have observed, there are several high profile immigration law issues on which the BIA has reversed direction or failed to articulate a clear, consistent policy.[185] Thus, it appears that the BIA may undermine the rule-of-law objective of stability by failing to consistently articulate and apply its own legal policies.

An evaluation of BIA caselaw supports this conclusion, at least with respect to the contemporary BIA.[186] In the cases surveyed, fourteen (or 12%) of the decisions reversed a prior decision of the BIA—facially, a very high proportion of cases.[187] Although it is not possible to compare this figure to reversals of position in immigration regulations (due to difficulties in assessing whether a new regulation reversed prior agency position), it seems likely that this proportion of reversals of position is high, not only as an absolute matter, but as compared to legislative lawmaking.

A closer examination of the reasons for these BIA reversals reveals, however, that they are often motivated or compelled by a desire to promote other rule-of-law goals. For example, 29% of the BIA reversals reviewed were compelled by a change in statutory, regulatory, or foreign law.[188] An additional 21% of the reversals were motivated by a desire for consistency with federal court of appeals precedents.[189] Thus, a full 50% of BIA reversals were motivated by a need or desire to promote consistency—another critical rule-of-law objective.[190]

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184. *See, e.g.*, Roberts, *Administrative Discretion*, *supra* note 165, at 160; Rex D. Kahn, *Why Refugee Status Should Be Beyond Judicial Review*, 35 U.S.F. L. REV. 57, 66 & n.82 (2001); Margulies, *supra* note 141, at 844.

185. *See, e.g.*, Kahn, *supra* note 184, at 66 n.82; Margulies, *supra* note 141, at 844.

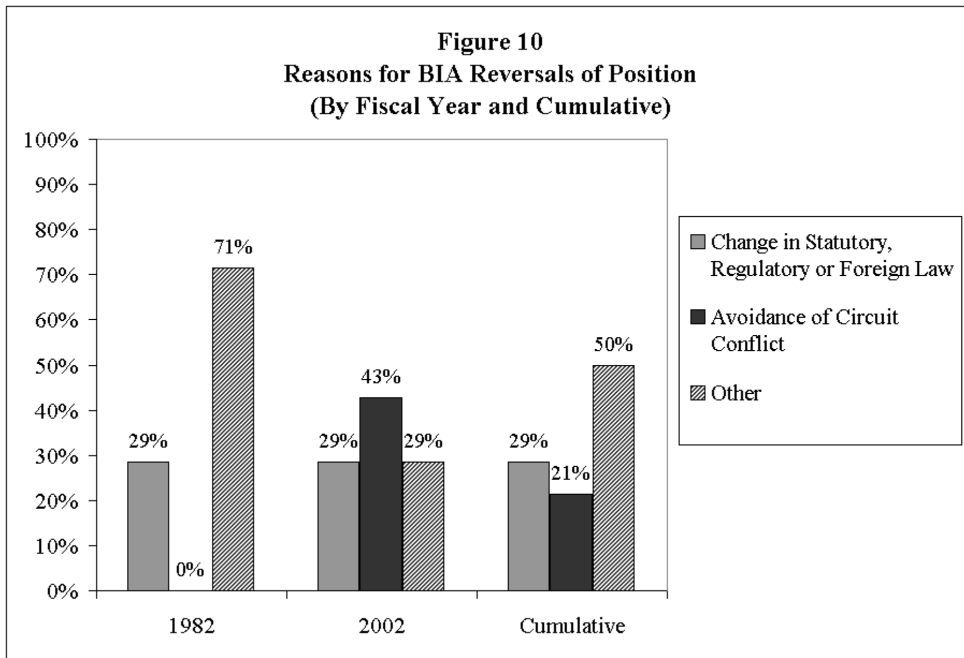
186. In contrast to the relatively high numbers of reversals of position observed in later years, in the 1952 sample no reversals were observed. Data on file with author.

187. Data on file with author.

188. *See infra* Figure 10. There were no reversals of BIA position in FY 1952. Therefore, FY 1952 is omitted from the data represented in Figure 10.

189. *Id.*

190. *Id.*



Thus, an analysis of BIA caselaw does support the conclusion that the BIA reverses its position frequently, thereby undermining the rule-of-law goal of stability. An examination of the reasons for these changes of position, however, suggests that they are often made in furtherance of another rule-of-law objective: consistency. Therefore, an assessment of the BIA's consistency leads to mixed conclusions with respect to the BIA's promotion of rule-of-law objectives.

7. Predictability

Predictability, in the sense of the ability of regulated parties to know what the law proscribes, should clearly be promoted by adjudicative lawmaking. Any time that an agency exercises its legal "gap filling" role, whether through adjudicative lawmaking or legislative lawmaking, this assists parties in understanding the law and thus enhances predictability. Moreover, as noted in Part I, adjudicative lawmaking seems—even from a comparative standpoint—likely to be superior to legislative lawmaking in promoting predictability. This is because adjudicative lawmaking seems likely to lead to overall greater rules creation than legislative lawmaking, given the lesser obstacles to new rules creation in the adjudication context. Adjudicative lawmaking also seems more likely than legislative lawmaking to address the specific predictability concerns of discrete groups of regulated entities, given that adjudication—unlike legislative lawmaking—

is often directed at special individual circumstances.

An examination of BIA caselaw and legal literature tends to bear out the hypothesis that adjudicative lawmaking plays an important role in enhancing predictability. As noted at the outset of this section, the BIA has regularly exercised its lawmaking authority throughout its sixty-plus-year history, issuing precedential decisions at a rate of approximately forty-eight per year.[191] Many of these decisions have resulted in the creation of multiple legal rules, all of which promote predictability of the law for regulated entities.[192] From a comparative standpoint, moreover, adjudicative immigration lawmaking has arguably been superior to legislative immigration lawmaking—the BIA has historically tended to issue a greater number of rules than have been issued via immigration regulations, particularly in the context of substantive (as opposed to procedural) lawmaking.[193]

BIA caselaw and legal literature also tend to support the conclusion that adjudicative lawmaking can play a unique, critical role in promoting predictability for discrete groups of regulated entities. Interpretation of the Immigration and Nationality Act (INA) regularly involves the application of vague general terms to a wide variety of discrete individual circumstances.[194] Moreover, interpretation of the terms of the Act often requires the assessment of other (non-INA) laws that are both topically and jurisdictionally diverse.[195] Thus, there are an enormous number of discrete legal assessments that need to be carried out in order to interpret certain parts of the INA, assessments which are often uniquely poorly suited to legislative lawmaking given their contingency on potentially changeable non-INA law.

In several of these areas, the BIA has played a predominant or exclusive role in filling statutory gaps, and thus in enhancing predictability for regulated entities. For example, the BIA is acknowledged to be the primary entity responsible for defining what constitutes a crime of moral turpitude (a category of deportable offenses) under the INA, and has also played a major role in defining what constitutes an aggravated felony

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191. *See supra* note 87 and accompanying text.
192. *See supra* notes 138–50 and accompanying text.
193. *Id.*
194. *See, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(i) (2000) (providing for the deportation, under certain circumstances, of an alien upon conviction of a "crime involving moral turpitude").
195. For example, whether a particular crime is a crime involving moral turpitude and whether it is an "aggravated felony" for the purposes of the immigration laws depends on a case-by-case assessment of the underlying state, federal, or foreign criminal law. Similarly, determining whether an individual qualifies as a "sister," "brother," "mother," or "father" for visa purposes may also require reference to the terms of the family law of other countries.

(another category of deportable offenses).[196] The BIA has also played a predominant role in developing the law surrounding what factual and legal circumstances must be met in order to demonstrate a visa-qualifying familial relationship (e.g., what constitutes an INA-qualifying marriage, parent/child relationship, etc.).[197] Similarly, the BIA has also played a substantial role in clarifying what forms of state and federal post-conviction relief serve to eliminate the immigration consequences of a conviction.[198] Each of these areas may literally determine an alien's ability to enter or remain in the United States, but has been addressed minimally, if at all, through legislative lawmaking. Thus, the BIA's exercise of its adjudicative lawmaking function has played a critical role in enhancing predictability for numerous discrete categories of immigrants.

CONCLUSIONS

This Article represented an effort to empirically assess the potential benefits of adjudicative lawmaking by administrative agencies. The results of the study are striking—by numerous rule-of-law measures, adjudicative lawmaking promotes desirable outcomes. Although adjudicative lawmaking also displays certain drawbacks from a rule-of-law perspective, these drawbacks are—with limited exceptions—quite minor.

These results directly contradict the traditional wisdom, which has generally viewed adjudicative lawmaking by administrative agencies as undesirable.[199] Specifically, numerous prior authors have hypothesized that adjudicative lawmaking should be discouraged because it is comparatively disadvantageous vis-à-vis legislative lawmaking.[200] Such authors have focused on a number of theoretical disadvantages of adjudicative

196. *See* Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 311–15 (1997); *see also* Alexandra E. Chopin, *Disappearing Due Process: The Case for Indefinitely Detained Permanent Residents' Retention of Their Constitutional Entitlement Following a Deportation Order*, 49 EMORY L.J. 1261, 1278 n.102 (2000) (noting that "crimes of moral turpitude" are "a class of offenses defined by Board of Immigration Appeals case law"). An astounding 13% (15 of 113) of all BIA precedential decisions surveyed were concerned with the issue of what constitutes a crime of moral turpitude or what constitutes an aggravated felony.

197. Eight percent (9 of 113) of the decisions surveyed addressed the issue of what constitutes a visa-qualifying familial relationship.

198. Five percent (6 of 113) of the decisions surveyed addressed the issue of what forms of postconviction relief may serve to eliminate the immigration consequences of a criminal conviction.

199. *See, e.g.*, Araiza, *supra* note 5, at 356; Bernstein, *supra* note 4, at 621–22; Grunewald, *supra* note 4, at 278–79, 281; Handler, *supra* note 4, at 259–61; Mayton, *supra* note 4, at 103; McFarland, *supra* note 4, at 433–38; Pierce, *supra* note 4, at 308–09; *see also* Elliott, *supra* note 4, at 1491 (noting that most American academic students are overly enamored with the legislative lawmaking process).

200. *See* Bernstein, *supra* note 4, at 621–22; Grunewald, *supra* note 4, at 278–79, 281; Handler, *supra* note 4, at 259–61; Mayton, *supra* note 4, at 103; McFarland, *supra* note 4, at 433–38; Pierce, *supra* note 4, at 308–09; *see also* Elliott, *supra* note 4, at 1491.

lawmaking, including: (1) its lack of prospectivity, (2) its tendency to arise in fact-bound circumstances, (3) its limited predictability or transparency (as compared to legislative lawmaking), and (4) its limited opportunities for public participation (as compared to legislative lawmaking).[201]

In striking contrast to this traditional perspective, the instant empirical analysis indicates that adjudicative lawmaking in fact has a number of significant benefits. Among other things, the analysis demonstrates that adjudicative lawmaking is superior to legislative lawmaking in the areas of: (1) creating significant numbers of legal rules, (2) limiting government discretion, and (3) enhancing predictability for regulated entities through legal gap filling. The analysis further establishes that there are—in addition to the above-noted comparative benefits—significant absolute benefits of adjudicative lawmaking, including: (1) promoting consistency in the development of immigration law and (2) assisting in the notice or publicity of such law. Finally, the empirical analysis conducted for this Article suggests that several of the previously identified theoretical drawbacks to adjudicative lawmaking, including its lack of prospectivity, are of lesser significance than previously hypothesized.

The reasons for the discrepancies between the conclusions of most prior authors and the instant analysis appear to be threefold.[202] First, prior academic treatments of adjudicative lawmaking have ignored absolute goods that may be furthered by such lawmaking—i.e., goods that may also be furthered by legislative lawmaking. Second, no prior analysis has endeavored to empirically assess the drawbacks and benefits of adjudicative lawmaking in any sort of a systematic fashion. Finally, the rule-of-law criteria evaluated by this study included several factors that have not traditionally been evaluated by other scholars—factors by which adjudicative lawmaking appears to be comparatively superior to legislative lawmaking.

This Article's differing substantive conclusions necessarily lead to differing prescriptive conclusions from those expressed in the prior literature. Specifically, in contrast to prior literature—which has generally suggested that we should take steps to limit adjudicative lawmaking by administrative agencies—the results of this Article suggest that adjudicative lawmaking should generally be encouraged. At a minimum, the results of this Article suggest that we should be concerned by

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201. *See, e.g.*, Araiza, *supra* note 5, at 356–57; Bernstein, *supra* note 4, at 587–98; Grunewald, *supra* note 4, at 278–79, 281; Mayton, *supra* note 4, at 103; McFarland, *supra* note 4, at 433–38; Pierce, *supra* note 4, at 308–09; *see also* Elliott, *supra* note 4, at 1491.

202. As noted, *supra*, a few prior articles have argued that the traditional critiques of adjudicative lawmaking are exaggerated. *See* Elliott, *supra* note 4, at 1491–92; Robinson, *supra* note 4, at 514–28; Kovacic, *supra* note 7, at 320.

significant decreases in adjudicative lawmaking by administrative agencies and should take steps to arrest or reverse such decreases.

The question then becomes: What steps can be taken? It is not immediately apparent how external actors can affect the quantity of law made by administrative agencies via adjudication. However, the experiences of the agency under review in our study—the Board of Immigration Appeals—provides some initial insights into the factors that may impact decreases in adjudicative lawmaking.

Most strikingly, as discussed in Part II, the experience of the BIA demonstrates that the federal courts can play a substantial role in reversing declines in adjudicative lawmaking by administrative agencies. Indeed, a single federal court—the Second Circuit Court of Appeals—has accounted for a full 28% of the increased numbers of precedential decisions issued by the BIA in the two most recent fiscal years.[203] Cumulatively, remands from the federal circuit courts have accounted for 38% of the increase in the number of precedential decisions issued by the BIA. These experiences highlight the fact that the federal Judiciary is uniquely situated to ensure that administrative agencies continue to fulfill their adjudicative lawmaking function and do not abdicate their responsibilities to properly develop the law.

There are, therefore, important conclusions that can be drawn, both substantively and prescriptively, from the case study of the BIA—conclusions that differ significantly from those drawn in the prior literature. Adjudicative lawmaking by administrative agencies matters, and it furthers important rule-of-law goals. Such lawmaking can and should be encouraged by external actors, including, most notably, the federal Judiciary. It is my hope that this study can serve as a starting point for more extended discussions of these conclusions and their implications for the role of administrative adjudication in the development of American law.

203. Indeed, the Second Circuit not only has begun ordering the BIA to consider important issues of law, but also has set time limits for the Board to do so. *See, e.g.*, Ucelo-Gomez v. Gonzales, 448 F.3d 180, 188 (2d Cir. 2006).

APPENDIX: METHODOLOGY

In order to assess the hypothesized benefits and drawbacks of the BIA's history of adjudicative lawmaking, three years were selected for review of (1) published BIA decisions, (2) judicial immigration decisions issued by the courts of appeals, and (3) immigration regulations issued by the Department of Justice and/or Department of Homeland Security. An explanation is provided below of the methodology for selecting the years to be reviewed, the cases surveyed, and exclusions from the data analyzed.

I. SELECTION OF YEARS FOR REVIEW

In order to obtain results that would not be specific to only a discrete timeframe, years spanning the spread of the BIA's history were selected for review. Because of the difficulty of surveying regulations prior to the availability of the Federal Register in an easily accessible format online, the year 1982 (the first full fiscal year that the Federal Register is available on LEXIS or Westlaw) was selected as the midpoint year for the survey. The "early" survey year was set at thirty years prior to this (1952), and the "late" survey year was set twenty years subsequent to this (2002), in order to obtain a spread of years. The early and late years selected were not equidistant from the midpoint, because of a desire to obtain a spread that covered more of the early history of the BIA. In all cases, years were surveyed on a federal government fiscal year basis (October 1 of Year X–September 30 of Year Y) because that is the format in which data on the volume of BIA published and unpublished decisions is available from the EOIR.

II. SURVEY METHODOLOGY

A. Board of Immigration Appeals Decisions

The following searches were performed in the "Immigration Precedent Decisions" LEXIS database in order to obtain BIA decisions for the analysis:

date(geq (10/01/01) and leq (9/30/02))
date(geq (10/01/81) and leq (9/30/82))
date(geq (10/01/51) and leq (9/30/51))

All non-BIA decisions were removed from the results, as were all nonprecedential decisions that nonetheless appeared in the precedential database. Upon substantive review of the cases, any cases addressing

purely individual issues, which did not appear to have any precedential value, were also excluded from the analysis.

All of the remaining cases were assessed (N=54 for FY 1952, N=35 for FY 1982, and N=24 for FY 2002). The following categories/questions were addressed:

Number of Precedential Decisions Issued
(Calculated Cumulatively by Year)

Number of Rules
Number of Rules Created
Number of Substantive Rules Created
Number of Procedural Rules Created

Discretion-Limiting Rules
Discretion-Limiting Rules at Issue
If Discretion-Limiting Rule at Issue, What Type(s)? (BIA/Judicial/Regulation-Based)
If Discretion-Limiting Rule at Issue, Did Alien Prevail?

Reversals of Prior BIA Decisions
Decision Overruled Prior BIA Position?
What Was the Reason for Reversal? (Policy Change/Change in Statutory or Foreign Law/Change in Regulation/Intervening Supreme Court Case Law/Circuit Court Case Law/Other)

Development of the Law
A short substantive summary of the area of law that the decision developed was also completed.

Cases were coded UNC if the response to any of the above categories was unclear or unknown. UNC designations were counted as nos/zeros for the purposes of the analysis.

B. Federal Circuit Court Decisions

The following searches were performed in the "US Courts of Appeals Cases, Combined" LEXIS database order to obtain federal circuit court cases for the analysis:

("board of immigration") and date(geq (10/01/01) and leq (9/30/02))

("board of immigration") and date(geq (10/01/81) and leq (9/30/82))

("board of immigration") and date(geq (10/01/51) and leq (9/30/51))

name("immigration and naturalization" or "attorney general" or justice) and (regulation! or rule or "8 c.f.r." or "8 c. f. r.") and immigration and not "board of immigration") and date(geq (10/01/01) and leq (9/30/02))

name("immigration and naturalization" or "attorney general" or justice) and (regulation! or rule or "8 c.f.r." or "8 c. f. r.") and immigration and not "board of immigration") and date(geq (10/01/81) and leq (9/30/82))

name("immigration and naturalization" or "attorney general" or justice) and (regulation! or rule or "8 c.f.r." or "8 c. f. r.") and immigration and not "board of immigration") and date(geq (10/01/51) and leq (9/30/51))

Because of the extremely high number of appeals during the FY 2002 timeframe, every tenth case was selected for review (resulting in a total of sixty cases reviewed). Results for FY 2002 were then extrapolated from this sample.

Appeals that did not pertain to immigration law, or that pertained to immigration law only indirectly (such as criminal appeals), were excluded from the analysis for all years. In addition, cases where no information regarding the case was provided (such as unpublished table decisions that are not available on LEXIS) were also excluded from the analysis.

All of the remaining cases were assessed (N=6 for FY 1952, N=59 for FY 1982, and N=60 for FY 2002).[204] The following categories/questions were addressed:

Deference

Number of BIA Rules at Issue

Number of BIA Rules Affirmed/Adopted (Deferred to/Adopted/Not Disturbed (Not Otherwise Specified))

Number of BIA Rules Reversed (Deference Applied/Refused to Apply Deference/Deference Not Mentioned)

Prospectivity

Prospectivity Challenge Raised?

If So, Number of Challenges Raised?

Number of Challenges to BIA Rule

Number of Challenges to Immigration Regulation

Number of Challenges to Statute/Interpretation of Statute

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204. As discussed *supra*, the sixty cases evaluated for FY 2002 constituted a sampling of all immigration cases heard by the federal courts of appeals during that year and results were extrapolated from that sample.

Did Challenge(s) Prevail?

Cases were coded UNC if the response to any of the above categories was unclear or unknown. UNC designations were counted as nos/zeros for the purposes of the analysis.

C. Immigration Regulations

The following searches were performed in the "FR–Federal Register" LEXIS database order to obtain immigration regulations for the analysis:

> action(final rule) and agency(justice or "homeland security") and (immigr! or asylum! or deportat! or exclus! or removal) and date(geq (10/01/01) and leq (9/30/02))
>
> action(final rule) and agency(justice or "homeland security") and (immigr! or asylum! or deportat! or exclus!) and date(geq (10/01/81) and leq (9/30/82))

As the Federal Register is not available prior to FY 1982 on LEXIS or Westlaw, HeinOnline was searched in order to obtain data for FY 1952. Because of the lesser search capabilities of HeinOnline, a broad search was executed for the following terms during the years 1951 and 1952: immigration, immigrant, asylum, deportation, exclusion. The results were then manually sorted to exclude:

(1) Regulations from outside of the FY 1952 time period (regulations issued prior to 10/01/51 or after 9/30/52);

(2) Regulations that were not issued by the Department of Justice; and

(3) Federal Register notices that are not final rules.

For all three years, all regulations not pertaining to immigration were excluded. Upon substantive review of regulations, any regulations addressing purely individual and/or administrative issues, which did not appear to have any precedential value, were also excluded from the analysis.

All of the remaining regulations were assessed (N=11 for FY 1952, N=6 for FY 1982, and N=4 for FY 2002). The following categories/questions were addressed:

Number of Immigration Regulations Issued

(Calculated Cumulatively by Year)

Number of Rules
Number of Rules Created
Number of Substantive Rules Created[205]
Number of Procedural Rules Created

III. ANALYSIS METHODOLOGY

All analysis was conducted relying on the above categories of data collected. Where statistical testing was utilized in order to verify the statistical significance of a result, a chi-square test was used, except where the expected value was too low to permit the use of a chi-square test. A Fisher's Exact test was used in the few cases where the expected value was too low to permit the use of a chi-square test.

The statistical significance of results was generally assessed for each fiscal year, with the significance of the results listed for each year. Where small sample sizes did not permit a "by year" assessment of statistical significance, the significance of the results was assessed cumulatively.

205. Rules were coded as "substantive" if they could arguably be considered substantive.