Stanford Law Review

Volume 77 June 2025

ARTICLE

Abandoning Deportation Adjudication

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Abstract. The immigration court system—an executive agency that adjudicates hundreds of thousands of deportation cases every year—is experiencing profound crises of undercapacity and politicization of the adjudication process. Adjudicators in the system face extraordinary pressures to rush through cases as quickly as possible, even if that means ignoring material evidence or relying on biased heuristics to streamline proceedings.

Against this backdrop, judicial review plays an important oversight role, with courts counterbalancing the relentless need for speed by insisting on a certain minimum baseline of quality in adjudication. Courts engage in quality control by requiring agency adjudicators to exhibit reasoned decision-making—that is, to show they have considered relevant evidence in the record and to explain their reasoning. The goal is to incentivize more careful and impartial adjudication in each case in which a person's potential banishment from the United States is at stake.

The Supreme Court gave short shrift to judicial review's quality-control function when it held in a 2021 case called *Garland v. Ming Dai* that federal courts must affirm deportation orders even when the agency's analysis is unclear. *Ming Dai*, which did not purport to alter existing review standards, has flown under the scholarly radar. But circuit courts are

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paying attention. Invoking *Ming Dai*, judges across the country are contending that the reasoned decision-making requirements demand too much of the agency and exceed the power of federal courts to impose.

This Article describes and defends rigorous judicial review in deportation cases, sounds the alarm about the doctrinal experimentation that *Ming Dai* has inspired, and catalogs what we stand to lose if the more anemic form of judicial review being auditioned in the circuits gains prominence. At a time when many are deeply concerned about the judiciary's war with the administrative state, this Article unearths a more obscure but no less consequential judicial project that aims to endow certain segments of the federal bureaucracy with vast power to administer justice as they see fit.

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Introduction

With the Supreme Court's recent evisceration of *Chevron* deference,[1] we are undoubtedly living through "anti-administrativist" times.[2] But there is a Janus-faced aspect of this ascendant legal regime, where calls for a radical downsizing of agencies' lawmaking powers are coupled with ready acceptance of certain agencies' expansive powers over adjudication.[3]

Adam Cox and Emma Kaufman have mapped out deeply regressive elements of this underappreciated "probureaucracy" agenda.[4] They make the provocative claim that the Court's jurisprudence is trending toward a two-tiered system of justice—where a privileged few will gain access to Article III courts to resolve their legal disputes, while millions of race-class subordinated people will remain trapped within the administrative state's mass adjudication systems where more relaxed adjudicatory standards will govern their fates.[5]

One important part of this story, which Cox and Kaufman detail at length, is the increasing politicization of administrative adjudication.[6] Greater political control of agency adjudication means administrative courts will look and feel less like *courts*, with the White House's political priorities driving case outcomes rather than fair and impartial administration of laws as written.[7] But a second, equally important part of the story is the crushing caseloads under which the administrative state's mass adjudication systems operate.[8] That adjudicators are overworked and under-resourced has predictably dire effects on decisional accuracy within these institutions, which are responsible for

1. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) ("*Chevron* is overruled.").
2. Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 4, 7 (2017) (documenting contemporary attacks on the administrative state and coining the term "anti-administrativism").
3. *See* Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1812-13 (2023) ("When it comes to adjudication . . . the [Supreme] Court wants to *preserve and empower* the administrative state as a place for millions of people to resolve their legal claims."); *see also infra* Part III.A.
4. Cox & Kaufman, *supra* note 3, at 1773, 1816-17.
5. *Id.* at 1788-96.
6. *Id.* at 1783-88.
7. *See* Harold J. Krent, *Presidential Control of Adjudication Within the Executive Branch*, 65 CASE W. RSRV. L. REV. 1083, 1084 (2015).
8. *See* David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 4-5 (2020) (describing how crushing caseloads at agencies that adjudicate veteran, deportation, and disability benefits cases threaten those agencies' capacity to issue accurate decisions).

deciding millions of legal claims of extraordinary importance involving immigrants, veterans, and welfare claimants.[9]

Today, a poster child for both forms of dysfunction is the immigration court system. Housed within the Department of Justice, immigration courts decide hundreds of thousands of deportation cases annually,[10] making life-altering decisions about who gets to stay in the United States and who must suffer deportation. Agency adjudicators called "immigration judges" or "IJs" preside over deportation proceedings where they confront the herculean task of adjudicating "what amount to death penalty cases . . . in traffic court settings."[11] Case backlogs in this system have reached historic highs, and the system is teetering on the "brink of collapse."[12]

Political interference has also long been endemic in this context.[13] The first Trump administration's relentless quest to advance its restrictionist immigration agenda laid bare just how vulnerable the system is to the "vicissitudes of politics."[14] Now, with President Trump vowing to implement the "largest deportation program in American history,"[15] we can expect his administration to once again dragoon the immigration court system into implementing its partisan vision of immigration policy.[16]

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9. *Id.* at 16-19; *see also* Christopher J. Walker, *A Reform Agenda for Administrative Adjudication: Administrative Procedure Act Reformers Should Also Pay Attention to Adjudication*, REGUL., Spring 2021, at 30, 33, https://perma.cc/KPP2-9MYP ("[M]ost high-volume administrative adjudicative systems today face severe backlogs and long processing times as well as stark inconsistencies and inequities in adjudicative outcomes.").

10. *See* Exec. Off. for Immigr. Rev., Adjudication Statistics: Pending Cases, New Cases, and Total Completions (2024), https://perma.cc/5CKU-4G7B.

11. Dana Leigh Marks, *Immigration Judge: Death Penalty Cases in a Traffic Court Setting*, CNN (June 26, 2014, 9:29 AM EDT), https://perma.cc/4LFS-XFAJ.

12. AM. BAR ASS'N COMM'N ON IMMIGR., 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM—EXECUTIVE SUMMARY AND SUMMARY OF RECOMMENDATIONS 14-15 (2019), https://perma.cc/3NAM-J4ZE; *Immigration Court Backlog: Historical Backlog (from 1998)*, TRAC IMMIGR., https://perma.cc/D22F-FMV6 (archived Apr. 20, 2025) (showing a backlog of over 3.6 million cases in fiscal year (FY) 2025 as of April 2025).

13. *See infra* Part I.B; Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 372-74 (2006).

14. Cox & Kaufman, *supra* note 3, at 1799-1800.

15. *Trump Promises to Implement the Largest Mass Deportation Plan in U.S. History*, NBC NEWS (Nov. 7, 2024), https://perma.cc/GA7A-HERX.

16. For more on the first Trump administration's efforts to harness the immigration court system toward achieving its enforcement-oriented objectives, see Part I.B below. Even more sweeping policy and personnel changes are being rolled out as this Article is being finalized for publication in the early weeks of the second Trump administration. *See* Ailia Zehra, *Justice Department Fires 20 Immigration Judges: Report*, HILL (Feb. 15, 2025, 9:43 PM ET), https://perma.cc/6AQG-8HLH (reporting the termination of twenty

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Because of these dynamics, IJs face, and will likely continue to face, overwhelming pressure to rush through deportation cases as quickly as possible, even if that means glossing over material evidence or relying on biased heuristics to streamline proceedings.[17] And when IJs inevitably err, there is no effective in-house agency mechanism to catch and fix their mistakes. The Board of Immigration Appeals (BIA), the system's administrative appellate tribunal, is notoriously under-resourced itself and was subject to a series of reforms that drained it of much of its effectiveness as an oversight body.[18] Scholars have also documented a "near-total disregard for quality assurance initiatives" by agency management.[19]

Given the agency's hyperfocus on quantity and apparent disregard for quality, judicial review plays a crucial role in ensuring the integrity of the adjudication process.[20] The value of judicial review in the immigration context may strike some as counterintuitive. Legal scholarship, after all, can "fixate[]" on the extraordinary deference courts extend to the political branches in immigration cases.[21] Although there is undoubtedly truth to these accounts, the reality is that in the trenches and away from the spotlight, Article III courts play a vital and constructive role in mitigating maladministration in the immigration system.[22]

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immigration judges and the introduction of "many new policies that contradict those of the Biden administration"); Britain Eakin, *Trump Admin to Nearly Halve Immigration Appeals Board*, LAW360 (Feb. 20, 2025, 9:27 PM EST), https://perma.cc/94RM-TW8B (documenting the Trump administration's efforts "to reduce the size of the Board of Immigration Appeals from 28 to 15 members, with nine members who were appointed by the Biden administration immediately impacted").

17. *See infra* Part I.B.

18. *See infra* Part I.B.

19. Ames et al., *supra* note 8, at 40.

20. When I refer to the integrity of the adjudication process, I have in mind such notions as ensuring that the agency is fairly and accurately deciding disputes between the government and noncitizens; faithfully executing the immigration laws that Congress enacted; and upholding the regulatory, statutory, and constitutional rights of noncitizens facing deportation. I acknowledge, however, that others may prioritize different values, including that immigration courts should be "nimble, responsive political bodies whose output matches the President's views." Cox & Kaufman, *supra* note 3, at 1803. Court review may not seem so indispensable—and in fact may seem counterproductive—to those who would prioritize political responsiveness and accountability. *Cf. infra* note 418 and accompanying text (exploring this Article's implications for debates on the value and drawbacks of proceduralism in administrative law).

21. ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW 5 (2020). The focus of much of this legal commentary is the plenary power doctrine, under which the Supreme Court engages in deferential constitutional review. *Id.* at 6.

22. *See infra* Part I.C.

This Article's first contribution is to theorize how courts have designed their review of deportation adjudication to improve the quality of agency decision-making. Every year, noncitizens petition circuit courts to review thousands of deportation orders, including one out of every four cases that the BIA decides.[23] In these cases, reviewing courts aim to serve as an important backstop to agency politicization, overwork, and disorganization by reinjecting a certain minimum baseline of fairness and accuracy back into the process.[24]

One prominent mechanism through which courts engage in quality control is by requiring IJs and the BIA to demonstrate reasoned decision-making.[25] Reasoned decision-making in this context has two components: First, adjudicators must show that they have meaningfully considered the evidence before them, and second, they must provide adequate reasoning supporting their conclusions.[26] (I will call these the consideration and explanation requirements.) If these requirements sound familiar to non-immigration specialists, it is because they are standard administrative law tools that courts deploy across a variety of regulatory contexts to encourage more methodical and less capricious agency decision-making.[27]

In the deportation adjudication context, these requirements respond to deep-seated pathologies of administration, including the immense pressure that IJs and the BIA face to churn through deportation cases as quickly as possible without necessarily giving each case the consideration it merits.[28] The goal is to incentivize overworked adjudicators to engage more carefully and impartially with each case in which a person's potential banishment from the United States is on the line.[29]

After describing the role of reasoned decision-making and judicial review, this Article's next, and principal, contribution is to sound the alarm about recent developments that threaten to undermine the judiciary's quality-control

23. *See infra* Part I.C ("Between 2013 and 2021, judicial review was sought for more than one in four BIA decisions."). Noncitizens, but not the government, may seek review of administratively final deportation orders in the federal circuit courts. *See* 8 U.S.C. § 1252(b)(2)-(b)(3)(A), (b)(3)(C).

24. *See infra* Part I.C; Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1099 (2018) (describing judicial review as "a backstop against arbitrary decision-making" by "[t]ime-strapped agency adjudicators" who "have to rule under conditions hardly conducive to thoughtful deliberation").

25. *See infra* Part I.C.

26. *See infra* Part I.C.

27. *See infra* Part I.D.

28. *See infra* Part I.C.

29. *See infra* Part I.C.

function in deportation cases. These developments trace their origins to the Supreme Court's 2021 decision in *Garland v. Ming Dai*,[30] which instructed courts to affirm deportation orders even when the agency's decisions are not of "ideal clarity."[31]

Ming Dai exhibited little concern for the crisis of decisional quality that plagues deportation adjudication and that has troubled circuit judges across the country.[32] Unlike the circuits, which review thousands of deportation cases every year, the Supreme Court decides two, maybe three, deportation cases a term.[33] The entrenched problems of deportation adjudication with which circuit courts have become intimately familiar through repeat exposure—and which they are trying in good faith to tackle via the consideration and explanation requirements—seemed to pass the Justices by when they chastised the lower court in *Ming Dai* for demanding too much of the agency.[34]

Since it was decided four years ago, *Ming Dai* has received little scholarly attention.[35] And in some ways, that neglect is understandable. Even as the Supreme Court ignored the systemic benefits of the reasoned decision-making requirements, it did not purport to alter existing standards of review or to modulate their intensity.[36] It is reasonable, therefore, to read *Ming Dai* as a relatively unimportant case that applied the law without changing it.[37]

But that is not how everyone interprets *Ming Dai.* A cadre of circuit judges across the country sees in *Ming Dai* an opportunity for change.[38] Seizing on that opinion's disinclination to second-guess the agency, circuit judges are

30. 141 S. Ct. 1669 (2021).

31. *Id.* at 1679 (quoting Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974)); *see also infra* Part II.B.

32. *See infra* Part II.B.

33. For example, in 2021, the Supreme Court decided only *Ming Dai* and two other cases that came up from the immigration court system. *See* Pereida v. Wilkinson, 141 S. Ct. 754 (2021); Niz-Chavez v. Garland, 141 S. Ct. 1474 (2021).

34. *See infra* Part II.B.

35. One exception is Julia Simon-Kerr's thoughtful exploration of how the Justices in *Ming Dai* exhibited very different understandings of witness credibility. *See* Julia Simon-Kerr, *Law's Credibility Problem*, 98 WASH. L. REV. 179, 184-89 (2023). Her work, however, does not address *Ming Dai*'s implications for judicial review, which is this Article's focus. More recently, Adam Crews has also engaged in a careful reading of *Ming Dai* as part of a broader project to understand the revival of the Supreme Court's *Vermont Yankee* opinion in federal courts. *See* Adam Crews, *Visions of* Vermont Yankee, 77 STAN. L. REV. 1117, 1165-66 (2025). Crews's work has helped me refine my own thinking about *Ming Dai*'s context and potential impact.

36. *See infra* Part II.B.

37. *See infra* Part III.

38. *See infra* Part III.A.

experimenting with doctrinal approaches that undercut stringent enforcement of the consideration and explanation requirements in deportation cases.[39]

It is imperative that we pay close attention to these percolating developments in the lower courts. At stake is the judiciary's ability to impose a necessary measure of quality control on an adjudication system that is experiencing a profound crisis of administration.[40] If the efforts that *Ming Dai* has inspired to scale back judicial review gain momentum, bureaucratic misfeasance and malfeasance are more likely to go unchecked, resulting in more unlawful deportations.[41] An increase in unlawful deportations means more people separated from their families, deprived of their livelihoods, and expelled to countries where they could face grave harm.

There is also not necessarily a doctrinal buffer that would limit the damage to the immigration context. Many of the conceptual moves involved in sapping the judiciary of its power to meaningfully oversee deportation adjudications do not turn on the idiosyncrasies of immigration law.[42] To the contrary, they involve reconceptualizing generic administrative law tools, meaning that the fruits of judicial experimentation stand ready to be exported to other adjudication regimes where courts may prefer to exert a lighter touch.[43]

Through a close study of judicial review of deportation adjudication, this Article enriches a nascent body of literature contesting the dominant narrative in administrative law scholarship today, which portrays the judiciary as singularly focused on destabilizing and dismantling the administrative state.[44] Scholars have begun to question this framing, arguing that the ascendant approach is, in fact, characterized by contradictory impulses, with courts combatting some segments of the federal bureaucracy while collaborating with others.[45]

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39. *See infra* Part III.A.

40. *See infra* Part III.B.1.

41. *See infra* Part III.B.1.

42. *See infra* Part III.B.3.

43. *See infra* Part III.B.3.

44. *See* Cox & Kaufman, *supra* note 3, at 1771 ("[B]oth the [Supreme] Court's critics and its defenders seem to agree that recent administrative-law cases reflect a systemic philosophy meant to strip power from the civil service.").

45. *Id.* at 1772-73 (arguing that the widely accepted view of the Roberts Court as "antibureaucracy . . . . oversimplifies the ideological movement that is underway in administrative law" and overlooks how the Court "defends and depends upon a vast adjudicative state to resolve millions of legal claims outside of Article III"); *see also* Emily R. Chertoff & Jessica Bulman-Pozen, *The Administrative State's Second Face*, 100 N.Y.U. L. REV. (forthcoming 2025) (manuscript at 103-04), https://perma.cc/Y7KG-29AG (arguing that the administrative state has two faces—"one turned toward the benefits and regulatory state, and one toward agencies that govern through physical

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This Article sheds light on the evolving mechanics of collaboration in deportation cases. It traces emerging developments in the circuit courts that could accelerate judicial disengagement with the day-to-day administration of immigration law and endow the agency with considerable power to decide cases as it pleases.[46] This Article also explores how these doctrinal developments could migrate beyond the immigration context and affect the court-agency relationship in other mass adjudication systems.[47] By engaging in this exploration, this Article responds to calls to better integrate the study of administrative and immigration law.[48]

Part I of this Article elaborates on the crisis in deportation adjudication and analyzes how courts have responded by applying classic administrative law tools of reasoned decision-making. Part II engages in a close reading of *Ming Dai*, unpacking both how that opinion claimed to apply existing review standards and how it engaged in a mode of analysis that gave short shrift to the judiciary's crucial quality-control function. Part III turns to the lower courts to document how some judges are capitalizing on *Ming Dai*'s ambiguities to transform judicial review in deportation cases. Subpart A canvasses these opinions and identifies doctrinal moves that would extend *Ming Dai* in dangerous directions. Subpart B explores the likely consequences if these approaches gain traction in the lower courts or find a receptive audience at the Supreme Court. Subpart C suggests ways for scholars and advocates to make sense of and respond to these emerging trends.

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force and surveillance"—and that the "much-discussed attack on the administrative state . . . is really an attack on only [the first] face"); K. Sabeel Rahman, *After* Chevron*: Political Economy and the Future of the Administrative State*, LAW & POL. ECON. PROJECT: LPE BLOG (July 23, 2024), https://perma.cc/T4L9-KV2C ("[T]he origins of these new doctrines of judicial power [in administrative law] . . . underscore how the dismantling of agency authority is targeted at those actions and agencies most central to checking concentrations of private power . . . . By contrast, th[e Supreme Court] has been exceedingly solicitous and protective of Executive power when deployed in other, more sinister ways: perpetuating the national security surveillance state, validating the Trump administration's 'Muslim ban,' and the like.").

46. *See infra* Parts III.B.1-.2. Another project in this genre is Nancy Morawetz's recent work, which identifies a new legal theory that the Office of the Solicitor General has deployed that would require courts to continue to defer to the legal interpretations of the Attorney General in immigration cases in a post-*Chevron* world. *See* Nancy Morawetz, *Immigration Law After* Loper Bright*: The Meaning of 8 U.S.C. § 1103(a)(1)*, 99 N.Y.U. L. REV. ONLINE 282, 282-87 (2024).

47. *See infra* Part III.B.3.

48. *See, e.g.*, Christopher J. Walker, *The Costs of Immigration Exceptionalism*, YALE J. ON REGUL.: NOTICE & COMMENT (Feb. 9, 2016), https://perma.cc/QU4J-WBV7.

I. Deportation Adjudication and Judicial Review

Today, most federal adjudication occurs before agencies rather than Article III courts.[49] Some of these agencies are sprawling, handling tens or even hundreds of thousands of cases every year.[50] These mass adjudication systems decide matters with profound stakes like "the rights of immigrants to asylum, the rights of veterans to just compensation for their service, and disabled workers' access to the social safety net."[51]

Courts play an important supervisory role over agency adjudication in what is known as the "appellate review model," where agencies "adjudicate factual and legal issues in the first instance, subject to [review] by Article III courts."[52] Under this model, federal courts annually review thousands of decisions arising from the administrative state's mass adjudication systems.[53]

However, the value of judicial review as an oversight mechanism is contested. In immigration scholarship, court review is generally lauded, and efforts to preclude or dilute judicial oversight are viewed with skepticism.[54] The principal rationales offered for judicial review are, first, that Article III courts counterbalance the tendency of the political branches to ignore the interests of politically powerless noncitizens;[55] and second, that deportation is a severe penalty that compels the type of fair and impartial adjudication associated with the Article III judiciary.[56]

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49. Christopher J. Walker, *Charting the New Landscape of Administrative Adjudication*, 69 DUKE L.J. 1687, 1693-94 (2020).

50. Gelbach & Marcus, *supra* note 24, at 1104 tbl.1 (listing various agency adjudication systems and their number of decisions in FY 2013).

51. Ames et al., *supra* note 8, at 5.

52. Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569, 1583 (2013).

53. Gelbach & Marcus, *supra* note 24, at 1100-02 ("The 7,225 cases immigrants filed in 2013, for instance, accounted for 12.8% of new federal appeals that year.").

54. *See, e.g.*, Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1630-31 (2000) (describing judicial review as "[i]ndispensable"); Jennifer Lee Koh, *Executive Defiance and the Deportation State*, 130 YALE L.J. 948, 963-64 (2021) (arguing that judicial review "allow[s] the judiciary to engage in broader oversight of the executive branch").

55. *See, e.g.*, Kevin R. Johnson, *A Handicapped, Not "Sleeping," Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CALIF. L. REV. 1259, 1292-96 (2008) (arguing that the electorate's tendency to disregard the wellbeing of minority immigrant communities requires stringent judicial review as a counterbalance).

56. *See, e.g.*, Am. Immigr. Council, Background on Judicial Review of Immigration Decisions 1 (2013), https://perma.cc/Q7W6-8S77 ("Court review provides necessary oversight of government decision-making—review which is essential in immigration cases given that a denied application or a removal order can mean separation from family in the United States or being returned to a country where a person fears for his life.").

In administrative law scholarship, by contrast, opinions on judicial review are decidedly more mixed, with "some of the most respected commentators in the field offer[ing] pointed and often biting criticism of the courts' place in the administrative process."[57] While much of this scholarship tends to focus on judicial review of rulemaking,[58] Jerry Mashaw, who devoted years of study to mass adjudication by the Social Security Administration (SSA), came to hold a fairly critical view of the effectiveness of judicial review as a quality control mechanism.[59] He opined that "the quality of administrative justice will not be improved significantly by the substantive or procedural interventions of courts responding to claims of individual legal or constitutional rights."[60] Mashaw's considerable influence over the field of administrative law might explain some of the deep-seated resistance to the notion that judicial review serves as an effective tool against maladministration in mass adjudication systems.[61]

In thinking through how to make sense of these different perspectives on the value of judicial review, a helpful observation comes from Thomas Miles and Cass Sunstein, who posit that the value of judicial review "cannot be settled in the abstract."[62] When a particular agency's "decisions are almost never arbitrary and never especially harmful even when arbitrary," judicial review might not be a useful allocation of scarce resources and could perhaps do more harm than good.[63] Conversely, when the conditions at an agency are such that its decisions are often "a product of bias and confusion," then "federal courts would provide an important ex post corrective and ex ante deterrent."[64]

In this, as in everything, context matters. Mashaw was skeptical of judicial review, but he came to his views largely through his work on the SSA, which, at the time of his study, had an "unusually hospitable environment," including

57. Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 690 (1990) (describing debates over both the availability and intensity of judicial review).

58. *See, e.g.*, Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717, 1730-33 (2012); Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013, 1014 (2000).

59. JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 226 (1983).

60. *Id.*

61. Gelbach & Marcus, *supra* note 24, at 1107-08 ("Decades later, [Mashaw's] claim continues to reverberate in discussions of whether the federal courts should review agency adjudication.").

62. Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 808-09 (2008).

63. *Id.* at 809.

64. *Id.*

"wide acceptance of its program, little politicization, little fear of high-salience disasters, a dedicated group of civil servants with esprit de corps, and no debilitating split in culture among its employees."[65] Conversely, immigration scholars writing today about judicial review are approaching the question with a very different exemplar agency in mind: an agency that is notoriously dysfunctional and politicized, and where agency leadership has exhibited little appetite for in-house quality control.[66]

Judge Richard Posner, not one to mince his words, famously referred to the immigration court system as the "least competent federal agency."[67] Little wonder, then, that scholars focused on this agency would see in judicial review a meaningful check on arbitrary and unjust agency decision-making.

Because the content and quality of adjudication at the agency can determine the value-add of judicial review, I turn now to describing the deportation adjudication system and its problems. I then describe the ways in which circuit courts have drawn on traditional administrative law principles to tackle the agency's systemic pathologies. This Part concludes by highlighting the connections between judicial review of deportation adjudication and administrative law's doctrine of hard look review.

A. The Structure of Deportation Adjudication

The immigration court system is housed within the Department of Justice in a sub-agency called the Executive Office for Immigration Review (EOIR).[68] The Immigration and Nationality Act (INA) vests power in immigration judges to conduct removal proceedings.[69]

65. Nicholas R. Parrillo, *Introduction: Jerry L. Mashaw's Creative Tension with the Field of Administrative Law*, *in* ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW 1, 6 (Nicholas R. Parrillo ed., 2017).

66. *See infra* Part I.B.

67. Chavarria-Reyes v. Lynch, 845 F.3d 275, 280 (7th Cir. 2016) (Posner, J., dissenting).

68. 6 U.S.C. § 521(a) (2012); U.S. Dep't of Just., Executive Office for Immigration Review: An Agency Guide 1 (2017), https://perma.cc/WGY7-D8SV.

69. 8 U.S.C. § 1229a(a)(1). There are exceptions to this requirement of a hearing in immigration court. *See, e.g.*, Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 193 (2017). A quick aside on nomenclature: "Removal" is a term of art in the INA that refers to the expulsion of a person from the United States. Laypeople tend to call such expulsions "deportations." Because "deportation" better captures the non-specialist's understanding of the issue under adjudication, I have chosen to use deportation in this Article even though it may strike experts as mildly imprecise. *See* KIT JOHNSON, IMMIGRATION LAW: AN OPEN CASEBOOK 32-33 (2022), https://perma.cc/24JC-5A7F (offering technical definitions of both deportation and removal as those terms are used in the INA).

In immigration court, an IJ must first determine whether a person is removable from the United States.[70] If a person is removable, they may be eligible to apply for relief from removal like asylum, adjustment of status, and cancellation of removal.[71]

After determining removability, the relief phase usually involves a hearing in immigration court where witnesses are examined and cross-examined, evidence is submitted, and arguments are made for and against relief.[72] A significant part of what the IJ does at the hearing is assess the credibility of witnesses "and determine whether their statements are plausible and internally consistent."[73]

The penalty that IJs wield—deportation—is enormously consequential. IJs "decide the fates of people fleeing persecution, including unaccompanied children who fear gang violence, and the futures of some people who have been living legally in the United States for so long that their native lands are a distant memory."[74] Despite the weighty stakes, the resources available to IJs are modest. In fiscal year (FY) 2023, 734 IJs[75] were responsible for adjudicating a staggering 526,382 cases.[76]

Once an IJ issues their decision, either the government or the noncitizen can appeal to the BIA, which is still housed within EOIR.[77] In FY 2020, parties appealed more than one in five IJ decisions.[78]

The BIA, like the immigration courts, is resource constrained. In recent years, approximately two dozen BIA members have been responsible for

70. U.S. Dep't of Just., *supra* note 68, at 1.

71. *See, e.g.*, Morales-Izquierdo v. Gonzales, 486 F.3d 484, 491 (9th Cir. 2007) (en banc); *see also* 8 U.S.C. § 1158 (asylum); 8 U.S.C. § 1229(b) (cancellation of removal; adjustment of status).

72. Nicholas R. Bednar, *The Public Administration of Justice*, 44 CARDOZO L. REV. 2139, 2163 & n.123 (2023); Koh, *supra* note 69, at 192.

73. Bednar, *supra* note 72, at 2163. Adverse credibility determinations can be devastating to an applicant's claim for immigration relief because an applicant's testimony is usually a central piece of evidence in the case, and an applicant is rarely capable of meeting their burden of proof without such testimony. *See generally* 8 U.S.C. §§ 1158(b)(1)(B)(ii)-(iii), 1229a(c)(4)(B)-(C), 1231(b)(3)(C) (establishing the relevant evidentiary burdens).

74. Marks, *supra* note 11.

75. Exec. Off. for Immigr. Rev., Adjudication Statistics: Immigration Judge (IJ) Hiring (2024), https://perma.cc/M85H-4M2N.

76. Exec. Office for Immigr. Rev., *supra* note 10.

77. 8 C.F.R. § 1003.1(a)(1), (b).

78. MUZAFFAR CHISHTI, DORIS MEISSNER, STEPHEN YALE-LOEHR, KATHLEEN BUSH-JOSEPH & CHRISTOPHER LEVESQUE, MIGRATION POL'Y INST., AT THE BREAKING POINT: RETHINKING THE U.S. IMMIGRATION COURT SYSTEM 2 (2023), https://perma.cc/6WJA-E6JH.

deciding between 20,000 and 34,000 appeals every year.[79] The structure of appellate review has changed "dramatically" in recent decades "to streamline case processing and reduce scrutiny of IJ decisions."[80] Significantly, these reforms have made single-member BIA opinions the "norm"—a change from historical practice when appeals were decided by multi-member panels.[81] Another notable change is that the BIA today reviews IJs' factual findings under a deferential clear-error standard of review, whereas previously the BIA reviewed such findings de novo.[82]

Once noncitizens receive administratively final decisions, they (but not the government) can seek judicial review directly in the circuit courts.[83] Courts apply de novo review to questions of law.[84] Until recently, they deferred to reasonable agency interpretations of ambiguous statutory provisions under the *Chevron* doctrine,[85] and it is as yet unclear what alternative interpretation regime will supplant *Chevron* in the immigration context.[86] Additionally,

79. Exec. Off. for Immigr. Rev., Adjudication Statistics: Case Appeals Filed, Completed, and Pending (2024), https://perma.cc/49ZD-A422. I say "approximately" because some BIA positions can stay vacant, and because the agency has the power to appoint temporary adjudicators to increase the Board's capacity. *See* 8 C.F.R. § 1003.1(a)(4); Carreon v. Garland, 71 F.4th 247, 252 (5th Cir. 2023). The number of permanent Board members has also fluctuated in recent years, increasing from twenty-one to twenty-three members in 2020, and twenty-three to twenty-eight members in 2024, and then decreasing from twenty-eight to fifteen members in 2025. *See* Reducing the Size of the Board of Immigration Appeals, 90 Fed. Reg. 15525, 15526 (Apr. 14, 2025).

80. Amit Jain, *Bureaucrats in Robes: Immigration "Judges" and the Trappings of "Courts,"* 33 GEO. IMMIGR. L.J. 261, 272 (2019); *see also* Faiza W. Sayed, *The Immigration Shadow Docket*, 117 NW. U. L. REV. 893, 903-05 (2023).

81. Jain, *supra* note 80, at 272-73 ("[S]ingle-member Board opinions remain the norm: [A] noncitizen today may receive review by a three-member panel only if their case falls into one of six unusual categories."); *see also* Sayed, *supra* note 80, at 903, 905.

82. *See* AM. BAR ASS'N COMM'N ON IMMIGR. POL'Y, PRAC. & PRO BONO, SEEKING MEANINGFUL REVIEW: FINDINGS AND RECOMMENDATIONS IN RESPONSE TO DORSEY & WHITNEY STUDY OF BOARD OF IMMIGRATION APPEALS PROCEDURAL REFORMS 2-4 (2003), https://perma.cc/TV7V-A393.

83. 8 U.S.C. § 1252(a)(5), (b)(2), (b)(9). For most cases, the BIA's decision marks the end of the administrative process. However, the Attorney General has the authority to refer cases to herself and adjudicate them afresh. 8 C.F.R. § 1003.1(h)(1)(i). This practice, known in administrative law as "agency-head review," is controversial. *See, e.g.*, Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1, 5 (2023).

84. *See, e.g.*, Lopez v. Garland, 116 F.4th 1032, 1036 (9th Cir. 2024).

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

86. *See* Morawetz, *supra* note 46, at 282-84 (describing and critiquing a novel theory identifying express statutory delegation to the Attorney General). *Compare Lopez*, 116 F.4th at 1038-39 (finding that the agency's interpretation of an INA provision that previously had been accorded *Chevron* deference is entitled to "respect under *Skidmore*"), *with* Moctezuma-Reyes v. Garland, No. 23-3561, 2024 WL 5194988, at *2-3 (6th Cir.

footnote continued on next page

courts also review adjudications for arbitrariness under the "arbitrary and capricious" standard of review.[87]

In some cases, and on some discretionary issues, Congress has limited federal court review to "constitutional claims or questions of law."[88] When courts may review factual findings, "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."[89] The Supreme Court has described this "standard of review [a]s the substantial-evidence standard,"[90] which courts use to review factfinding in a variety of administrative contexts.[91]

B. The Crisis of Deportation Adjudication

In recent years, the immigration court system has teetered on the "brink of collapse."[92] The problems at the agency are myriad but can be grouped into three general categories: (1) a pronounced lack of adjudicatory capacity; (2) the overt politicization of the adjudication process; and (3) inadequate in-house quality control mechanisms.

The first of these problems is that the immigration court system lacks the necessary capacity to meet the staggering number of cases it must complete.[93] This is, and has long been, the agency's "[b]asic [p]roblem."[94]

Even as IJs now churn through hundreds of thousands of cases every year,[95] the backlog in immigration court has mushroomed to over three million cases.[96] Former IJ Dana Leigh Marks testified to Congress that IJs "spend on average 36 hours a week on the bench. That leaves [the IJs] 4 hours a

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Dec. 23, 2024) (holding that after *Loper Bright*, the court "need[s] to independently assess the meaning of the statute[]").

87. *See* Judulang v. Holder, 565 U.S. 42, 55 (2011); Jimenez-Cedillo v. Sessions, 885 F.3d 292, 297-98 (4th Cir 2018).

88. 8 U.S.C. § 1252(a)(2)(D).

89. *Id.* § 1252(b)(4)(B).

90. Nasrallah v. Barr, 140 S. Ct. 1683, 1692 (2020).

91. *See, e.g.*, 5 U.S.C. § 706(2)(E) (substantial evidence review in formal agency action under the APA); 29 U.S.C. § 160(e) (substantial evidence review of decisions by the National Labor Relations Board); 42 U.S.C. § 405(g) (substantial evidence review of decisions of the Commissioner of Social Security).

92. AM. BAR ASS'N COMM'N ON IMMIGR., *supra* note 12, at 15.

93. Bednar, *supra* note 72, at 2166-75.

94. LENNI B. BENSON & RUSSELL R. WHEELER, ENHANCING QUALITY AND TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATION 24 (2012), https://perma.cc/6HTD-CPPA.

95. *See* Exec. Off. for Immigr. Rev., Adjudication Statistics: New Cases and Total Completions (2023), https://perma.cc/UT5K-GLBW.

96. *See Immigration Court Backlog*, *supra* note 12 (showing a backlog of over 3.6 million cases in FY 2025 as of April 2025).

week to read the materials submitted to us in cases, to read new legal developments, to read [t]he parties' briefs, as well as changes in country conditions."[97] The agency also staffs law clerks and administrative support staff extremely leanly, leaving IJs without the structural supports they need to manage their burgeoning caseloads.[98]

Adjudicators who are strapped for time cut corners out of necessity—they "may not spend as much time reviewing" briefing or record evidence, and they "may schedule more hearings than manageable in a single day."[99] And they are likely to resort to heuristics or stereotypes, predetermining case outcomes "based on the [person's] appearance, economic status, or demeanor in court."[100]

When it comes to issuing decisions, IJs often choose to "render only quick, oral decisions that often lack analysis and that often do not articulate the factual predicate for the decision."[101] Given the conditions in which deportation adjudication occurs, it is all but "inevitabl[e]" that the overall effect is one of "conveyor-belt justice."[102]

Adjudicators who have served as IJs readily acknowledge this entrenched problem of undercapacity.[103] One former IJ offered this vivid description:

97. *Executive Office for Immigration Review: Hearing Before the Subcomm. on Immigr., Citizenship, Refugees, Border Sec., and Int'l L. of the H. Comm. on the Judiciary*, 111th Cong. 83 (2010) (statement of Hon. Dana Leigh Marks, President, National Association of Immigration Judges).

98. Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1652 (2010) ("As of August 20, 2009, the 232 immigration judges shared only fifty-six law clerks—approximately one for every four immigration judges." (footnotes omitted)); Bednar, *supra* note 72, at 2170-73, 2188-90.

99. Bednar, *supra* note 72, at 2157.

100. *Id.* at 2158. The problem of relying on heuristics is magnified because recent presidential administrations have "disproportionately appointed IJs with backgrounds in immigration enforcement." Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control over Immigration Adjudication*, 108 GEO. L.J. 579, 621-22, 630 (2020). When relying on heuristics to streamline decision-making, adjudicators "internalize evidence that confirms their prior expectations and ignore evidence that contradicts those priors." Bednar, *supra* note 72, at 2158.

101. Andrew Tae-Hyun Kim, *Rethinking Review Standards in Asylum*, 55 WM. & MARY L. REV. 581, 614 (2013).

102. Legomsky, *supra* note 98, at 1656.

103. S. POVERTY L. CTR., THE ATTORNEY GENERAL'S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL 18 (2019), https://perma.cc/7LTM-R2MB (noting that one IJ described the training system as "profoundly disturbing" because of the imperative to "[d]o things as fast as possible" (quoting Hamed Aleaziz, *Being an Immigration Judge Was Their Dream. Under Trump, It Became Untenable*, BUZZFEED NEWS (Feb. 13, 2019), https://perma.cc/DPA3-67J5)); *id.* at 20 (collecting complaints from IJs that the "lack of resources . . . force[s IJs] to take on greater administrative responsibilities, reducing their available time to review evidence and deliberate upon cases"); *id.* at 21 (describing a system of "performance evaluations . . . [that] encourages quick slapdash justice").

"They come down a belt, you've got a big stamp, you stamp them on the forehead that says 'deport,' and away they go. The problem is you don't have time to grant relief and have a hearing . . . There is no judging."[104] Another IJ described her experience as "nightmarish," explaining that to tackle her "pending caseload [of] about 4,000 cases" she had only "about half a judicial law clerk and less than one full-time legal assistant to help" her.[105]

Empirical analysis of IJ decisions paints a similarly bleak picture. A recent study of more than five hundred IJ decisions found a widespread pattern of IJs "frequently committ[ing] basic errors in analyzing the law and facts, engag[ing] in baseless speculation and poor analysis, and demonstrat[ing] bias against applicants."[106]

Undercapacity is not the only systemic problem that plagues the agency. The second major problem that repeatedly crops up in the literature is a persistent concern over IJs' lack of decisional independence.[107] This is partly a structural issue that has long plagued EOIR.[108] "IJs do not enjoy the protections of Administrative Law Judges,"[109] and the process of IJ hiring has been

104. *Id.*

105. *Amid "Nightmarish" Case Backlog, Experts Call for Independent Immigration Courts*, AM. BAR ASS'N: NEWS (Aug. 9, 2019), https://perma.cc/Z35K-AFUD.

106. Karen Musalo, Anna O. Law, Annie Daher, Katherine M. Donato & Chelsea Meiners, *With Fear, Favor, and Flawed Analysis: Decision-making in U.S. Immigration Courts*, 65 B.C. L. REV. 2743, 2783 (2024). For an example of a "literally incomprehensible opinion by an immigration judge" which the BIA, "pursuant to the 'streamlining' regulation, . . . affirmed without opinion," see *Recinos De Leon v. Gonzales*, 400 F.3d 1185, 1187, 1193-96 (9th Cir. 2005). *See also id.* at 1193-96 (attaching as an appendix "[t]he IJ's opinion—which appears to be an unedited version of a badly transcribed, rambling set of oral observations"). For examples of bias infecting the adjudication process, see *Quinteros v. Attorney General of the United States*, 945 F.3d 772, 789 (3d Cir. 2019) (McKee, J., concurring). *See also id.* ("[I]t is difficult . . . to read this record and conclude that the Board was acting as anything other than an agency focused on ensuring Quinteros' removal rather than as the neutral and fair tribunal it is expected to be."); Cham v. Att'y Gen. of the U.S., 445 F.3d 683, 686 (3d Cir. 2006) ("The case now before us exemplifies the 'severe wound . . . inflicted' when not a modicum of courtesy, of respect, or of any pretense of fairness is extended to a petitioner and the case he so valiantly attempted to present." (quoting Iliev v. INS, 127 F.3d 638, 643 (7th Cir. 1997))).

107. *See* Mary Hoopes, *Judicial Deference and Agency Competence: Federal Court Review of Asylum Appeals*, 39 BERKELEY J. INT'L L. 161, 203 (2021) (describing "[a] well-developed body of scholarship [that] has emphasized the lack of decisional independence within immigration courts and the related politicization of adjudication").

108. *See* Legomsky, *supra* note 98, at 1665, 1667-75; Legomsky, *supra* note 13, at 372-74; Cox & Kaufman, *supra* note 3, at 1801-03.

109. Jain, *supra* note 80, at 275. Whether some of the statutory protections that administrative law judges (ALJs) enjoy will survive is an open question, with the Acting Solicitor General recently informing Congress that the current Trump administration believes that insulating ALJs from removal by the President is unconstitutional. *See* Charlie Savage, *Trump Claims Power to Fire Administrative Law Judges at Will*, N.Y. TIMES (Feb. 20, 2025), https://perma.cc/RM2A-TFJS.

criticized for being politicized, in contravention of norms around civil service hiring.[110]

Although the lack of decisional independence is a long-time concern, the problem came to a head during the first Trump administration. Previous administrations had shown some restraint when it came to directly influencing the adjudication of individual cases.[111] This restraint evaporated when President Trump took office in 2017. His administration spent the next four years transforming the immigration court system to advance a restrictionist vision for immigration policy.[112]

Scholars have extensively documented the frenzied changes made to the immigration court system during this period.[113] Measures included the politicized hiring of IJs and BIA members, the reassignment of IJs and BIA members whose views did not align with the administration's, and the introduction of individualized case quotas and performance metrics for IJs.[114]

This last development—the introduction of case quotas—proved especially controversial, with the IJs' union arguing that it was "tantamount to transforming a judge into an interested party in the proceedings."[115] Empirical analysis has since confirmed "that the quota policy successfully led [IJs] to issue more [deportation] orders . . . [and t]he post-policy change in behavior was

110. *See* OFF. OF PRO. RESP. & OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 137 (2008), https://perma.cc/6AD2-HNKR; Musalo et al., *supra* note 106, at 2755.

111. Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 708-09 (2019).

112. *See generally How the Trump Administration Broke the Immigration Court System*, AM. IMMIGR. LAWS. ASS'N (Apr. 19, 2021), https://perma.cc/3VU4-NP26 (compiling policies of the first Trump administration that "transformed the immigration courts into an enforcement agency rather than a fair and neutral arbiter").

113. This literature is vast. For a small sampling, see Cox & Kaufman, note 3 above, at 1802-03; Marouf, note 111 above, at 709, 714-15; Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1, 5-6 (2018); and Elise N. Blasingame, Christina L. Boyd, Roberto F. Carlos & Joseph T. Ornstein, *How the Trump Administration's Quota Policy Transformed Immigration Judging*, 118 AM. POL. SCI. REV. 1688, 1688, 1699-1700 (2024).

114. *See* Kim, *supra* note 113, at 6, 28-30 (listing changes in the immigration court system during the first Trump administration and explaining IJ hiring initiatives); Marouf, *supra* note 111, at 730-32 (detailing how the first Trump administration used the reassignment of IJs as a political tool and removed a case from one IJ's docket when he refused to order deportation); Blasingame et al., *supra* note 113, at 1688-89 (discussing the quota system).

115. *Strengthening and Reforming America's Immigration Court System: Hearing Before the Subcomm. on Border Sec. & Immigr. of the S. Comm. on the Judiciary*, 115th Cong. 7 (2018) (statement of J. A. Ashley Tabaddor, President, National Association of Immigration Judges).

strongest among those [IJs] who were less inclined, pre-policy, to issue [deportation] decisions."[116] As this Article is being finalized for publication, it appears as though the second Trump administration will once again seek to implement sweeping personnel and policy changes at EOIR.[117]

A third, structural problem with EOIR is the lack of meaningful quality control mechanisms. The BIA is often ineffective at remedying trial-level error; many observers believe that streamlining efforts in the early 2000s undermined the BIA's ability to superintend immigration courts.[118]

Relatedly, the BIA also suffers from its own under-resourcing problems. At some points in recent decades, BIA members were estimated to spend only seven to ten minutes per administrative appeal, hardly a recipe for sound and reasoned decision-making.[119] Although the situation has improved—more recent estimates suggest that BIA members spend an average of an hour per appeal[120]—"short opinions by single members" remain "the dominant form of decision making . . . . [T]hey can be as short as two or three sentences, even when the issues would appear to merit a longer discussion."[121]

Scholars have also documented how agency management has exhibited a "near-total disregard for quality assurance initiatives."[122] Jerry Mashaw, whose skepticism of judicial review I have previously described,[123] viewed quality assurance systems as essential to systemic accuracy in mass adjudication systems.[124] He argued that agencies must develop quality control standards, evaluate adjudication against those standards, and develop managerial solutions that increase the accuracy of decision-making.[125] Against this

116. Blasingame et al., *supra* note 113, at 1688.

117. *See supra* note 16.

118. Legomsky, *supra* note 98, at 1657-65; Stacy Caplow, *After the Flood: The Legacy of the "Surge" of Federal Immigration Appeals*, 7 NW. J.L. & SOC. POL'Y 1, 4-6 (2012). *But see* Edward R. Grant, *Laws of Intended Consequences: IIRIRA and Other Unsung Contributors to the Current State of Immigration Litigation*, 55 CATH. U. L. REV. 923, 950-52, 962-63 (2006) (arguing that critiques of streamlining efforts are exaggerated).

119. Gelbach & Marcus, *supra* note 24, at 1111 (citing Kadia v. Gonzales, 501 F.3d 817, 820 (7th Cir. 2007) (Posner, J.)).

120. Sayed, *supra* note 80, at 945.

121. Legomsky, *supra* note 98, at 1657 (quoting AM. BAR ASS'N COMM'N ON IMMIGR., REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 32 (2010), https://perma.cc/32MJ-7EUR).

122. Ames et al., *supra* note 8, at 40.

123. *See supra* notes 59-61 and accompanying text.

124. MASHAW, *supra* note 59, at 15, 149.

125. Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 791-804 (1974).

backdrop, "EOIR's near-total lack of quality-monitoring efforts reflects an agency unconcerned with accountability for poor quality."[126]

C. Judicial Review of an Agency in Crisis

Since the mid-2000s, coinciding with the BIA's efforts to "streamline" the administrative appeals process, federal circuit courts have been "inundated with immigration-related cases."[127] Between 2013 and 2021, judicial review was sought for more than one in four BIA decisions.[128] In 2020, appeals from the BIA "constituted the largest category of administrative agency appeals in every circuit except the D.C. Circuit."[129]

Circuit courts, which now routinely review thousands of deportation cases every year, have a front-row seat to the crisis in the immigration court system.[130] And many federal judges are deeply troubled by what they are seeing.[131] Judge Posner of the Seventh Circuit has been especially unforgiving in his characterization of the immigration court as the "least competent federal agency."[132] But elsewhere, he has adopted a more sympathetic tone, recognizing that the "avalanche of asylum claims has placed unbearable pressures on the grossly understaffed Immigration Court" and this "crushing workload" at the agency is responsible for causing "[r]epeated egregious failures."[133]

Judge Walker, former chief judge of the Second Circuit, testified before Congress that he could not see how IJs can "be expected to make thorough and competent findings of fact and conclusions of law under these

126. Ames et al., *supra* note 8, at 47.

127. CHISHTI ET AL., *supra* note 78, at 18; Legomsky, *supra* note 98, at 1646 (describing how the BIA's reforms "triggered a flood of petitions for review in the courts of appeals"); Caplow, *supra* note 118, at 5.

128. CHISHTI ET AL., *supra* note 78, at 18.

129. *Id.*

130. *See* U.S. Cts., U.S. Courts of Appeals—Sources of Appeals, Original Proceedings, and Miscellaneous Applications Commenced, by Circuit, During the 12-Month Periods Ending September 30, 2018 Through 2022, tbl.B-3 (2022), https://perma.cc/73T5-W6P8; U.S. Cts., U.S. Courts of Appeals—Sources of Appeals, Original Proceedings, and Miscellaneous Applications Commenced, by Circuit, During the 12-Month Periods Ending September 30, 2016 Through 2020, tbl.B-3 (2020), https://perma.cc/MB33-TBYF.

131. CHISHTI ET AL., *supra* note 78, at 18 ("Federal appeals courts have used sharp language in criticizing the quality of BIA and IJ decisions.").

132. Chavarria-Reyes v. Lynch, 845 F.3d 275, 280 (7th Cir. 2016) (Posner, J., dissenting).

133. Kadia v. Gonzales, 501 F.3d 817, 820-21 (7th Cir. 2007).

circumstances."[134] This is particularly true, he has noted, given that hearings in immigration court "are highly fact-intensive and depend upon the presentation and consideration of numerous details and documents to determine issues of credibility and to reach factual conclusions."[135] Judge Bea of the Ninth Circuit has explained that it is to be expected that IJs will not be particularly thorough and "review all the documents in the record" given the sheer volume of their workload.[136] Former Judge Martin of the Sixth Circuit has expressed concern about "the significantly increasing rate at which [deportation] adjudication lacking in reason, logic, and effort from other immigration courts is reaching the federal circuits."[137]

These are a small sampling of the "unprecedented scathing criticisms that so many U.S. courts of appeals have leveled at EOIR."[138] As federal courts' exposure to immigration cases increased, "so did judicial awareness and intolerance of the flaws of immigration adjudication."[139] Although cases that make it to the judicial review stage comprise only a small fraction of the total cases the agency adjudicates,[140] the absolute number of such appeals,

134. *Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 5 (2006) (statement of John M. Walker, Jr., Chief Judge, U.S. Court of Appeals for the Second Circuit), https://perma.cc/37WG-STTJ.

135. Katherine McIntire Peters, *Justice Overwhelmed*, GOV'T EXEC. (July 15, 2006), https://perma.cc/PU9U-8HMY.

136. *Improving the Immigration Courts: Effort to Hire More Judges Falls Short*, TRAC IMMIGR. (July 28, 2008), https://perma.cc/CRB5-9MMA.

137. N'Diom v. Gonzales, 442 F.3d 494, 500 (6th Cir. 2006) (Martin, Jr., J., concurring).

138. Legomsky, *supra* note 98, at 1645.

139. Caplow, *supra* note 118, at 27.

140. From 2019 to 2023, the percentage of circuit cases with BIA as the source remained between 0.7-4.75%.

FY	Total Case Completions at EOIR	Cases Commenced in the Circuit Courts with BIA as the Source
2019	277,085	5,112
2020	232,259	6,067
2021	115,910	5,510
2022	314,409	4,399
2023	523,477	3,606

For case completions at EOIR, see Exec. Off. for Immigr. Rev., note 95 above. For cases commenced at the circuits, see U.S. Cts., U.S. Courts of Appeals—Sources of Appeals, Original Proceedings, and Miscellaneous Applications Commenced, by Circuit, During the 12-Month Periods Ending September 30, 2019 Through 2023 tbl.B-3 (2023), https://perma.cc/YE42-J4RV.

numbering in the thousands annually,[141] means that reviewing courts have a broad window into the problems that plague the agency.

Federal court review of a large number of deportation cases every year has led scholars to argue that courts should approach their review function not just with an eye toward fixing individual errors but also toward addressing systemic problems in the adjudication process.[142] Jonah Gelbach and David Marcus have dubbed this type of judicial review "problem-oriented oversight."[143] They define problems "as systematic underlying pathologies in internal agency administration that afflict adjudication," and argue that courts can both identify such problems and partner with the agency to fix them.[144] Drawing on empirical findings from both the deportation and social security contexts, they show that federal courts are already engaged in versions of problem-oriented oversight.[145]

Gelbach and Marcus's theory of problem-oriented oversight underscores how judicial review can function as a type of quality control, which is especially valuable in the deportation adjudication context in which intra-agency quality assurance mechanisms are lacking.[146] Given the high volume of cases they review, federal courts play a pattern-spotting and problem-solving role that scholars like Mashaw have previously identified as an in-house managerial responsibility.[147]

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141. *See supra* note 140.

142. *See* Gelbach & Marcus, *supra* note 24, at 1101; *see also* Christopher J. Walker & James R. Saywell, *Remand and Dialogue in Administrative Law*, 89 GEO. WASH. L. REV. 1198, 1231-32 (2021) ("In a system where the ordinary remand rule is routinely followed, we should see better agency decisions . . . . [The ordinary remand rule] becomes a tool for judicial engagement and greater judicial oversight of the administrative state."); Hoopes, *supra* note 107, at 164 (asserting that courts should be able to identify "agencies in crisis" and use less deferential standards of review to reveal and remedy recurring problems in those agencies' adjudications).

143. Gelbach & Marcus, *supra* note 24, at 1101.

144. *Id.* at 1135.

145. *Id.* at 1101-03, 1130-31.

146. *See supra* Part I.B.

147. *See* Mashaw, *supra* note 125, at 791. There is evidence that the agency relies on court review to help with quality control measures, such as identifying IJs who engage in problematic decision-making. *See* Gelbach & Marcus, *supra* note 24, at 1157 & n.330 (describing a Department of Justice "policy of initiating an investigation any time a federal court of appeals identifies an IJ by name in an opinion"); Brief of Thirty-Five Former Immigration Judges and Members of the Board of Immigration Appeals as Amici Curiae in Support of Respondents at 14, Rosen v. Ming Dai, 141 S. Ct. 1234 (2021) (Nos. 19-1155 & 19-1156), 2021 WL 146886 (describing how agency management in some immigration courts uses federal court remands as a way to identify IJs who repeatedly make erroneous credibility determinations); *see also* ROBERT J. HUME, HOW COURTS IMPACT FEDERAL ADMINISTRATIVE BEHAVIOR 107-08 (2009) (concluding, based on an empirical study of agency responsiveness to federal court review, including BIA,

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In the deportation adjudication context, two widely used judicial tools that fit the mold of problem-oriented oversight are the standard administrative law requirements of reasoned decision-making,[148] which I call the consideration and explanation requirements.[149] These are the requirements that adjudicators (1) demonstrate meaningful consideration of evidence in the record, and (2) offer adequate explanations supporting their ultimate conclusions. Both requirements are tools that courts across the country deploy when reviewing deportation determinations.[150]

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that "opinion language [from federal courts] is important, even if it is not the only influence on administrative behavior"). IJs also report being motivated by reputational concerns such as "fear that every decision or proceeding may trigger a 'personalized' and scathing published criticism from the reviewing circuit court." Stuart L. Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57, 71 (2008).

148. *See* COX & RODRIGUEZ, *supra* note 21, at 229-30 ("The requirement that agency decisions be backed by reasons is a core feature of American administrative law.").

149. These types of doctrinal tools are not necessarily what Gelbach and Marcus had in mind in their discussion of problem-oriented oversight. Their focus is on higher-visibility interventions, which they describe as courts breaking from the "often boring and repetitive" work of reviewing decisions to provide "extraordinary commentary on patterns or trends they have observed." Gelbach & Marcus, *supra* note 24, at 1129. But as I detail here, courts also rely on far more ubiquitous review mechanisms that are tailored toward entrenched pathologies in the system. *Cf.* Hoopes, *supra* note 107, at 196 (making a similar claim about courts using "the elastic nature of the appellate review system" "to spur agency action" and tackle systemic problems).

150. Immigration practitioners who focus on deportation litigation in the federal courts will no doubt be familiar with these tools, which are frequently the subject of litigation. One leading treatise describes as standard practice, for example, that "agency opinion[s] must . . . be specific and must state with sufficient particularity and clarity the reasons for denial." IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 2051 (17th ed. 2020); *id.* at 2051, 2053 (elaborating on the reasoned decision-making requirement and listing cases where courts apply the requirement). Similarly, another treatise geared toward practitioners who litigate immigration cases in the federal courts identifies opinions from every circuit court in which the court mandates that the agency provide clear and cogent reasons for its decision and/or meaningfully consider the evidence in the record. ROBERT PAUW, LITIGATING IMMIGRATION CASES IN FEDERAL COURT 142-44 (6th ed. 2022) (collecting cases across all circuit courts that recognize and apply one or both of these requirements). The Ninth Circuit, which maintains a robust immigration "outline" for practitioners, also lists the agency's failure to provide a reasoned explanation and failure to consider arguments or evidence as common grounds to attack deportation orders. NINTH CIR., JURISDICTION OVER IMMIGRATION PETITIONS, PROCEDURAL RULES, AND STANDARDS OF REVIEW 125-26 (2023), https://perma.cc/72CK-SGNY. Beyond these practitioner-geared sources, evidence for the ubiquity of the explanation and consideration requirements comes from recent work by Mary Hoopes, who studied over 2,000 deportation cases decided across five circuit courts. *See* Hoopes, *supra* note 107, at 173-74. As her work documents, circuit court decisions remanding deportation orders, particularly those issued by the Seventh and Ninth Circuits, frequently turn on these two requirements. *See id.* at 184-86, 189-90. Other scholars, too, have noted anecdotally how circuit courts have repeatedly "singled out the agency's repeated failures to provide reasoned

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When the entrenched pathology in the agency is under-resourcing, the consideration and explanation requirements target the underlying problems within the agency—adjudicators who cut corners, rely on biased heuristics, or skim over the evidence that noncitizens submit.[151] By reversing decisions that are not well explained and that do not demonstrate serious engagement with the evidentiary record, judges incentivize adjudicators to give cases more careful consideration.[152] Careful consideration, in turn, can improve decisional quality by making agency determinations more thorough and measured, and by pushing adjudicators to weigh counterarguments and alternatives.[153]

The consideration and explanation requirements can also help identify deportation decision-making that is the product of undue political influence.[154] A reason-giving requirement can root out "illegitimate reasons when they are the only plausible explanation for particular outcomes."[155] And by reducing the likelihood that a deportation determination turns on illegitimate factors, the consideration and explanation requirements encourage adherence to factors that Congress intended for the agency to apply.[156] So, for example, when political appointees pressure IJs to rush through cases,[157] the consideration and explanation requirements exert counterpressure that helps

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explanations—or indeed any explanations—for its decisions." Shruti Rana, *"Streamlining" the Rule of Law: How the Department of Justice Is Undermining Judicial Review of Agency Action*, 2009 U. ILL. L. REV. 829, 834 (2009).

151. *See supra* Part I.B.

152. *See* Valarezo-Tirado v. Att'y Gen. of the U.S., 6 F.4th 542, 549 (3d Cir. 2021) ("[C]rowded dockets or a backlog of cases" do not "allow an IJ or the BIA to dispense with an adequate explanation . . . merely to facilitate or accommodate administrative expediency.").

153. *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 657 (1995) ("[W]hen institutional designers have grounds for believing that decisions will systematically be the product of bias, self-interest, insufficient reflection, or simply excess haste, requiring decisionmakers to give reasons may counteract some of these tendencies."); EDWARD STIGLITZ, THE REASONING STATE 140 (2022) ("[T]he time required to provide reasons may slow down actors' thinking, allowing them to access considerations that would not otherwise be available to influence behavior."); Legomsky, *supra* note 98, at 1663 ("A reasoned opinion . . . . requires the adjudicator to consider the arguments of the losing side with care . . . . [T]he very process of writing an opinion forces adjudicators to confirm that their tentative conclusions are the ones most compatible with the evidence and the law.").

154. JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT 106 (2018) (emphasizing reason-giving and requiring that agencies' "decisions be factually supported," courts ensure that administrative action is "protect[ed] against political direction by a chief executive").

155. Schauer, *supra* note 153, at 658.

156. Daniel T. Deacon, *Responding to Alternatives*, 122 MICH. L. REV. 671, 689 (2024).

157. *See supra* Part I.B.

ensure that the adjudication process does not cut off people from accessing deportation relief to which they are statutorily entitled.

Scholars have observed that some judges have ratcheted up their scrutiny of deportation orders as the adjudication crisis at the agency has deepened.[158] What this means, concretely, for the consideration and explanation requirements is that these judges are unwilling to accept minimal or boilerplate analysis that IJs and the BIA often supply in support of their determinations, instead requiring analysis from the agency that bears some hallmarks of logic and coherence.[159] Additionally, many judges are skeptical when the agency professes familiarity with the record but fails to engage with it explicitly, instead requiring a demonstration that adjudicators meaningfully considered material record evidence.[160]

Normatively, scholars who have observed these developments in judicial review of deportation adjudication have viewed them favorably, arguing that

158. *See, e.g.*, Hoopes, *supra* note 107, at 207 (noting how some courts "have engaged in closer scrutiny in response to repeated signals that the quality of adjudication was compromised"); Michael Kagan, *Dubious Deference: Reassessing Appellate Standards of Review in Immigration Appeals*, 5 DREXEL L. REV. 101, 158 (2012) ("[S]ome judges in immigration appeals rely on the inherent ambiguities of the deference doctrine and appear not to defer to the BIA much at all."); *cf.* Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 88 & n.64 (2011) (arguing that courts that more frequently review an agency's decisions uphold that agency's actions less frequently).

159. *See, e.g.*, Poradisova v. Gonzales, 420 F.3d 70, 77 (2d Cir. 2005) ("[W]e require a certain minimum level of analysis from the IJ and BIA opinions denying asylum, and indeed must require such if judicial review is to be meaningful."); E.A.C.A. v. Rosen, 985 F.3d 499, 508 (6th Cir. 2021) ("One sentence is insufficient to analyze [petitioner's] claim . . . especially given the evidence she offered in support of her eligibility . . . . [W]e may not presume the BIA's reasoning when it has failed to provide any explanation."); Gonzalez-Vega v. Lynch, 839 F.3d 738, 741 (8th Cir. 2016) ("Although the BIA need not write an exegesis on every contention a movant advances, it must give an explanation specific enough that we can discern and evaluate its reasoning."); Ayala v. U.S. Att'y Gen., 605 F.3d 941, 948 (11th Cir. 2010) ("The Board and the immigration judge are not required to 'address specifically each claim the petitioner made or each piece of evidence the petitioner presented,' but they must 'consider the issues raised and announce [their] decision in terms sufficient to enable a reviewing court to perceive that [they] ha[ve] heard and thought and not merely reacted.'" (quoting Tan v. U.S. Att'y Gen., 446 F.3d 1369, 1374 (11th Cir. 2006))).

160. *See, e.g.*, Cole v. Holder, 659 F.3d 762, 771-72 (9th Cir. 2011) ("[W]here there is any indication that the BIA did not consider all of the evidence before it, a catchall phrase [that the agency considered all the evidence before it] does not suffice . . . ."); Gjerazi v. Gonzales, 435 F.3d 800, 813 (7th Cir. 2006) ("Like all asylum applicants, [petitioner] is entitled to a well-reasoned, documented, and complete analysis that engages the evidence he presented, particularly the ample evidence demonstrating a political motivation for his persecution.").

they are an appropriate response to the crisis in adjudication.[161] But more intense review of deportation adjudication is not without its detractors. Cases in which circuit courts have rigorously applied the consideration or explanation requirements have long drawn sharp dissents from judges who attack their colleagues on the bench for impermissibly imposing their own policy preferences on the agency.[162]

D. Shades of Hard Look Review

These debates over the intensity of judicial review in the deportation context resemble longstanding debates about the desirability and legality of

161. *See* Shruti Rana, Chevron *Without the Courts?: The Supreme Court's Recent* Chevron *Jurisprudence Through an Immigration Lens*, 26 GEO. IMMIGR. L.J. 313, 332 (2012) ("[T]he judicial role is not only an important one, but becomes highly significant in light of agency degeneration."); Kim, *supra* note 101, at 586 (arguing that in light of the agency's systemic under-resourcing problem, circuit courts should, in many cases, review the agency's fact-finding less deferentially); Hoopes, *supra* note 107, at 207 (viewing judicial review from circuits that have increased their scrutiny of deportation adjudication "in response to repeated signals that the quality of adjudication was compromised" favorably and asserting that this "approach better fulfills the legitimizing function of judicial review").

162. *See, e.g.*, Dia v. Ashcroft, 353 F.3d 228, 262 (3d Cir. 2003) (en banc) (Alito, J., concurring in part and dissenting in part) (asserting that while "the Court pays lip service to the very limited standard of review . . . the Court in effect inverts that standard and refuses to sustain the IJ's credibility finding, not because a reasonable adjudicator could not find that [petitioner] lacked credibility, but because, in the Court's view, a reasonable fact finder could make a contrary finding"); Abovian v. INS, 257 F.3d 971, 980-81 (9th Cir. 2001) (Kozinski, J., dissenting from the denial of rehearing en banc) ("[T]his case is hardly atypical of our circuit's immigration law jurisprudence. Rather, it is one more example of the nitpicking we engage in as part of a systematic effort to dismantle the reasons immigration judges give for their decisions . . . . None of this has anything to do with administrative law, as that concept is known anywhere outside the Ninth Circuit."); Ming Dai v. Barr, 940 F.3d 1143, 1149 (9th Cir. 2019) (Trott, J., respecting the denial of rehearing en banc) (asserting that stringent review causes "significant damage . . . to the [INA] and to Congress' attempt to stop us from substituting our judgment for the Board's"); *see also* Kim, *supra* note 101, at 586, 592 (documenting how judges on the Second Circuit have been sharply divided over how rigorous substantial-evidence review in asylum cases should be). These debates about the proper role of courts in the deportation system are not new. *See, e.g.*, Wang v. INS, 622 F.2d 1341, 1352 (9th Cir. 1980) (Goodwin, J., dissenting) (contending that judicial intervention in deportation cases amounted to constricting the "broad discretion" that Congress vested in INS); Katherine L. Vaughns, *Taming the Asylum Adjudication Process: An Agenda for the Twenty-First Century*, 30 SAN DIEGO L. REV. 1, 56 (1993) (describing how courts became "increasingly interventionist" in asylum cases in the 1980s "because of a growing mistrust of the INS" which "grew more pronounced during the eighties, as the Reagan administration implemented controversial policies designed to stem the tide of asylum-seekers coming into this country").

administrative law's "hard look review."[163] That doctrine, which found purchase at the Supreme Court in its famous *State Farm* decision,[164] requires "a court [to] assess[] whether the agency examined relevant data and offered a satisfactory explanation for its policy choices that is 'based on . . . relevant factors' and does not 'fail[] to consider an important aspect of the problem' or 'run counter to the evidence.'"[165] The consideration and explanation requirements are core elements of hard look review.[166]

Judges on the D.C. Circuit were at the forefront of developing the hard look doctrine in the mid-twentieth century under circumstances similar to the ones just described: "[H]ard look review took hold just as the number of administrative law cases coming to the courts was exploding," and as courts were "increasingly called upon to review the alleged mistakes of agencies."[167] Judges responded by developing review mechanisms that both facilitated a meaningful role for themselves[168] and targeted what they perceived to be recurring problems in agencies with which they were becoming increasingly familiar through repeat exposure.[169]

The rationales offered for hard look review are also familiar. Judge Harold Leventhal of the D.C. Circuit, who was an early champion of this mode of review,[170] described courts as operating in "partnership"[171] with the agency as "collaborative instrumentalities of justice."[172] He explained that the reasoned decision-making requirements that hard look review imposes "releas[e]" administrative decision-making from the "clutch of unconscious preference

163. *See* Kim, *supra* note 101, at 641-43 (suggesting that the intensification of judicial review of deportation cases is "akin" to the development of hard look review under the APA).

164. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983); Miles & Sunstein, *supra* note 62, at 763.

165. Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1299 (2012) (quoting *State Farm*, 463 U.S. at 43).

166. *See* Cass R. Sunstein, *In Defense of the Hard Look: Judicial Activism and Administrative Law*, 7 HARV. J. L. & PUB. POL'Y 51, 52 (1984) (describing four "devices" of hard look review, which are the requirements of "reasoned explanation," "adequate consideration," "consistency," and "[t]he prohibition on arbitrariness").

167. Patrick M. Garry, *Judicial Review and the "Hard Look" Doctrine*, 7 NEV. L.J. 151, 167 (2006).

168. *See id.*

169. *See* Gillian E. Metzger, *The Story of* Vermont Yankee*: A Cautionary Tale of Judicial Review and Nuclear Waste*, *in* ADMINISTRATIVE LAW STORIES 125, 145 (Peter L. Strauss ed., 2006).

170. *Id.* at 146 (explaining that Judge Leventhal "coined the phrase 'hard look' review").

171. Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) (quoting Niagara Mohawk Power Corp. v. Fed. Power Comm'n, 379 F.2d 153, 160 n.24 (D.C. Cir. 1967)).

172. *Id.* at 851-52 (quoting United States v. Morgan, 313 U.S. 409, 422 (1941)).

and irrelevant prejudice."[173] Requiring reason-giving, according to Judge Leventhal, encourages agencies to make "reflective findings, in furtherance of evenhanded application of law, rather than impermissible whim, improper influence, or misplaced zeal."[174]

Echoing the sentiment, Merrick Garland, who would later go on to oversee EOIR as Attorney General, defended hard look review as "particularly well suited to dealing with . . . inconsistencies generated by lack of awareness or care, or by the influence of 'unconscious preference or irrelevant prejudice.'"[175] These are, of course, the sorts of problems endemic to the immigration court system, and the problems to which courts are responding by rigorously enforcing the consideration and explanation requirements.[176] Garland argued that by emphasizing such requirements, hard look review "impose[s] a measure of discipline" that "force[s] decisionmakers to focus on the distinctions they draw, facilitating the elimination of irrationality and carelessness from the administrative process."[177]

As it has become an entrenched feature of administrative law, hard look review has generated considerable backlash, much of which has focused on the doctrine's effects on rulemaking.[178] Often this criticism involves claims that too much reason-giving and record-building ossifies the administrative process, making it "too slow, expensive, and cumbersome."[179] Relatedly, hard

173. *Id. at* 852.

174. *Id.*

175. Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 553 (1985) (quoting *Greater Bos. Television Corp.*, 444 F.2d at 852).

176. *See supra* Parts I.B-.C.

177. Garland, *supra* note 175, at 553.

178. *See, e.g.*, Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the "Hard Look,"* 92 NOTRE DAME L. REV. 331, 352 n.122, 352-54 (2016) (summarizing academic criticism of effects of hard look review on rulemaking and collecting examples of such criticism). Others have come to the doctrine's defense. *See, e.g.*, Sunstein, *supra* note 166, at 58-59 (arguing that hard look review was "contemplated by the [APA], and there is reason to suspect that it is favored by the political branches of the government" and also that the doctrine "promote[s] identification and implementation of the values at stake in regulation").

179. Shapiro & Murphy, *supra* note 178, at 352; *cf.* JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 225 (1990) ("The result of judicial requirements for comprehensive rationality has been a general suppression of the use of rules."). For a more general version of this point, see Cristina M. Rodríguez, *The Supreme Court, 2020 Term—Foreword: Regime Change*, 135 HARV. L. REV. 1, 106-07 (2021) ("[T]he expectation that the government rigorously explain changes in its policies to satisfy a rationalist standard relies in various ways on fictions that can inhibit policy change and thus the concrete realization of democratic politics.").

look review is also criticized for judicializing rulemaking, which critics argue contributes to making the process cumbersome and inefficient.[180]

Another attack on hard look review is that it lacks "legal foundations."[181] In the first half of the twentieth century, courts reviewing administrative decision-making for arbitrariness applied a standard that was more akin to rational basis review, where the agency's decision would be upheld if there was any conceivable basis to support it.[182] Scholars have argued that there is no provision of law that authorizes courts to ratchet up judicial review from this requirement of minimum rationality.[183]

Scholars have also pointed to the incongruity between hard look review and the more hands-off approach associated with the Supreme Court's seminal decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, which held that courts may not impose procedural requirements on agencies that lack a statutory basis "[a]bsent constitutional constraints or extremely compelling circumstances."[184] These scholars await a *Vermont Yankee II* in which the Supreme Court rules that rigorous enforcement of the consideration and explanation requirements are judicial innovations that courts lack the power to enforce (or, at least, to enforce too stringently).[185]

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180. *See* Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 116-17 (2003); Cross, *supra* note 58, at 1020-21; *see also* Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1296 (2017) ("[A] repeated complaint laid against judicial review of administrative action is that courts have failed to consider how judicial doctrines affect agencies internally and misguidedly sought to remake administrative agencies in a judicial rather than bureaucratic image.").

181. Miles & Sunstein, *supra* note 62, at 762.

182. *See* Metzger, *supra* note 165, at 1299 & n.25; Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 893-94 (2020).

183. GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 700 (6th ed. 2013) (arguing that the APA "clearly intended to codify preexisting law, which consistently interpreted the phrase 'arbitrary or capricious' to permit only the most minimal judicial review of agency decisions" (citation omitted)).

184. 435 U.S. 519, 543 (1978). *Vermont Yankee* arose in the context of informal rulemaking but has since been extended to the context of informal adjudication. *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 653-56 (1990).

185. Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for* Vermont Yankee II, 55 TUL. L. REV. 418, 419 (1981) ("If the Court is serious about preserving the outcome of *Vermont Yankee*, it must add to its procedural decision a substantive one, modifying the expansive scope of review standard that allows reviewing courts to build a record in informal proceedings."); Richard J. Pierce, Jr., *Waiting for* Vermont Yankee II, 57 ADMIN. L. REV. 669, 670 (2005) ("Verkuil argued persuasively that the circuit court practice of applying 'hard look' review to some agency actions had the same serious adverse effects as the practice the Court held unlawful in *Vermont Yankee* and that application of the 'hard look' doctrine was as unsupportable by reference to statutes and the Constitution as was the practice the Court held unlawful in *Vermont Yankee*."); Richard J. Pierce, Jr., *Waiting for* Vermont Yankee III, IV, *and* V?: *A Response to*

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Despite these criticisms, hard look review endures in administrative law without the Supreme Court ever repudiating its decision in *State Farm*.[186] But as the remainder of this Article explores, some of the criticisms leveled against hard look review are manifesting in judicial pushback to rigorous review of deportation adjudication.

II. The Decisions in *Ming Dai*

In 2021, the Supreme Court issued its unanimous decision in *Garland v. Ming Dai*,[187] to little critical commentary.[188] But even as the case has flown under the scholarly radar, it has unleashed efforts in the lower courts to transform judicial review of deportation adjudication. To situate those developments, which are the focus of Part III below, this Part engages in a close reading of the Ninth Circuit and Supreme Court opinions in *Ming Dai*, highlighting the very different conceptualizations of the judicial role those opinions reflect.

A. The Ninth Circuit's Hard Look

In 2020, the Supreme Court granted the government's petitions for certiorari in *Ming Dai*[189] and a companion case, *Garland v. Alcaraz-Enriquez*, to consider what the government characterized as an idiosyncratic rule that the Ninth Circuit applies when reviewing credibility determinations in deportation cases.[190] The Ninth Circuit has long held that when the agency

Beermann and Lawson, 75 GEO. WASH. L. REV. 902, 906 (2007) ("Hard-look review . . . arose through the same kind of arrogant and illegitimate judicial decision-making process that spawned the practice the Court condemned in *Vermont Yankee*."); *see also* Metzger, *supra* note 169, at 162 ("[O]n *Vermont Yankee*'s own reasoning, the rational administrative response to searching substantive review is to act preemptively by developing an exhaustive record, responding to every possible later judicial objection, which imposes delay and limits the flexibility of informal rulemaking in the same way as does judicial procedural scrutiny.").

186. The exact intensity of review under the hard look doctrine is contested. Jacob Gersen and Adrian Vermeule, for example, have questioned the conventional wisdom that arbitrariness review is as searching as scholars make it out to be. Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1356, 1358 (2016).

187. 141 S. Ct. 1669, 1673 (2021).

188. *See supra* note 35 and accompanying text (noting little scholarly attention has been paid to *Ming Dai* with the exception of two recent works).

189. Barr v. Ming Dai, 141 S. Ct. 221, 221 (2020) (granting writ of certiorari). By the time the case was decided by the Supreme Court, the Attorney General had changed, and the case name became *Garland v. Ming Dai*. 141 S. Ct. 1669.

190. Barr v. Alcaraz-Enriquez, 141 S. Ct. 222, 222 (2020); Petition for Writ of Certiorari at 13-14, Ming Dai, 141 S. Ct. 221 (No. 19-1155), 2020 WL 1373149; *see also* Ming Dai v. Sessions, 884 F.3d 858, 875 (9th Cir. 2018) (Trott, J., dissenting) (characterizing the

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fails to make explicit adverse credibility determinations against noncitizens, the court will assume that those noncitizens testified credibly when evaluating whether the agency's factual findings were supported by substantial evidence.[191]

The Ninth Circuit's approach to credibility is best understood as a subspecies of the reasoned decision-making requirements that circuit courts routinely impose with an eye toward improving the quality of agency adjudication. Because credibility is a key component of eligibility for most forms of immigration relief, the stakes of an adverse credibility determination are high.[192] And by presuming credibility absent an explicit finding to the contrary, the Ninth Circuit's approach incentivizes the agency to make clear credibility determinations or pay the price on judicial review.[193] An IJ's repeated reversal for failing to make such credibility determinations can trigger a managerial intervention, with repeat offenders receiving counseling on how to improve their decision-making.[194]

The Ninth Circuit's approach to credibility finds some textual support in the INA, which extends to noncitizens a "rebuttable presumption of credibility on appeal" if an IJ fails to make an "explicit[]" adverse credibility determination.[195] Additionally, and contrary to the government's

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Ninth Circuit's approach to witness credibility as "idiosyncratic"), *rev'd sub nom. Ming Dai*, 141 S. Ct. 1669.

191. *Ming Dai*, 141 S. Ct. at 1676 ("For many years, and over many dissents, the Ninth Circuit has proceeded on the view that, '[i]n the absence of an explicit adverse credibility finding [by the agency], we must assume that [the alien's] factual contentions are true' or at least credible." (quoting Kataria v. INS, 232 F.3d 1107, 1114 (9th Cir. 2000))).

192. *See supra* note 73.

193. The Ninth Circuit appears to apply a variant of this rule when reviewing social security adjudications as well. *See* Gelbach & Marcus, *supra* note 24, at 1146-47 ("The Ninth Circuit applies something called the 'credit-as-true' rule in social security cases" in which reviewing "courts must 'credit as true' treating physician evidence that the ALJ does not adequately discount"). Gelbach and Marcus describe this rule from the SSA context as an example of problem-oriented oversight. *Id.* at 1135, 1145-46. Courts in the Ninth Circuit can "credit as true" the treating physician's account of her patient's disability in cases when an ALJ rules against the patient-claimant without adequately explaining why. *Id.* at 1147. The doctrine thus "raise[s] the costs for agencies" like the SSA that routinely fail to correct known problems. *Id.* at 1146.

194. Brief of Thirty-Five Former Immigration Judges, *supra* note 147, at 14 (noting that the Assistant Chief Immigration Judge in New York would "review reversals from the BIA or the Second Circuit Court of Appeals and counsel immigration judges who exhibited a pattern of issuing unsupportable decisions—monitoring, in particular, repeated failures to provide cogent reasons for adverse credibility determinations").

195. 8 U.S.C. §§ 1158(b)(1)(B)(iii), 1229a(c)(4)(C).

characterization in its petition for certiorari,[196] the Ninth Circuit's approach is not a particular outlier amongst the circuits, all of which agree that "any adverse credibility determination must be supported with 'specific and cogent' reasons."[197] Drawing on the statutory standards in the INA and consistent with the general requirement across circuits that credibility determinations be specific and cogent, the Ninth Circuit's longstanding rule was that if an IJ did not make an explicit adverse credibility determination—and further, if the BIA did not explicitly rebut the presumption of credibility that arose on appeal—then the court would assume that a noncitizen testified credibly when reviewing the case.[198]

The Ninth Circuit applied its explicitness rule in *Ming Dai* and *Alcaraz-Enriquez*. *Ming Dai* involved a Chinese asylum seeker who testified that he was "beaten, arrested, jailed, and denied food, water, sleep, and medical care because he tried to stop the police from forcing his wife to have an abortion."[199]

196. *See* Petition for Writ of Certiorari, *supra* note 189, at 23-24 ("The court of appeals' decision not only is incorrect, but also conflicts with the decisions of other courts of appeals in multiple respects and presents a question of significant practical importance.").

197. *See* Brief of Thirty-Five Former Immigration Judges, *supra* note 147, at 7-8, 8 n.4 (citing cases in various circuit courts); *see also* Scott Rempell, *Gauging Credibility in Immigration Proceedings: Immaterial Inconsistencies, Demeanor, and the Rule of Reason*, 25 GEO. IMMIGR. L.J. 377, 387 (2011) ("[A]ppellate courts have universally required that immigration decisions [regarding credibility] include 'specific, cogent reasons' to support the outcome." (quoting Secaida-Rosales v. INS, 331 F.3d 297, 307 (2d Cir. 2003))).

198. *See* Garland v. Ming Dai, 141 S. Ct. 1669, 1676 (2021). Whether the Ninth Circuit's approach was truly an outlier was a point of contention between the parties at the Supreme Court, with counsel for Mr. Dai arguing that the Ninth Circuit's rule was standard-fare substantial-evidence review. Brief for the Respondent in Opposition at 14-15, 18-20, *Ming Dai*, 141 S. Ct. 1669 (No. 19-1155), 2020 WL 6162720 ("This uncontroversial holding is consistent with the rule in other courts of appeals."). The Supreme Court itself did not seem too sure about the existence of a circuit split on this issue, going only so far as to say that the Ninth Circuit's approach "*appears* to be an outlier" and citing a single First Circuit case for that proposition. *Ming Dai*, 141 S. Ct. at 1676 (emphasis added) (citing Wan Chien Kho v. Keisler, 505 F.3d 50, 56 (1st Cir. 2007)). But some other circuits, in fact, apply a similar credibility rule as the Ninth Circuit. *See, e.g.*, De Santamaria v. U.S. Att'y Gen., 525 F.3d 999, 1011 n.10 (11th Cir. 2008) ("Where an IJ fails to explicitly find an applicant's testimony incredible and cogently explain his or her reasons for doing so, we accept the applicant's testimony as credible."); Li v. Att'y Gen. of the U.S., 400 F.3d 157, 163 (3d Cir. 2005) ("[W]here the BIA makes no findings on the credibility issue, 'we must proceed as if [petitioner's] testimony were credible and determine whether the BIA's decision is supported by substantial evidence . . . .'" (quoting Kayembe v. Ashcroft, 334 F.3d 231, 235 (3d Cir. 2003))); Mendez v. Holder, 566 F.3d 316, 318 (2d Cir. 2009) ("Because the agency has not questioned Petitioner's credibility, we take the facts asserted by him to be true.").

199. Ming Dai v. Sessions, 884 F.3d 858, 862-63 (9th Cir. 2018), *rev'd sub nom.* Garland v. Ming Dai, 141 S. Ct. 1669 (2021).

Neither the IJ[200] nor the BIA[201] made an explicit adverse credibility determination in the case. The IJ, however, denied asylum for two reasons: first, because Mr. Dai had not been forthcoming that his wife and daughter had traveled to the United States with him and had then voluntarily returned to China;[202] and second, when interrogated about the "real story,"[203] he confessed that he wanted to come to the United States to seek economic opportunity.[204] The BIA "adopt[ed] and affirm[ed]" the IJ's decision, but focused primarily on the first of the two reasons the IJ supplied to deny asylum.[205]

The Ninth Circuit held that it would assume Mr. Dai's testimony was credible because neither the IJ nor the BIA had made an explicit adverse credibility determination.[206] The court proceeded to rule that he had also made out a sufficient and persuasive claim for asylum, rejecting the agency's contrary conclusion as unsupported by substantial evidence.[207]

As to the first reason the IJ offered for denying relief, the Ninth Circuit explained that it defied logic to deny Mr. Dai asylum simply because his wife and daughter had come to the United States only to return to China a few months later.[208] Mr. Dai's wife, the court explained, did not face the same risk of future harm that he faced because, among other reasons, she "had already been subjected to the involuntary insertion of an IUD, whereas [Mr.] Dai fears future involuntary sterilization."[209] The court also rejected the second reason

200. *See* Petition for a Writ of Certiorari app. E, at 165a-77a, Barr v. Ming Dai, 141 S. Ct. 221 (No. 19-1155), 2020 WL 1373149 [hereinafter Ming Dai IJ Decision].

201. Petition for a Writ of Certiorari app. D, at 162a-64a, Barr v. Ming Dai, 141 S. Ct. 221 (No. 19-1155), 2020 WL 1373149 [hereinafter Ming Dai BIA Decision].

202. Ming Dai IJ Decision, *supra* note 200, at 173a-74a.

203. *Id.* at 174a.

204. *Id.*; *see also Ming Dai*, 884 F.3d at 873.

205. Ming Dai BIA Decision, *supra* note 201, at 163a-64a.

206. *Ming Dai*, 884 F.3d at 869-70.

207. *Id.* at 874. An asylum applicant's testimony is sufficient to establish eligibility for asylum if it "is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." 8 U.S.C. § 1158(b)(1)(B)(ii). The Ninth Circuit's reference to credibility, persuasiveness, and sufficiency applied this statutory standard to Mr. Dai's case. *Ming Dai*, 884 F.3d at 867 (quoting 8 U.S.C. § 1158(b)(1)(B)(ii)).

208. *Ming Dai*, 884 F.3d at 872.

209. *Id.* The court recognized that the decision below also rested on a variant of this point—that Mr. Dai's lack of forthrightness about his family's travel from and back to China was "detrimental to his claim and is significant to his burden of proof." *Id.* (quoting Ming Dai BIA Decision, *supra* note 201, at 164a). But the court found it notable that the agency had never "questioned the facts regarding Dai's persecution in China" and that his lack of truthfulness about this "tangential point" could not undermine the persuasiveness of his account of the core of his asylum claim at least absent a clearer explanation from the agency that this was its reasoning. *Id.* at 872-73. Moreover, the

footnote continued on next page

the IJ offered—that Mr. Dai came to the United States to seek out economic opportunity—because under prevailing case law, the existence of a non-asylum-related reason for coming to the United States does not defeat an otherwise valid asylum claim.[210]

As for *Alcaraz-Enriquez*, the case the Supreme Court consolidated with *Ming Dai*, the Ninth Circuit confronted the possible deportation of a mentally ill Mexican citizen who had lived in the United States for much of his life.[211] Mr. Alcaraz's deportation case hinged on whether a decades-old conviction constituted a particularly serious crime that barred him from eligibility for withholding of removal, a form of humanitarian protection.[212] Relying on the probation report for the incident, the IJ determined that Mr. Alcaraz's crime was "particularly serious."[213] But at trial, Mr. Alcaraz had testified to a different, less violent set of facts than those in the probation report.[214] Those facts, if credited by the IJ, could have led the IJ to conclude the crime was not particularly serious.[215]

The BIA in *Alcaraz-Enriquez* affirmed, explaining that the IJ "was not required to adopt [Alcaraz's] version of events over other plausible alternatives" and that he "properly considered all evidence of record."[216] Neither the IJ nor the BIA made an explicit adverse credibility ruling.[217] The Ninth Circuit granted the petition and remanded the case in a short memorandum opinion, holding that "the BIA erred when it credited the

court was concerned that the agency was "smuggl[ing] into the persuasiveness inquiry" some "[c]redibility concerns" that did not rise to the level of an "adverse credibility finding." *Id.* at 872.

210. *Id.* at 873 ("A valid asylum claim is not undermined by the fact that the applicant had additional reasons (beyond escaping persecution) for coming to or remaining in the United States, including seeking economic opportunity.").

211. Petition for a Writ of Certiorari app. C, at 11a-22a, Barr v. Alcaraz-Enriquez, 141 S. Ct. 222 (No. 19-1156), 2020 WL 1373150 [hereinafter Alcaraz-Enriquez IJ Decision].

212. Alcaraz-Enriquez v. Sessions, 727 F. App'x 260, 261 (9th Cir. 2018) (mem.), *rev'd sub nom.* Garland v. Ming Dai, 141 S. Ct. 1669 (2021); 8 U.S.C. § 1231(b)(3).

213. Alcaraz-Enriquez IJ Decision, *supra* note 211, at 14a.

214. *Id.*

215. *See id.* at 14a-15a; *cf. Alcaraz-Enriquez*, 727 F. App'x at 261 (noting that the BIA's "particularly serious crime" determination was erroneous because it credited the probation report's version of events over Mr. Alcaraz's testimony without making an explicit finding that he was not credible).

216. Petition for Writ of Certiorari app. C at 6a-9a, Barr v. Alcaraz-Enriquez, (No. 19-1156), 2020 WL 1373150 [hereinafter Alcaraz-Enriquez BIA Decision].

217. *Alcaraz-Enriquez*, 727 F. App'x at 261 (discussing Alcaraz-Enriquez BIA decision); Alcaraz-Enriquez IJ Decision, *supra* note 211, at 14a-15a (crediting the probation report's version of events without mentioning credibility).

probation report over Alcaraz's testimony without making an explicit adverse credibility finding."[218]

B. The Supreme Court's Softer Glance

In a unanimous opinion authored by Justice Gorsuch, the Supreme Court reversed and remanded in both cases.[219] The opinion began by quoting the INA's substantial-evidence provision, under which courts "must accept 'administrative findings' [of fact] as 'conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.'"[220] This statutory standard, the Court held, is "highly deferential,"[221] and incompatible with "the embellishment the Ninth Circuit has adopted" in demanding explicit credibility determinations from the BIA.[222] Citing *Vermont Yankee*, the Supreme Court chastised the lower court for imposing a "judge-made procedural requirement[]" on the BIA that has no clear statutory basis.[223]

The Court went on to reason that the BIA enjoys the power to "implicitly" rebut the credibility presumption without using any "particular formula or incant[ing] 'magic words' like 'incredible' or 'rebutted.'"[224] The Court also explained that the BIA has the authority to deny immigration relief based on a determination that a noncitizen's credible testimony was unpersuasive or otherwise insufficient to meet a noncitizen's burden of proof.[225] Such

218. *Alcaraz-Enriquez*, 727 F. App'x at 261. The Ninth Circuit also held that the agency's decision was erroneous because "Alcaraz was never given any sort of opportunity to cross-examine the witnesses whose testimony was embodied in the probation report." *Id.* at 262. The Supreme Court declined to reach this issue. Garland v. Ming Dai, 141 S. Ct. 1669, 1675 n.1 (2021).

219. *Ming Dai*, 141 S. Ct. at 1673, 1681.

220. *Id.* at 1677 (quoting 8 U.S.C. § 1252(b)(4)(B)). Although the Court in *Ming Dai* did not explicitly refer to this statute as the substantial-evidence provision, it cited *Nasrallah v. Barr*, which did. *Id.* (citing Nasrallah v. Barr, 140 S. Ct. 1683, 1692 (2020) (noting that 8 U.S.C. § 1252(b)(4)(B) is "the substantial-evidence standard" of review)). Further, when discussing what courts do when reviewing agency fact determinations, the Court in *Ming Dai* cited both Section 1252(b)(4)(B), the INA's substantial-evidence provision, and the APA's substantial-evidence provision at 5 U.S.C. § 706(2)(E). *See id.* at 1678 ("[C]ourts deferentially review the *agency's* fact determinations." (citing 8 U.S.C. § 1252(b)(4)(B); and 5 U.S.C. § 706(2)(E))).

221. *Ming Dai*, 141 S. Ct. at 1677 (quoting *Nasrallah*, 140 S. Ct. at 1692).

222. *Id.*

223. *Id.* (citing Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978)). In invoking *Vermont Yankee*, the *Ming Dai* Court did not consider whether "constitutional constraints or extremely compelling circumstances," *Vt. Yankee*, 435 U.S. at 543, existed to justify what the Court considered the Ninth Circuit's judicially fashioned procedure. *See Ming Dai*, 141 S. Ct. at 1677.

224. *Ming Dai*, 141 S. Ct. at 1679.

225. *Id.* at 1680.

determinations, the Court explained, need not be explicitly made; reviewing courts must accept implicit analysis from the BIA so long as its "path may reasonably be discerned."[226]

The obvious question these statements raise is just how much implicitness from the BIA a reviewing court must tolerate when reviewing a decision for substantial evidence. On this issue, the Supreme Court sent mixed signals. At one point, the Court articulated a permissive standard, stating that "so long as the record contains 'contrary evidence' of a 'kind and quality' that a reasonable factfinder could find sufficient, a reviewing court may not overturn the agency's factual determination."[227]

Elsewhere in the opinion, however, the Court reaffirmed important guardrails to which the agency and reviewing courts must adhere. The Court clarified that the BIA cannot "'arbitrarily' reject" evidence proffered by the noncitizen.[228] And the Court also reiterated administrative law's *Chenery* principle, under which "judges generally must assess the lawfulness of an agency's action in light of the explanations the agency offered for it rather than any *ex post* rationales a court can devise."[229] In other words, the Court acknowledged that substantial-evidence review, while deferential, does not permit reviewing courts to conjure up their own justifications for agency action that lack basis in the agency's own analysis.

The Court then proceeded to consider the facts of the two cases before it in light of the legal principles just articulated.[230] With *Alcaraz-Enriquez*, the Court's analysis was relatively straightforward, perhaps even unexceptional.[231] There were, essentially, two possible paths for the agency to have taken: Either it could have credited the version of events to which Mr. Alcaraz testified in immigration court, or it could have credited the version of events described in the probation report.[232] The Court strongly intimated that the agency's "implicit[]" analysis crediting the probation report was both clear enough and reasonable enough that it should be upheld by the Ninth Circuit.[233]

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226. *Id.* at 1679 (quoting Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974)).

227. *Id.* at 1677 (quoting Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Greenwich Collieries, 512 U.S. 267, 279 (1994)).

228. *Id.* (quoting *Greenwich Collieries*, 512 U.S. at 279).

229. *Id.* at 1679 (citing SEC v. Chenery Corp., 318 U.S. 80 (1943)).

230. *Id.* at 1679-81.

231. *But see infra* note 246.

232. *Ming Dai*, 141 S. Ct. at 1674 ("The parties appear to agree that the answer to that question turns on which version of events one accepts . . . .").

233. *Id.* at 1679-80 (noting that the BIA had expressly adopted the IJ's decision and the IJ had expressed concern both that Mr. Alcaraz's "story [had] changed" over time and that his "testimony sought to minimize his actions").

The Court then addressed the facts in *Ming Dai*. In that case, the BIA had issued a short opinion in which it had said only that Mr. Dai's lack of forthrightness about his family's return to China was "detrimental" to his claim and prevented him from "meet[ing] his burden of proof," without explaining why this was so.[234]

The BIA's cursory analysis of the facts in *Ming Dai* raised several concerns, as the Ninth Circuit extensively documented in its decision below.[235] Did the BIA misunderstand Mr. Dai's asylum claim as derivative of his wife's when he was asserting an independent claim under the INA?[236] Had the BIA considered the ways in which Mr. Dai was differently situated from his wife and daughter such that it would be safer for them than for him to return to China? Had the BIA, in fact, concluded that Mr. Dai's failure to "spontaneously disclose"[237] his family's travel called into question the veracity of the core of his claim regarding his own past persecution?[238] If so, had the BIA considered the documentary evidence in the record that corroborated that core claim, including medical records showing that he received treatment for a dislocated shoulder and broken ribs and that his wife underwent surgery to "[t]erminate the gestation and insert an IUD"?[239]

If one were to cast a skeptical eye on the BIA's decision in Mr. Dai's case, as the Ninth Circuit clearly did, one might wonder if the agency had overlooked Mr. Dai's independent asylum claim or neglected compelling documentary evidence that supported that claim. Or one might wonder if the BIA had flouted case law confirming that people seeking asylum are permitted to also hold economically motivated reasons for wanting to live in the United

234. Ming Dai BIA Decision, *supra* note 201, at 163a-64a.

235. *See supra* notes 206-10 and accompanying text.

236. The IJ understood Mr. Dai's wife to be "the primary object of the persecution in China," and found her return to weaken both their claims. Ming Dai IJ Decision, *supra* note 200, at 175a. But as the Ninth Circuit explained, the IJ's analysis is inconsistent with Ninth Circuit law because the harms that Mr. Dai and his wife suffered "in the past are qualitatively different and give rise to different fears about future persecution," and because Mr. Dai's "claim is independently established by statute and is not dependent on any comparison with" his wife's. Ming Dai v. Sessions, 884 F.3d 858, 871-72 (9th Cir. 2018); *see also* 8 U.S.C. § 1101(a)(42) ("[A] person . . . who has been persecuted for . . . resistance to a coercive population control program . . . shall be deemed to have been persecuted on account of political opinion . . . .").

237. *Ming Dai*, 884 F.3d at 883.

238. *Cf.* Abovian v. INS, 257 F.3d 971, 977 (9th Cir. 2001) (Kozniski, J., dissenting from the denial of rehearing en banc) ("[I]nadvertent contradictions as to details can give rise to the suspicion that the petitioner made up the whole story, and the minor inconsistencies reflect the difficulty in telling a good lie.").

239. Brief for the Respondent at 1, Garland v. Ming Dai, 141 S. Ct. 1669 (2021) (No. 19-1155), 2021 WL 75220 (internal quotation marks omitted).

States.[240] But if the BIA's bare-bones reasoning suffices, a reviewing court has little power to probe whether adjudicators below were careless or relied on legally unsupportable reasons when they denied relief.

Unlike the Ninth Circuit's decision below, the Supreme Court exhibited no concern about such possible errors behind the asylum denial. Indeed, nothing in the Supreme Court's opinion suggests an awareness of such possible problems, a perplexing oversight considering how well-ventilated they were in the opinion below.

As it had with *Alcaraz-Enriquez*, the Court remanded for the Ninth Circuit to definitively determine whether the BIA had either implicitly found that Mr. Dai's presumption of credibility had been overcome or implicitly determined that Mr. Dai's credible testimony was deficient in some other respect.[241] Either path, the Supreme Court again strongly intimated, struck the Justices as reasonable.[242]

* * *

Two broader issues emerge from the Supreme Court's opinion in *Garland v. Ming Dai*. First, the opinion is notable for its failure to acknowledge the system benefits that accrue from judicial review that incentivizes adjudicators to make analytically sound decisions.[243] The idea of judicial review as quality control seemed to pass the Justices by when they critiqued the Ninth Circuit's approach as unduly heavy-handed.

The problem with the Supreme Court's approach is that it is insensitive to the ways in which carelessness and bias are often implicated in poorly reasoned deportation decisions, a concern that seems especially salient given how the agency handled Mr. Dai's case.[244] There, it was possible that the agency had a sound basis to deny relief, but it was also possible that the agency had relied on legally faulty grounds or had overlooked material evidence when denying

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

241. *Ming Dai*, 141 S. Ct. at 1680.

242. *See id.* ("[T]he Ninth Circuit should consider whether the BIA found that Mr. Dai's presumption of credibility had been overcome. And, once more, it is hard to say that decision is one no reasonable adjudicator could have reached."); *id.* at 1681 ("The Ninth Circuit erred by treating credibility as dispositive of both persuasiveness and legal sufficiency . . . . Faced with conflicting evidence, it seems likely that a reasonable adjudicator could find the unfavorable account more persuasive than the favorable version in both cases.").

243. *See supra* Part I.C.

244. *See supra* notes 236-41 and accompanying text.

relief.[245] Based only on the reasoning the BIA and IJ had provided, it was not possible to tell what exactly drove the agency's decision.[246]

To be sure, in deciding the two cases before them, the Justices confirmed the continued vitality of the *Chenery* principle in the deportation context, under which a reviewing court may not invent reasons for the agency but instead "must assess the lawfulness of an agency's action in light of the explanations the agency offered."[247] And nothing in the Court's opinion implied that any special, amped-up deference applies in immigration cases. To the contrary, the opinion was littered with citations to run-of-the-mill administrative law cases.[248] On the other hand, by encouraging courts to search the record for evidence that a "reasonable factfinder could find sufficient,"[249] the Supreme Court's decision left open the possibility that reviewing courts could supplement or fortify agency analysis that is otherwise lacking.

245. *Cf.* Henry J. Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 207-08 (noting that when a court remands a case based on an agency's inadequate or incomplete explanation, "it permits a court in effect to say to an agency, 'Do you really mean it?'" and "[c]onceivably, the [agency] will take the hint and re-think the bases of its decision; if not, the court will at least have the benefit of an explicated decision").

246. *See* Ming Dai BIA Decision, *supra* note 201, at 163a-164a; Ming Dai IJ Decision, *supra* note 200, at 166a-176a. Although the *Alcaraz-Enriquez* case seems more straightforward, the agency's lack of analytical clarity also could lend itself to similar questions. There, the IJ recited the two contradictory version of events and then credited as true the version from the probation report without explaining why he was choosing that version over the version to which Mr. Alcaraz testified in court. *See* Alcaraz-Enriquez IJ Decision, *supra* note 211, at 14a-15a. Although there are legitimate reasons why the IJ could have made this choice, one can imagine illegitimate reasons too, like bias or hostility against a noncitizen with a criminal record and significant mental health challenges. Requiring the IJ to make his credibility analysis explicit could have pushed him to think more carefully about his choice and perhaps ferreted out illegitimate motives.

247. *Ming Dai*, 141 S. Ct. at 1679; *see also* SEC v. Chenery Corp., 318 U.S. 80, 95 (1943) ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.").

248. *See, e.g.*, *Ming Dai*, 141 S. Ct. at 1677 (citing Banks v. Chi. Grain Trimmers Ass'n, 390 U.S. 459, 467 (1968) (applying the substantial-evidence standard in a workers compensation case)); *id.* at 1679 (citing *Chenery Corp.*, 318 U.S. at 87); *id.* (citing Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 285-86 (1974) (applying the APA's arbitrary and capricious standard in a case reviewing an order of the Interstate Commerce Commission)). The Supreme Court had also applied the *State Farm* arbitrary and capricious standard in the deportation context, *see* Judulang v. Holder, 565 U.S. 42, 52-53, 55 (2011), and the *Ming Dai* Court did nothing to signal its disfavor of that case.

249. *Ming Dai*, 141 S. Ct. at 1677.

Second, *Ming Dai*'s reference to the Ninth Circuit's explicitness rule as an impermissible "judge-made *procedural* requirement[]" is striking.[250] When the Supreme Court has rejected judge-made procedures before, it has "focus[ed] on the processes by which outsiders present their arguments and evidence to the agency."[251] In *Vermont Yankee*, for example, which the Court quoted in *Ming Dai*,[252] the procedures the D.C. Circuit had imposed that the Supreme Court rejected were extra-statutory requirements that compelled agencies engaged in informal rulemaking to use trial-type procedures like cross-examination.[253]

The Ninth Circuit's explicitness rule is not procedural in the same way. But, as Merrick Garland has observed, such a rule is arguably "quasi-procedural" in the sense that it "impos[es] upon the *internal* processes by which agencies reach rational decisions."[254] In other words, the explicitness requirement can be understood as a type of *decision procedure* that the Ninth Circuit was forcing—or, at least, strongly incentivizing—the BIA to follow.[255] And that decision procedure, the Supreme Court concluded in *Ming Dai*, was impermissible because it lacked a source in positive law.[256]

Until *Ming Dai*, the Supreme Court had carefully distinguished between the types of external procedures at issue in *Vermont Yankee* (which courts may not impose) and the internal decision procedures implicated by hard look review (which courts may impose). In *State Farm*, for instance, the Supreme Court issued a "ringing endorsement of the quasi-procedural hard look," distinguishing it from the external judge-made procedural innovations that were struck down in *Vermont Yankee*.[257] Similarly, in *Pension Benefit Guaranty Corp. v. LTV Corp.*, the Supreme Court again confronted, and rejected, an argument that analogized searching arbitrariness review with the judge-made

250. *Id.* (emphasis added). Adam Crews argues that the *Ming Dai* Court's invocation of *Vermont Yankee* is part of a broader resurgence of that case among conservative jurists over the past decade. *See* Crews, *supra* note 35, at 1120-21, 1121 n.9.

251. *See* Garland, *supra* note 175, at 510 n.23.

252. *Ming Dai*, 141 S. Ct. at 1677 (quoting Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978)).

253. *Vt. Yankee*, 435 U.S. at 541-48.

254. *See* Garland, *supra* note 175, at 510 n.23 (emphasis added).

255. *See id.* at 530 (noting that the hard look requirements "focus not on the kind of procedure that an agency must use to generate a record, but rather on the kind of decisionmaking record the agency must produce to survive judicial review; the method of generating the record is left to the agency itself").

256. *Ming Dai*, 141 S. Ct. at 1677.

257. Garland, *supra* note 175, at 543; *see also* Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 50-51 (1983) ("In *Vermont Yankee*, we held that a court may not impose additional procedural requirements upon an agency. We do not require today any *specific procedures* which [the agency] must follow." (emphasis added)).

procedures the Court had deemed impermissible in *Vermont Yankee*.[258] There, the Court "attempted to diffuse this charge of inconsistency" with *Vermont Yankee*, explaining that "its decisions . . . at most impose a 'general procedural requirement of sorts . . . that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale.'"[259] This type of explanation requirement, the Court noted, was very different from the "specific procedural requirements" that *Vermont Yankee* prohibits courts from imposing on agencies.[260]

In *Ming Dai*, the Supreme Court seemed to walk back its support for "quasi-procedural" hard look review for the first time. Of course, nothing in the Court's opinion states explicitly that the Court understood itself to be expanding *Vermont Yankee*'s domain or modifying its decisions in *State Farm* or *Pension Benefit*, which remain controlling authority in the lower courts.[261]

III. *Ming Dai* in the Circuits

Since it was decided in 2021, *Ming Dai* has received little scholarly attention.[262] And by many indications, the opinion did little more than apply existing standards of review to reverse what the Justices understood to be an idiosyncratic rule followed by the Ninth Circuit alone.[263]

But scratch the surface and a more complex picture emerges. While not claiming to transform existing doctrine, *Ming Dai* reflects a judicial "mood"[264] that exudes both confidence in the administrative process and impatience with the Ninth Circuit for demanding too much of the agency.[265] Perhaps this mood

258. *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654-55 (1990).

259. Metzger, *supra* note 169, at 162 (quoting *Pension Benefit Guar. Corp.*, 496 U.S. at 654).

260. *Pension Benefit Guar. Corp.*, 496 U.S. at 654.

261. Adam Crews argues that the Court in *Ming Dai* invoked *Vermont Yankee* for the proposition that the judiciary should respect congressional delegation of procedural discretion to agencies. *See* Crews, *supra* note 35, at 1165-66. Even if the Justices invoked *Vermont Yankee* for this reason, it remains unclear why they did not consider cases like *Pension Benefit*, which suggests that the APA's prohibition on arbitrary and capricious decision-making constrains agencies' quasi-procedural discretion. *See Pension Benefit Guar. Corp.*, 496 U.S. at 654 (citing 5 U.S.C. § 706(2)(A) as the statutory authority for courts to "impose[] a general 'procedural' requirement of sorts"); Crews, *supra* note 35, at 1181 (acknowledging that hard look review may have "plausible textual bases in the APA").

262. *See supra* note 35 and accompanying text.

263. *See supra* notes 247-49 and accompanying text; Garland v. Ming Dai, 141 S. Ct. 1669, 1676 (2021) (stating that the Ninth Circuit's approach "appears to be an outlier").

264. In a foundational case about the substantial-evidence review standard, the Supreme Court famously referred to the "mood" of review with which Congress meant to imbue the standard. Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951).

265. *See supra* Part II.B.

reflected only the Court's desire to remind the Ninth Circuit not to impose "embellishment[s]"[266] like the explicitness rule. Or perhaps *Ming Dai*'s drafters at the Supreme Court were writing quickly, if somewhat imprecisely, in a case they themselves understood to have limited impact in shaping the law's development.[267]

Whatever the reason, judges in the circuit courts who believe that their colleagues have been insufficiently deferential to the agency in deportation cases have taken note. Today, some of these judges are using *Ming Dai* as a springboard to attack hard look review in deportation cases. If successful, these efforts could have transformative implications. Subpart A collects these opinions and connects the dots between them. Subpart B identifies the likely consequences if the views these opinions represent gain prominence. Subpart C concludes by drawing out the implications of these developments for scholars and advocates.

One caveat before proceeding: I do not claim that the opinions collected here represent the dominant view in the circuits today.[268] In fact, several of the opinions are dissents. But the reason these opinions matter is because they bring—to borrow Jack Balkin's phrasing—"off-the-wall" ideas "on-the-wall."[269] And if there is one lesson we can take away from the Supreme Court's recent

266. *Ming Dai*, 141 S. Ct. at 1677.

267. Other canonical administrative law decisions may not originally have been understood by the Justices who issued them as watershed pronouncements. *See, e.g.*, Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 ADMIN L. REV. 253, 282 (2014) ("*Chevron* presents a striking instance of a case that became great not because of the inherent importance of the issue presented, but because the opinion happened to be written in such a way that key actors in the legal system[, in particular influential judges on the D.C. Circuit,] later determined to make it a great case."); Aaron L. Nielson, *Three Wrong Turns in Agency Adjudication*, 28 GEO. MASON L. REV. 657, 663 (2021) (arguing that "[t]he Court's opinion in *Seminole Rock*—a short, quick decision with almost a breezy tone" would eventually, decades later, be interpreted expansively and in a way that was untethered from its original context (citing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 410-19 (1945)).

268. Many court opinions, for example, either ignore or downplay *Ming Dai*, reading it as a case that does not meaningfully alter judicial review standards. *See, e.g.*, Paye v. Garland, 109 F.4th 1, 10-11 (1st Cir. 2024) (failing to cite *Ming Dai* when reversing the agency for failing to consider material evidence and explain why that evidence did not affect its asylum analysis); Kakar v. U.S. Citizenship & Immigr. Servs., 29 F.4th 129, 132 (2d Cir. 2022) (reading *Ming Dai* narrowly to require some reason-giving by the agency).

269. JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 12 (2011) (describing changes to constitutional doctrine, Balkin argues that for a variety of reasons, "arguments move from 'off-the-wall' to 'on-the-wall,' from unreasonable to plausible to persuasive to orthodoxy").

decisions, it is that once-fringe theories in administrative law can go mainstream in the blink of an eye.[270]

A. The Cases

1. Relaxing the explanation requirement

This Subpart details how, in *Ming Dai*'s wake, some judges are making the case for highly deferential review standards that resemble constitutional law's rational basis review. As relevant here, rational basis has two distinguishing features. First, courts do not insist on reason-giving from the government.[271] Second, and relatedly, courts do the work themselves of identifying reasons that *could* justify the challenged action, paying little heed to whether those hypothetical reasons actually motivated government decision-makers.[272]

Palucho v. Garland, a Sixth Circuit case, illustrates both a de-emphasis on reason-giving by the agency and a court's willingness to supply its own reasons to justify the outcome under review.[273] *Palucho* turned on whether the agency had considered two country-condition reports that offered compelling evidence supporting the petitioners' claims for asylum.[274] Despite the relevance of those reports, neither the BIA nor the IJ had mentioned them in their decisions.[275] The majority held that the agency nevertheless discharged its obligation to consider the reports when the BIA identified the correct legal standard and cited two pages in the petitioners' brief "devoted to this general subject."[276] The Board's decision, the Sixth Circuit said, showed that it had

270. *See* Charlie Savage, *Weakening Regulatory Agencies Will Be a Key Legacy of the Roberts Court*, N.Y. TIMES (Jun. 28, 2024), https://perma.cc/YDB6-6KY8 (noting how during the October 2023 Term, "the Supreme Court's conservative supermajority . . . issued sweeping rulings" including one overturning *Chevron* deference—"a 40-year-old foundational part of administrative law"—and another that "struck down a key practice used by many agencies to enforce rules via in-house tribunals").

271. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) ("Even in the absence of [rationales for legislation provided by legislature] the existence of facts supporting the legislative judgment is to be presumed.").

272. *See* Flemming v. Nestor, 363 U.S. 603, 612 (1960) (noting that it is "constitutionally irrelevant" whether the bases on which a statute is upheld "in fact underlay the legislative decision").

273. 49 F.4th 532 (6th Cir. 2022).

274. *Id.* at 535, 538.

275. *Id.* at 537 ("[N]either the Board nor the immigration judge *expressly* cited the country-condition reports"); *see also id.* at 545 (Clay, J., dissenting) (noting that "[a]side from a passing citation in the Background section," and not the analysis section of the IJ's opinion, "the IJ did not reference any of the general country conditions evidence" or otherwise meaningfully engage with such evidence).

276. *See id.* at 539 (majority opinion).

"implicitly" considered and rejected the reports.[277] The fact that the BIA's reasons for dismissing the report were unstated did not trouble the judges in the majority.[278]

The majority opinion went on to explain that were it not for binding circuit precedent, the court would read *Ming Dai* and the INA's substantial-evidence provision "literally" to bar any inquiry into "whether the agency adequately addressed the record when issuing the challenged finding of fact."[279] Instead, the court "would simply look at the record as a whole and consider whether it contained enough evidence 'of a kind and quality that a reasonable factfinder could find sufficient' for the finding."[280] In other words, but for binding precedent, the majority expressed a willingness to search the record itself and identify its own reasons justifying the outcome below.

But because circuit precedent "requires courts to evaluate an agency's decision based on the rationale that the agency provided," the *Palucho* majority did not purport to go quite so far.[281] In practical terms, however, because the court was willing to accept the Board's bare recitation of the legal standard and a single citation to two pages in the petitioners' brief as sufficient to demonstrate it had meaningfully considered and rejected the country-condition reports in the record, there is little daylight between the court's preferred approach and the approach it felt constrained by precedent to apply.[282] As the dissent pointed out, one deficiency in the majority's logic was its failure to even entertain the possibility that the agency had simply overlooked the two official reports, which supported the petitioners' claims for asylum.[283]

Several judges on the Ninth Circuit have taken a path like *Palucho* and demonstrated a willingness to identify hypothetical reasons to justify the deportation decisions under review. In *Flores Molina v. Garland*, a lengthy

277. *Id.* (quoting Garland v. Ming Dai, 141 S. Ct. 1669, 1679 (2021)).

278. One of the reasons the court seemed unconcerned about the agency's lack of reasoning appears to be because the court itself did a fair amount of work to shore up the BIA's analysis and seemed confident that it had correctly identified the BIA's "implicit[]" reasoning based on its own analysis of the record. *Id.* (quoting *Ming Dai*, 141 S. Ct. at 1679).

279. *Id.* at 538.

280. *Id.* (quoting *Ming Dai*, 141 S. Ct. at 1677).

281. *Id.* at 539 (noting that the Sixth Circuit had previously "recognized that § 1252(b)(4)(B) essentially codifies the substantial-evidence test for findings of fact").

282. *See id.* at 538-39. The dissent also noted that the majority's "*post hoc* justification" of the BIA's decision, pointing to evidence and reasoning supporting the decision below, "is nowhere to be found in the BIA's skeletal opinion." *Id.* at 546 (Clay, J., dissenting); *id.* (noting that the majority "concoct[s] a new justification for the BIA[]").

283. *Id.* at 546-47 (Clay, J., dissenting).

dissent characterized *Ming Dai* as "illustrat[ing]" that courts "are supposed to consider the record as a whole, and diligently search for grounds to affirm the agency's determination."[284] While the dissent did not dispute the majority's concern that the BIA had "fail[ed] to address highly probative evidence" in the record,[285] it instead stressed that the BIA "didn't ignore any part of the record; it simply emphasized and gave more weight to the more recent accounts that showed conditions were improving."[286] Further, the dissent opined that the only relevant inquiry for a reviewing court is whether, upon "scour[ing] the record," a reviewing court could itself identify whether "*any* reasonable adjudication [could] have agreed with the agency's result."[287] For the dissent, *Ming Dai* confirms that "[t]he overworked agency is not required to show every step of its work," "to disclose exactly what parts of the record it found persuasive[,] or quantify how much of the petitioner's testimony may have been discounted or even why."[288]

In *Rodriguez-Zuniga v. Garland*, the dissenting judge in *Flores Molina* found himself in the majority.[289] There, one of the grounds for asylum the petitioner claimed was persecution based on her political opinion; the IJ ignored the claim, and the BIA rejected it in a single conclusory footnote that stated, "there [was] no evidence [Rodriguez-Zuniga] ever expressed a political opinion."[290] The court held that the BIA's explanation was adequate and the outcome below was substantively reasonable,[291] and the court then offered its own reasoning to supplement the BIA's cursory analysis.[292] As the dissent pointed out, the majority ended up "expand[ing] on the BIA's single-sentence, footnoted rationale for nearly five pages."[293]

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284. 37 F.4th 626, 646 (9th Cir. 2022) (VanDyke, J., dissenting); *see also id.* at 645 (asserting that *Ming Dai* "reemphasized that Immigration Judges and the BIA enjoy wide discretion in how *they arrive at, and articulate*, the conclusion and supporting grounds that [the court] review" (citing *Ming Dai*, 141 S. Ct. at 1677-81)).

285. *Id.* at 637 (majority opinion).

286. *Id.* at 654-55 (VanDyke, J., dissenting).

287. *Id.* at 643.

288. *Id.* at 646.

289. 69 F.4th 1012, 1014 (9th Cir. 2023).

290. *Id.* at 1015.

291. *See id.* at 1026 ("[T]he reasons that the agency must offer are . . . coextensive with the complexity of the analysis required by the issue. And here, given the complete lack of evidence supporting Rodriguez-Zuniga's political opinion claim, it is hardly surprising the agency decided to dispose of it in a sentence." (citation omitted)).

292. *Id.* at 1017-18.

293. *Id.* at 1035 (Gilman, J., dissenting). A more charitable reading of the majority opinion would be that it only expanded on the BIA's single-sentence footnote on pages 1017-18. Even so, this still involves a substantial elaboration beyond the single footnote.

The dissenting judge in another Ninth Circuit case, *De Leon v. Garland*, also advanced a rational basis-like theory of judicial review.[294] He criticized his colleagues in the majority for limiting themselves "to considering only those aspects of the record that were affirmatively cited by the IJ."[295] Quoting *Ming Dai*, the *De Leon* dissent explained that a reviewing court should not set aside a deportation order "so long as the record contains contrary evidence of a kind and quality that a reasonable factfinder *could* find sufficient."[296] When such evidence exists, the dissent explained, a reviewing court is obligated to assess whether it provides additional justification for the agency's decision, even when the agency itself did not factor the evidence into its analysis.[297] Based on this understanding of the judicial role, the dissent combed through the record in *De Leon* and identified testimonial and documentary evidence that supported the agency's conclusion that the petitioner was ineligible for relief under the Convention Against Torture even though neither the IJ nor the BIA cited any of this evidence themselves.[298]

In another Ninth Circuit case, *Kalulu v. Bondi*, also involving a split panel, the majority once again relied on *Ming Dai* to relax the agency's explanation requirement.[299] That case was brought by a Zambian asylum seeker who sought protection in the United States based on persecution for her sexual orientation.[300] After she testified, the IJ entered an adverse credibility determination enumerating thirteen reasons why he found her not credible.[301] All three judges on the panel agreed that "some of the reasons relied on by the agency do not support its ultimate credibility finding."[302] As the partial dissent noted, several "of the agency's credibility findings [were] based on dubious

294. *See* 51 F.4th 992, 1013 & n.2 (9th Cir. 2022) (Collins, J., dissenting).

295. *Id.* at 1013 n.2.

296. *Id.* (quoting Garland v. Ming Dai, 141 S. Ct. 1669, 1677 (2021)).

297. *Id.* at 1011 (rejecting the majority's insistence that the court "may consider only the particular snippets of record evidence specifically and expressly cited by the agency").

298. *Id.* at 1013-15. The majority rejected the dissent's approach, citing *State Farm* for the proposition that courts may not supply reasoning for the agency that the agency itself has not provided. *Id.* at 1003 (majority opinion) (citing Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983)). The dissent, for its part, distinguished the reason-giving requirement reflected in cases like *State Farm* and *Chenery*, explaining that it was not identifying new "grounds" for the agency decision but rather that it was simply finding new evidentiary support for grounds already identified by the agency. *Id.* at 1010-11 (Collins, J., dissenting) (citing *Ming Dai*, 141 S. Ct. at 1677, 1679).

299. 128 F.4th 1009, 1015, 1022 (9th Cir. 2024) (amending Kalulu v. Garland, 94 F.4th 1095 (9th Cir. 2024)).

300. *Id.* at 1012.

301. *Id.* at 1015.

302. *Id.*; *see also id.* at 1025-26 (Sanchez, J., concurring in part and dissenting in part).

stereotyping, mischaracterizations of the evidence, or purported inconsistencies that are not inconsistencies at all or that the agency did not allow Kalulu to address."[303]

Nevertheless, the majority held that because "at least five of the factual bases underlying the agency's adverse credibility determination [were] supported by the record," the court would affirm, simply disregarding the potentially problematic other reasons the agency provided for its determination.[304] It was clear in *Kalulu* that the agency below had *not* relied on these five bases alone.[305] Still, the majority reasoned that a "reasonable adjudicator" could have entered an adverse credibility determination based on those five reasons alone.[306] In other words, the Court's approach subordinated the agency's actual reasoning to the reasoning on which a hypothetical reasonable factfinder could have relied.[307]

A recent decision from the Fourth Circuit reflects a similar approach, with the court filling in the blanks for the agency when the agency's analysis proved lacking. In *Lopez-Benitez v. Garland*, the court affirmed the agency's denial of asylum based on a determination that the petitioner had failed to demonstrate a sufficient nexus between the persecution he suffered and a protected ground under the INA.[308] The court conceded that the petitioner correctly stated the applicable legal test for nexus, which the agency did not seem to apply.[309] However, the court did not remand for the agency to evaluate the record evidence under that correct legal standard, instead concluding that the IJ and the BIA "did not commit legal error" because the evidence, which the court

303. *Id.* at 1026.

304. *Id.* at 1015, 1022 & n.12 (majority opinion) (citing Garland v. Ming Dai, 141 S. Ct. 1669, 1677 (2021)).

305. *See id.* at 1015 (conceding that the court had to "disregard[]" several of the thirteen reasons the agency relied on because they were "unsupported" or "erroneous").

306. *Id.* ("[E]ven after the record is stripped of any of the agency's erroneous findings[,] . . . . at least five of the factual bases underlying the agency's adverse credibility determination are supported by the record."); *id.* at 1022 (noting that the Supreme Court "requires that we . . . deny a petition unless, reviewing the record as a whole, 'any reasonable adjudicator would be *compelled* to conclude to the contrary'" (quoting *Ming Dai*, 141 S. Ct. at 1677)).

307. The panel in *Kalulu* eventually remanded the case on a different ground—it held that the agency had misunderstood documentary evidence that corroborated the petitioner's claims. *Id.* at 1014, 1024.

308. 91 F.4th 763, 770 (4th Cir. 2024). The INA requires that asylum seekers demonstrate a "well-founded fear of persecution" on account of one or more protected grounds. 8 U.S.C. § 1101(a)(42)(A). The protected grounds are "race, religion, nationality, membership in a particular social group, or political opinion." *Id.*

309. *Lopez-Benitez*, 91 F.4th at 769.

independently evaluated, was insufficient even when the correct test was applied.[310]

Finally, the dissent in a Third Circuit case, *Herrow v. Attorney General United States*, engaged in a similar line of reasoning as the majority in *Lopez-Benitez*, faulting the majority for focusing on the agency's failure to consider several pertinent facts in the record.[311] The dissent evaluated the evidentiary source for these overlooked facts and independently identified several deficiencies in that source.[312] Because of those deficiencies, the dissent concluded that the "agency need not explain its decision not to credit evidence that has minimal persuasive value."[313] In the *Herrow* dissent's analysis, the agency was excused from offering its own reasons and instead the reviewing court did the work of offering reasons to justify the outcome below.[314]

2. Reconsidering the consideration requirement

In addition to relaxing the agency's obligation to explain its reasoning, some judges also interpret *Ming Dai* to water down the requirement that adjudicators demonstrate they have meaningfully considered all relevant evidence in the record, including, in particular, evidence that tends to undermine those adjudicators' conclusions. A six-judge dissent in *Portillo Flores v. Garland*, an en banc decision of the Fourth Circuit,[315] typifies this approach.

In *Portillo Flores*, the evidence in question involved key testimony by the petitioner, which the majority noted—and the dissent conceded—the IJ and the BIA did not address in their opinions.[316] The majority faulted the agency for

310. *Id.* at 769-70. The court acknowledged that the petitioner testified that he was targeted on account of his membership in a particular social group but discounted this testimony because there was no supporting evidence to back the petitioner's claims. *Id.* at 770.

311. Herrow v. Att'y Gen. U.S., 93 F.4th 107, 120 (3d Cir. 2024) (Phipps, J., dissenting).

312. *Id.* at 120-21.

313. *Id.* at 121; *see also id.* (noting, in the alternative, that the agency's "omission of [an] explanation" was "nothing more than harmless error since, even if considered, the article would not compel a reasonable adjudicator to reach a contrary conclusion" (citing § 8 U.S.C. § 1252(b)(4)(B); and Garland v. Ming Dai, 141 S. Ct. 1669, 1681 (2021))).

314. *See id.*

315. 3 F.4th 615, 640 (4th Cir. 2021) (en banc) (Quattlebaum, J., dissenting).

316. *Id.* at 636 (majority opinion) (noting that "[t]his evidence was 'arbitrarily ignored' by the IJ and BIA, who never so much as mentioned any of the testimony on this point" (quoting Tassi v. Holder, 660 F.3d 710, 719 (4th Cir. 2011))); *id.* at 650 (Quattlebaum, J., dissenting) ("It is true that neither the IJ nor the BIA addressed this testimony specifically in written orders."). The dissent contested how important this testimonial evidence was to the petitioner's case: Independently analyzing the testimony the

footnote continued on next page

"disregarding credible, significant, and unrebutted evidence" without offering "specific, cogent reasons for doing so."[317] The dissent, however, asserted that the lack of "detail" and "thorough[ness]" in the IJ and BIA's decisions,[318] while unfortunate, was not enough to trigger a remand for two reasons: first, because the IJ and BIA otherwise rested on "highly probative evidence" supporting their decision; and second, because the BIA had referred to the petitioner's arguments in passing even though it had not specifically addressed the testimonial evidence supporting those arguments.[319]

The approach the dissent advocated was a permissive one under which agency adjudicators may neglect evidence that undermines their position, so long as there is also compelling evidence in support of their position.[320] The dissent's version of judicial review, of course, stymies courts from using the consideration requirement to push adjudicators to pressure test their conclusions and to grapple with evidence that does not fit their predetermined assumptions.[321]

In *Corpeno-Romero v. Garland*, a recent Ninth Circuit case, the dissent similarly downplayed the consideration requirement, suggesting that it was inconsequential that the agency failed to discuss three facets of the case, each of which, the majority asserted, support the petitioners' claims for asylum.[322] Citing *Ming Dai* for the proposition that judicial review of deportation orders must be "highly deferential,"[323] the dissent contended that "[w]hile the BIA did not explicitly discuss each of these factors in its written decision, that does not necessarily mean it failed to consider these aspects of the case—as each would

agency had overlooked, the dissent asserted that it was not as compelling as the majority made it out to be. *Id.* at 651-52.

317. *Id.* at 636 (majority opinion) (internal quotation marks omitted) (quoting Orellana v. Barr, 925 F.3d 145, 152 (4th Cir. 2019)).

318. *Id.* at 652 (Quattlebaum, J., dissenting); *see also id.* (finding reviewing courts must uphold agency decisions of "less than ideal clarity" (quoting *Ming Dai*, 141 S. Ct. at 1679)).

319. *Id.* (quoting Gonahasa v. U.S. INS, 181 F.3d 538, 542 (4th Cir. 1999)).

320. *Id.* at 650-51. The dissent also contended that because "[e]videntiary hearings can involve a substantial amount of evidence," the majority was placing "an unfair burden on the IJ" by requiring him to consider evidence that the petitioner himself had not highlighted in his closing statement at trial or in his briefing to the BIA. *Id.* at 651.

321. For justifications for a robust consideration requirement, see Part I.C above; and Deacon, note 156 above, at 722-23.

322. *See* 120 F.4th 570, 583-84 (9th Cir. 2024) (Callahan, J., dissenting in part and concurring in part); *id.* at 578-80 (majority opinion). The dissent agreed that the first and third factors were germane to the asylum analysis but expressed doubt about the legal relevance of the second factor. *See id.* at 584-87 (Callahan, J., dissenting in part and concurring in part).

323. *Id.* at 583 (Callahan, J., dissenting in part and concurring in part) (quoting Garland v. Ming Dai, 141 S. Ct. 1669, 1677 (2021)).

have been obvious to it."[324] Although this statement is true enough—it is not "necessarily" the case that the agency has overlooked evidence it does not specifically address—the purpose of the consideration requirement is to encourage the agency to grapple with facts that tend to undermine its assumptions and conclusions. The dissent in *Corpeno-Romero*, however, understood *Ming Dai* to be incompatible with a rigorous consideration requirement, implying that the agency has no obligation to show that it has considered aspects of a case that the dissent characterized as "obvious."[325]

A panel of the Third Circuit also resisted application of the consideration requirement in a deportation case by calling into question the meaning of the INA provision governing judicial review of factfinding.[326] That provision, codified at 8 U.S.C. § 1252(b)(4)(B), has long been interpreted as the equivalent to the traditional substantial-evidence standard that appears in many administrative law statutes, including the APA.[327] But in *Alexander-Mendoza v. Attorney General United States*, the Third Circuit cited *Ming Dai* and *Nasrallah v. Barr*, as confirmation that "an agency's factual findings in immigration proceedings are reviewed, not under the traditional substantial evidence standard, but under [a] highly deferential form of that standard."[328] The court held that under this heightened standard, "an agency's failure to consider detracting evidence does not, by itself, justify setting aside a factual finding" unless "the neglected detracting evidence, if considered, would have to compel a reasonable adjudicator to reach a contrary conclusion."[329] The Third Circuit's approach in *Alexandra-Mendoza* bars courts from remanding in cases where more careful consideration of relevant evidence could cause an IJ or the BIA to change their mind but would not necessarily compel that they do so—an important category of cases in which deficiencies in the quality of the agency's analysis leave unclear whether the IJ and the BIA reached the conclusion they did for the right reasons or the wrong ones.[330]

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324. *Id.* at 584.

325. *Id.*

326. Alexander-Mendoza v. Att'y Gen. U.S., 55 F.4th 197, 206-07 (3d Cir. 2022).

327. *See supra* notes 88-91 and accompanying text.

328. *Alexander-Mendoza*, 55 F.4th at 206 (citing *Ming Dai*, 141 S. Ct. at 1677; and Nasrallah v. Barr, 140 S. Ct. 1683, 1692 (2020)). The court asserted that 1996 amendments to the INA, along with contemporaneous caselaw, ratcheted up the level of deference to agency factfinding. *See id.* at 206.

329. *Id.* at 207.

330. *Cf.* Friendly, *supra* note 245, at 206-09 (explaining the virtues of reasoned decision-making in other contexts).

3. Expanding *Vermont Yankee*'s reach

Ming Dai marked the first time that the Supreme Court cited *Vermont Yankee* in a deportation case arising from the immigration court system.[331] And, as discussed in Part II above, *Ming Dai* was also the first time the Supreme Court invoked *Vermont Yankee* as a potential limitation on what Merrick Garland has called "quasi-procedural" judicial rules.[332] Seizing on these two developments, some circuit judges now assert that stringent reasoned decision-making requirements, as well as other interpretive rules that federal courts have developed to ensure fairness in deportation adjudication, conflict with *Vermont Yankee*'s prohibition on judge-made procedural rules.[333]

In *Palucho v. Garland*, discussed in Part III.A.1 above, the Sixth Circuit described the consideration requirement as review for "procedural error."[334] Based on this characterization, the court, citing *Ming Dai*, *Vermont Yankee*, *Pension Benefit*, and *Perez*, considered whether it lacked the power to impose "common-law codes of 'best practices' on agencies."[335] The *Palucho* court described the prohibition on judge-made best practices as "longstanding administrative law," downplaying the novelty of lumping in quasi-procedural mechanisms like the consideration and explanation requirements with the core of procedural innovations that *Vermont Yankee* precludes courts from imposing on agencies.[336] Conceptualized as a procedural tool, the court also suggested that the consideration requirement potentially conflicts with the statutory standard that Congress had enacted for judicial review of administrative fact-finding, which "[i]nterpret[ed] . . . literally, one could read" as "bar[ring] [courts] from engaging in any 'procedural' review that asks

331. The Supreme Court has cited *Vermont Yankee* in forty-eight opinions. *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 100 (2015); Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 653-55 (1990); Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 50-51 (1983). Of these opinions, *Ming Dai* is the only one involving a deportation adjudication. 141 S. Ct. at 1674.

332. *See supra* text accompanying notes 254-61.

333. These cases rely on *Ming Dai*'s assertion that "it is long since settled that a reviewing court is 'generally not free to impose' additional judge-made procedural requirements on agencies that Congress has not prescribed and the Constitution does not compel." *Ming Dai*, 141 S. Ct. at 1677 (quoting Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978)). These cases could also be understood as part of a broader resurgence that *Vermont Yankee* is having in the Supreme Court and circuit courts in recent years. *See generally* Crews, *supra* note 35 (documenting and theorizing this phenomenon).

334. 49 F.4th 532, 537 (6th Cir. 2022); *see also supra* notes 273-83 and accompanying text (discussing *Palucho* in the context of relaxing the reason-giving requirement in deportation cases).

335. *Palucho*, 49 F.4th at 538 (citing *Perez*, 575 U.S. at 101-02; and *Pension Benefit Guar. Corp.*, 496 U.S. at 653-55).

336. *Id.*

whether the agency adequately addressed the record when issuing the challenged finding of fact."[337] Ultimately the court held that it would not go so far—not because it found the argument unpersuasive, but because it understood itself to be bound by circuit precedent to a more limited reading of the statutory provision.[338]

In a Second Circuit case, *Ojo v. Garland*, the majority and dissenting judges offered sharply different interpretations of *Ming Dai*, with the majority construing the Supreme Court's opinion narrowly and the dissent construing it expansively.[339] The majority vacated and remanded the case to the agency in part because neither the IJ nor the BIA had discussed an expert report that the majority characterized as providing "probative and potentially dispositive evidence supporting Ojo's [Convention Against Torture] claim."[340]

The dissent in *Ojo* took the majority to task for unduly limiting the scope of the Supreme Court's decisions in *Ming Dai* and *Vermont Yankee*. The dissent characterized the majority as "nitpick[ing]" its way to remand simply because "the agency's opinion could have been written more clearly."[341] This, the dissent argued, was precisely the type of "magic words" requirement that the Supreme Court had rejected in *Ming Dai* and that was precluded by *Vermont Yankee*.[342] Reviewing courts, the dissent maintained, lack "permission to establish new *procedural* requirements."[343] Seizing on the majority's statement that it would not dilute review standards in deportation cases, the dissent claimed this amounted to an "admission that the court is inventing its own procedural requirements regardless of what the INA requires."[344]

Some judges also now invoke the prohibition on judge-made procedural rules in disputes over statutory interpretation. When these judges believe their colleagues are holding the agency to too exacting a substantive standard—often the result of statutory interpretations motivated by concerns about fair play or fundamental fairness—they recast such disagreements as "procedural" and accuse their colleagues of impermissibly imposing "judge-made procedural" rules that tie the agency's hands.[345]

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337. *Id.* (discussing 8 U.S.C. § 1252(b)(4)(B)).

338. *Id.* ("In light of our precedent, however, we do not read [Section 1252(b)(4)(B)] in this narrow way.").

339. *See* 25 F.4th 152, 175 (2d Cir. 2022); *id.* at 177 (Menashi, J., dissenting).

340. *Id.* at 169, 175 (majority opinion).

341. *Id.* at 176 (Menashi, J., dissenting).

342. *Id.* at 182 (quoting Garland v. Ming Dai, 141 S. Ct. 1669, 1679 (2021)); *id.* at 182-83 (citing Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978)).

343. *Id.* at 193 (emphasis added).

344. *Id.*

345. *See infra* notes 346-65 and accompanying text.

In *Ud Din v. Garland*, the Second Circuit disagreed with the Third Circuit over whether the asylum statute and its implementing regulations permit IJs to designate untimely asylum applications as frivolous.[346] A frivolousness finding can be devastating to noncitizens, triggering severe consequences including a permanent ban on immigration benefits.[347] Based on its review of the statute and implementing regulation, the Third Circuit concluded that these sources did not definitively answer the question.[348] Because these sources of law were deemed inconclusive and because the implementing regulations describe frivolous applications as "deliberately fabricated" "material elements,"[349] the Third Circuit looked to precedents on material misrepresentations in other contexts and concluded that an untimely application is categorically not frivolous because, by definition, it contains no material information for the agency to consider.[350] In approaching the issue this way, the Third Circuit indicated its desire to ensure a "just" outcome in light of a frivolousness finding's serious consequences.[351]

The Second Circuit in *Ud Din* disagreed with the Third Circuit's legal analysis, concluding that the relevant asylum statute's "text, context, and precedent all support the conclusion that" untimely asylum applications "can be deemed frivolous."[352] But instead of relying on just this textual analysis, the court also invoked *Ming Dai* to buttress its substantive legal interpretation, explaining that the Third Circuit's approach involved the imposition of an impermissible "judge-made procedural requirement[]" on the agency.[353]

The Fifth Circuit took a similar approach in *Abubaker Abushagif v. Garland*.[354] The issue in that case was whether a summary judgment standard should apply to motion-to-reopen determinations made by the BIA.[355] Several other circuits had reached the conclusion that such a standard applies, relying in large part on the Board's own description of the motion to reopen as a

346. 72 F.4th 411, 424-27 (2d Cir. 2023).

347. 8 U.S.C. § 1158(d).

348. *See* Luciana v. Att'y Gen. of the U.S., 502 F.3d 273, 280 (3d Cir. 2007).

349. *Id.* (quoting 8 C.F.R. § 208.18).

350. *Id.*

351. *Id.* at 283-84.

352. Ud Din v. Garland, 72 F.4th 411, 426-27 (2d Cir. 2023).

353. *Id.* at 425 (quoting Garland v. Ming Dai, 141 S. Ct. 1669, 1677 (2021)). Adam Crews documents how in cases outside the immigration context some courts have similarly interpreted the *Vermont Yankee* principle "as a rule of strict construction: When statutory language has a range of permissible meanings, courts should select the one that leaves the agency with the greatest procedural freedom." Crews, *supra* note 35, at 49.

354. 15 F.4th 323 (5th Cir. 2021).

355. *Id.* at 331.

preliminary assessment.[356] The rationale underlying their approach was "notions of fair play and substantive justice," given that motions to reopen are decided without the "benefit of a hearing."[357]

The Fifth Circuit in *Abubakar Abushagif* disagreed that a summary judgment standard should apply.[358] But instead of describing its disagreement in substantive terms, the court invoked *Ming Dai* and *Vermont Yankee* to assert that a summary judgment standard was "a judge-made procedural requirement" that courts cannot impose.[359] *Ming Dai* was deployed by the *Abubakar Abushagif* court to undermine an approach that other courts had adopted to ensure fairness in the BIA's motion-to-reopen case law.

Finally, in *Sosa v. Garland*, five judges dissenting from the denial of rehearing en banc by the Ninth Circuit also invoked the idea of judge-made procedures to oppose a substantive interpretation of asylum law adopted with fairness considerations in mind.[360] The Ninth Circuit panel in that case had applied what it called "cumulative-effect review" to determine whether an asylum applicant had suffered past persecution.[361] Cumulative effect review mandates that the agency consider the cumulative impact of all harms an asylum seeker has experienced to determine if they rise to the level of persecution.[362] The panel's approach, which it justified as congruent with the statutory scheme, ensured that the agency considered all relevant facts in the record.[363] The dissenters to the rehearing denial, however, argued that the panel went too far in requiring the BIA to engage in such review.[364] Instead of framing the disagreement as one about the substantive legal standards that apply in asylum cases, the dissenters instead used the now-familiar accusation

356. *Id.* at 331 n.3 (collecting cases). The BIA had long held that in adjudicating motions to reopen, it should assess whether a prima facie case for relief exists. *See In re* Lam, 14 I. & N. Dec. 98, 100 (B.I.A. 1972); *In re* S-V-, 22 I. & N. Dec. 1306, 1307 (B.I.A. 2000).

357. Reyes v. INS, 673 F.2d 1087, 1090 (9th Cir. 1982); *accord* Haftlang v. INS, 790 F.2d 140, 143 (D.C. Cir. 1986) ("This rule serves to ensure that the alien has had 'his day in court' to demonstrate the truth of the facts alleged.").

358. 15 F.4th at 331.

359. *Id.* at 332 (quoting *Ming Dai*, 141 S. Ct. at 1677).

360. 77 F.4th 1246, 1256-57 (9th Cir. 2023) (Callahan, J., dissenting from the denial of rehearing en banc).

361. *Id.* at 1247 (Smith, J., concurring in the denial of rehearing en banc). Judge Smith authored the initial panel opinion, *see* Sosa v. Garland, 55 F.4th 1213, 1216 (9th Cir. 2022), and explained that the dissent to denial of rehearing "compelled" him "to respond in order to obviate confusion on the relevant issues in the future," *Sosa*, 77 F.4th at 1246-47 (Smith, J., concurring in the denial of rehearing en banc).

362. *Sosa*, 77 F.4th at 1247 (Smith, J., concurring in the denial of rehearing en banc).

363. *Id.* at 1247-48.

364. *Id.* at 1256-57 (Callahan, J., dissenting from the denial of rehearing en banc).

that the majority was "creating a new, judicially imposed procedural rule governing the analysis of asylum applications."[365]

B. The Consequences

The opinions described in Subpart A above exhibit a variety of complementary strategies that could, independently or in combination, shrink judicial review's footprint. This Subpart explores how these percolations in the circuits could transform the court-agency relationship in deportation cases and beyond.

1. Undermining effective administration

This Article began by showcasing how Article III courts use their review function to target systemic problems that plague the deportation adjudication system.[366] This judicial role involves something resembling tough love: Courts neither do the agency's work for it nor sit idly by when the agency repeats mistakes. Rather, courts push the agency to be the best version of itself by counteracting some of the institutional and resource-driven pressures that adjudicators feel to rush cases to completion.[367]

The opinions discussed above chart a very different role for the court-agency partnership. With the rational-basis model, courts are transformed into agency loyalists, diligently scouring the record for reasons to legitimize the agency's preferred outcome.[368] Under this approach, the quality of the agency's analysis does not matter so much because the court does much of the reasoning for the agency.[369] Similarly, when courts relax the consideration requirement, the agency can more easily ignore material evidence—which impacts the accuracy of its decision-making—and still be affirmed by a reviewing court.[370]

As for the *Vermont Yankee* approach, the consideration and explanation requirements are recast as procedural innovations that courts lack authority to impose.[371] As a result, courts are obligated to affirm even in cases where they suspect that the adjudicators below acted hastily, carelessly, or with bias.[372]

365. *Id.* at 1257.

366. *See supra* Part I.C.

367. *See supra* Part I.C.

368. *See supra* Part III.A.1.

369. *See supra* Part III.A.1.

370. *See supra* Part III.A.2.

371. *See supra* Part III.A.3.

372. *See supra* Part III.A.3.

The common thread across these approaches is their evisceration of judicial review's quality-control function. Whether by fixing the agency's mistakes for it or by disavowing a meaningful judicial role in checking the agency when it makes those mistakes, these approaches permit low-quality deportation decisions to more easily survive judicial review.

These approaches reconceptualize the role of courts in deportation adjudication. Through rigorous enforcement of the consideration and explanation requirements, courts have carved out an important role for themselves in *administration*—that is, in "fairly and faithfully giving effect to the law in the real world."[373] When judicial review operates as quality control, courts work in partnership with the agency to improve the day-to-day administration of immigration law, seeking to make it fairer, more impartial, and more faithful to the statutory scheme that Congress enacted.[374] But under these alternative models of judicial review being auditioned in the circuits, courts cease to play such a meaningful role, abandoning the work of administration to the agency.

If the judiciary's quality-control function shrinks, it becomes more pressing for the agency to implement internal quality assurance mechanisms of the type that scholars have critiqued it for lacking.[375] But even if, against the odds,[376] such mechanisms are implemented, it is far from clear that they could effectively substitute for the judiciary's expertise.

When Article III judges express concern about the quality of adjudication in the immigration court system, they are often speaking as sophisticated factfinders themselves.[377] Many appellate judges are formerly trial judges or have spent years trying cases as lawyers.[378] And although scholars often cast

373. Emily S. Bremer, *Power Corrupts*, 41 YALE J. ON REGUL. 426, 430 (2024); *see also* Bijal Shah, *Judicial Administration*, 11 U.C. IRVINE L. REV. 1119, 1153, 1155-56 (2021) (noting that courts deploy the hard look doctrine to ensure effective agency administration, including the development of agency expertise, without engaging in policymaking directly themselves).

374. *See supra* Part I.D.

375. *See* Ames et al., *supra* note 8, at 40, 47-48; *see also supra* Part I.B.

376. One of the reasons that it seems unlikely that the agency will respond to more lenient judicial review by ratcheting up in-house review mechanisms is because it is often "the possibility of judicial review" that motivates "agencies to develop durable accountability structures." Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1677 (2023).

377. *See* Haley N. Proctor, *"Just the Facts, Ma'am"? A Response to Professors Blocher and Garrett*, 73 DUKE L.J. ONLINE 199, 199 (2024) (noting that "[f]acts are the chief business of the judiciary").

378. *See* Kim, *supra* note 101, at 634 (explaining that "[j]udges appointed to the appellate bench usually have years of experience hearing cases that would engender confidence in their skill in exercising sound judgment" while finding facts).

courts in the role of experts at law and legal interpretation,[379] the reality is that in most cases "the law is settled, and the court's central function . . . is finding facts and applying law to them."[380] Circuit judges, including those who come to the appellate bench without extensive trial experience, become accustomed to reviewing cases that turn on factual disputes or on the application of law to facts. They develop intuitions and expertise on whether an adjudication system is functioning as it should when making such determinations.[381]

As generalists, federal judges also have the benefit of comparing how deportation adjudication stacks up to adjudication in other fields.[382] And as compared to their agency counterparts, Article III judges are more likely to be steeped in "cultures of legal procedural justice," which "include the aspiration to deliver equal justice to all."[383] IJs and BIA members, by contrast, are embedded within bureaucratic organizations that are primarily "oriented . . . toward policy implementation rather than neutral adjudication."[384] This difference in orientation leads to a different type of intuition and expertise on which Article III judges rely when they criticize and seek to remedy systemic problems in deportation adjudication. If courts were to disengage via the new forms of review described in Part III.A above, the value that judicial review brings to this adjudication system may not be so easy to replace.

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379. An intuition related, perhaps, to the legal academy's skewed interest in the Supreme Court, which rarely reaches fact-bound questions. *See* Proctor, *supra* note 377, at 199 (noting how the judiciary's fact-finding role is "unglamorous" and "easily overlooked in a legal community that trains its collective eyes on the Supreme Court and its pronouncements of law").

380. *Id.*

381. *See supra* note 378; *cf.* Thomas W. Merrill, *Fair and Impartial Adjudication*, 26 GEO. MASON L. REV. 897, 901-02 (2019) (noting that when courts delineate the procedures required by due process in the context of an administrative decision, they "abstract[] from what [they] regard[] as the core or essential elements of a common law bench trial").

382. *Cf.* Erwin Chemerinsky, *Decision-Makers: In Defense of Courts*, 71 AM. BANKR. L.J. 109, 115 (1997) ("[A] court with general jurisdiction seemingly could select judges from a broader pool of candidates and allow[] decision-makers to benefit from the insights gained in cases involving diverse topics.").

383. *See* Paul Gowder, *Law and Leviathan: Redeeming the Administrative State*, 31 LAW & POL. BOOK REV. 12, 22-24 (2021) (book review).

384. *See id.* For example, Judge Posner's memorable conclusion that the immigration court is the "least competent federal agency" struck a comparative note. *See supra* text accompanying note 67. Posner was comparing the proceedings in the case before him to his understanding of what a fair and effective adjudicatory proceeding *should* look like. *See* Chavarria-Reyes v. Lynch, 845 F.3d 275, 280-81 (7th Cir. 2016) (Posner, J., dissenting) (documenting various problems with the adjudication process in immigration court and concluding that the petitioner "was railroaded by the immigration judge").

2. Bifurcating arbitrariness review

Another striking feature of the doctrinal developments this Article has unearthed is their incongruity with the rigorous hard look review the Supreme Court has applied when reviewing immigration *policymaking* by the executive branch, as it did when it reviewed the Deferred Action for Childhood Arrivals (DACA) rescission and census cases.[385] Outside immigration law too, hard look review appears alive and well—even newly muscular—in cases involving policymaking by federal agencies.[386]

If these trends continue, we could see a splintering of arbitrariness review, with the level of judicial scrutiny turning primarily on the type of agency action at issue.[387] High-profile policy decisions will be subjected to more

385. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1910, 1913-16 (2020) (applying *State Farm* and invalidating the termination of DACA because the agency failed to account for reliance interests and consider possible alternatives to a full recission); Dep't of Com. v. New York, 139 S. Ct. 2551, 2571, 2573-76 (2019) (finding that the agency's stated reasons for adopting a citizenship question for the census were "reasonable and reasonably explained," but also pretextual, and therefore setting aside the action as unlawful); *see also* Cox & Kaufman, *supra* note 3, at 1813 & n.186 (arguing that "[o]n the regulatory side of administrative law, the Court has ratcheted up judicial oversight . . . and grown ever more searching and dubious about the reasons agencies give for their actions" but acknowledging that "the Court has not been entirely consistent about increasing judicial oversight of regulatory policy"). Lower courts, too, have frequently engaged in stringent arbitrariness review of significant immigration policies of recent administrations. *See, e.g.*, Cristina Rodríguez & Adam Cox, *The Fifth Circuit's Interventionist Administrative Law and the Misguided Reinstatement of Remain in Mexico*, JUST SEC. (Dec. 21, 2021), https://perma.cc/5PYC-BNZN (arguing that "the Fifth Circuit appears to be ratcheting up arbitrary and capricious review into a form of interventionist administrative law that empowers courts to second guess agency policy judgments and block policy development"); *cf.* Rodríguez, *supra* note 179, at 98 ("[A]dministrative law and the courts were central to stunting much of President Trump's agenda [during his first term] . . . .").

386. *See* Daniel Deacon, Ohio v. EPA *and the Future of APA Arbitrariness Review*, YALE J. ON REGUL.: NOTICE & COMMENT (June 27, 2024), https://perma.cc/HZ54-W4QR (noting that the majority opinion, in a challenge to an EPA rule designed to control ozone pollution that crosses state lines, "seems to bend over backwards to extend grace to the" challengers to the EPA policy "while holding the government to a higher standard of clarity"); Christopher J. Walker, *Congress and the Shifting Sands of Administrative Law*, 34 WIDENER COMMONWEALTH L. REV. 187, 193-96 (2024) (discussing the DACA recission and census cases as well as *Ohio v. EPA*, 144 S. Ct. 2040 (2024), and asserting that the Supreme Court has recently announced doctrinal changes to arbitrary and capricious review that amount to "harder" look review).

387. Perhaps some version of this bifurcation has long existed. *See* Peter L. Strauss, *Overseers or "The Deciders"—The Courts in Administrative Law*, 75 U. CHI. L. REV. 815, 821 (2008) ("'Arbitrary [or] capricious' has one meaning for a court reviewing congressional judgments in enacting legislation, another for a court reviewing an agency's decision to adopt a high-consequence regulation, another for a court reviewing an agency's judgment to forego rulemaking it has been petitioned to undertake, and another for

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searching judicial review than individual deportation adjudications, with courts applying reasoned decision-making requirements stringently to the former but more forgivingly to the latter.[388]

Such a bifurcated approach may, at first glance, seem appealing in its efficiency: Courts could hold their fire for the most consequential of agency actions while not overburdening themselves with the heavy volume of individual adjudications that flood circuit courts.[389] But this is not the only relevant consideration.

First, as this Article has shown, courts have structured arbitrariness review in deportation cases not just to flyspeck the agency but to target systemic problems in the administration of immigration law.[390] For courts to dial down scrutiny of deportation adjudication would mean not just a loss of opportunity to correct for factual error in individual cases but a loss of opportunity to partner with the agency in correcting for the type of systemic errors the consideration and explanation requirements are designed to remedy.[391] Moreover, even as individual deportation adjudications may not seem significant from a public policy perspective, in the aggregate, these hundreds of thousands of cases *are*, in an important sense, our nation's deportation policy: They are where the rubber hits the road in the administration of our immigration laws.

Second, in significant policy disputes, courts are not the only entities closely scrutinizing agency action. Other powerful actors—organized interest groups, elected officials like members of Congress and the President, and the media—are all likely to be involved to a greater degree in holding the agency accountable.[392] By contrast, in individual adjudications, hardly anyone is

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review of the products of informal adjudications in relatively low-consequence matters . . . ." (alteration in original)).

388. Such bifurcation would be in keeping with Emily Bremer's observation that "administrative law today neglects administration, focusing instead on power and the institutions that wield it." Bremer, *supra* note 373, at 429.

389. Strauss, *supra* note 387, at 823 (noting that the intensity of arbitrariness review varies across contexts and is likely more exacting in cases involving "particularly high-consequence agency decisions" like "major rulemakings" and suggesting this variation in review makes sense because "the social stakes are higher" in such circumstances); *cf.* Richard H. Fallon, Jr., *Some Confusion About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 336 (1993) (arguing that when the availability of judicial review is viewed in functional terms, "it would not be workable to require careful judicial review of administrative fact-finding in every case" because "[t]he burden on courts could prove overwhelming" and "the added costs and delays could not be justified").

390. *See supra* Part I.C.

391. *See supra* Part III.B.1.

392. *Cf.* Blake Emerson, *The Existential Challenge to the Administrative State*, 113 GEO. L.J. (forthcoming 2025) (manuscript at 71), https://perma.cc/UHX9-7HJF (arguing that

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paying attention to what the agency is doing, meaning there are far fewer checks on the arbitrary or unlawful exercise of state power.[393]

And third, the substantial-evidence standard, which applies to deportation adjudications[394] is arguably a more searching review standard than arbitrary and capricious review, which applies to policymaking announced through rulemaking and other informal mechanisms.[395] As such, it is not obvious that courts are effectuating congressional will when they intensify review of policymaking under the arbitrary and capricious standard while at the same time dialing back scrutiny in contexts where the substantial-evidence standard governs.

3. Immigration exceptionalism—or experimentation?

If these judicial efforts to abandon deportation adjudication gain traction, one important question becomes how likely they are to affect the court-agency relationship in other adjudicatory systems. On the one hand, immigration law is famously exceptional.[396] And immigration exceptionalism is often credited with morphing how public law norms operate in immigration cases, with immigration law frequently deviating from the mainstream.[397] It is possible

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judicial review should be more searching in the context of administrative adjudication than notice-and-comment rulemaking because adjudications "do not benefit from the same open and participatory process as rules issued through notice and comment").

393. *See* Gowder, *supra* note 383, at 14-15, 38, 40-41 (arguing that concerns about the administrative state's "tyranny" are overblown in contexts involving rulemaking by agencies seeking to regulate businesses and underappreciated in contexts involving relatively obscure individual adjudications by "agencies with the power to affect fundamental interests of vulnerable individuals").

394. *See supra* note 90 and accompanying text.

395. *See* Strauss, *supra* note 387, at 822 (observing that "when directly faced with the challenge of making the verbal differentiations meaningful, the judicial reaction has been to find in the 'substantial evidence' formulation a congressional direction that review should be more intense" than in contexts where the arbitrary and capricious standard alone applies). *But see* Miles & Sunstein, *supra* note 62, at 764 ("[R]eview under the substantial-evidence standard is essentially the same as review under the arbitrary and capricious standard, though it is sometimes thought that review for substantial evidence is somewhat more searching."); *id.* at 764 n.25 (noting how in *State Farm*, the statute at issue required agency factfinding to be subject to the substantial-evidence test but "[n]otwithstanding that fact, the Court used the arbitrary and capricious standard—a decision that would be puzzling if the substantial evidence test were more severe").

396. *See* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984) ("Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system.").

397. *See* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 & n.2, 258 & n.15 (documenting the Supreme Court's

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that the softening of hard look review in deportation cases will become yet another example of immigration exceptionalism at work, and the developments this Article describes will remain siloed to this policy domain.[398]

But it is premature to presume this is the path the law will take. For one, there is nothing inherently immigration-specific about the doctrinal developments this Article has uncovered. To the contrary, most of the cases this Article has canvassed do not turn on the idiosyncrasies of immigration law.[399] Instead, they draw on generic administrative law principles and resemble criticisms of hard look review that have long circulated in administrative law scholarship.[400] There is no natural doctrinal buffer that would stand in the way of these new, more timid forms of judicial review migrating to other adjudicatory contexts.

This was precisely the argument that the petitioner in *Alcaraz-Enriquez* made to the Supreme Court.[401] Asserting that the Ninth Circuit's approach embodied standard-issue substantial-evidence review, his lawyer warned that a deviation from the usual rules in deportation cases would "set a new basement level standard for the quantum of reasoning an agency must offer to support its factual findings, one that would radiate far beyond immigration through the administrative state."[402]

To his point, scholars have documented how agency-specific precedents can develop but can then eventually "leak out into the mainstream of administrative law."[403] Similarly, when it comes to immigration exceptionalism, too myopic a focus on immigration law's outlier status elides the extent to which the immigration context can operate more as a testing site

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departures from mainstream constitutional norms in immigration cases); *see also* Adam B. Cox, *The Invention of Immigration Exceptionalism*, 134 YALE L.J. 329, 446 (2024) (arguing that contrary to conventional wisdom, immigration exceptionalism is a "thoroughly modern invention").

398. Administrative law scholars have also identified the existence of "agency-specific precedents," where "judicial precedents tend to rely most heavily on other cases involving the agency under review," and, over time, "both the articulation and application of the doctrine often beg[ins] . . . to develop their own unique characteristics within the precedents concerning the specific agency." Robert E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 500 (2011).

399. *See supra* Part III.A.

400. *Compare supra* Part III.A (describing judicial opinions that are pushing for review resembling rational basis and that assert that consideration and explanation requirements violate *Vermont Yankee*), *with supra* Part I.D (scholarly criticism of hard look review making similar claims).

401. Transcript of Oral Argument at 48-49, Garland v. Ming Dai, 141 S. Ct. 1669 (2021) (Nos. 19-1155 & 19-1156), https://perma.cc/DNY9-AD84.

402. *Id.*

403. Levy & Glicksman, *supra* note 398, at 534.

than a silo.[404] Immigration has proven to be a fertile ground, for instance, for the development of a body of constitutional precedents that "exert their own gravitational pull in cases outside the immigration sphere," particularly in cases involving other marginalized groups.[405]

The crucial question is whether courts will *want* to empower certain other bureaucracies at the expense of the federal judiciary. If they do, then the new doctrinal approaches that are developing in the deportation adjudication context could serve as a helpful blueprint.

To be sure, this might seem a strange time to be talking about judicial empowerment of bureaucracies. But when it comes to mass adjudication systems, Adam Cox and Emma Kaufman persuasively argue that there is an understudied "intellectual project" afoot to "*preserve and empower* the administrative state."[406] On their telling, docket control is the underlying impetus for these "probureaucracy" tendencies.[407] The Justices want to protect the workload—and, I would add, the prestige—of the federal judiciary, which necessitates a "large, uninhibited bureaucracy" capable of deciding the millions of disputes that are too numerous, or perhaps simply not elite enough, for Article III resolution.[408]

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404. For two compelling historical accounts of how immigration precedents contributed to the creation of modern administrative law, see Cox, note 397 above, at 412-16 (noting how immigration precedents helped develop the appellate review model where courts review legal determinations de novo and factual findings deferentially); and Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1, 22-44 (2002) (tracing how immigration cases contributed to the development of several important legal doctrines in administrative law).

405. Jennifer M. Chacón, *The Inside-Out Constitution:* Department of Commerce v. New York, 2019 SUP. CT. REV. 231, 264-65. With criminal procedure, for example, cases involving undocumented defendants have produced precedents that, over time, have weakened Fourth Amendment protections for all defendants and enabled racial profiling by police during routine investigations. Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1550-52 (2011). Along similar lines, Jennifer Chacón has analyzed how "limit[ed] judicial review and substantive rights" that noncitizen plaintiffs are afforded in immigration cases have "eroded" "equal protection norms" in cases involving U.S. citizen plaintiffs as well. Chacón, *supra*, at 264-65.

406. Cox & Kaufman, *supra* note 3, at 1813, 1815.

407. *Id.* at 1812, 1815, 1817.

408. *Id.* at 1815. On elitism, prestige, and the federal judiciary, see Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIA. L. REV. 173, 195-96, 198 (2003) (noting that "[t]he federal judiciary's approach has increasingly been to guard its own gates, perhaps serving to create and to preserve its own special character," and the result is a "hierarchy of adjudicators" with "low status litigants" being "relegated . . . to low status judges").

Another way to think about this issue is that the fundamental problem with administrative adjudication is that there is simply too much of it.[409] The Article III judiciary, with its eight hundred or so judges, could collapse under the weight of any substantial managerial role over the mass adjudication that occurs in the administrative state. If judicial review is *too* robust, courts will be flooded with petitions arising from overwhelmed administrative adjudication systems that the judiciary is under-resourced to handle. And at least some Article III judges may be disinclined "to engage in dreary review of evidentiary records," preferring instead to "maximize their influence over policy."[410] The theories to abandon deportation adjudication that are percolating in the circuits could prove attractive in other high-volume contexts where judges harbor such concerns about docket control.

Also not coincidentally, these other mass adjudication systems—which decide claims involving disability beneficiaries and veterans—are also primarily spaces where "poor people of color file legal claims."[411] Although their race-class subordinated status arguably should compel *greater* Article III oversight,[412] their judicial abandonment would be in line with regressive theories of due process and judicial review that are newly ascendant.[413]

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409. *See* Resnik, *supra* note 408, at 197, 200; *see also* Bremer, *supra* note 373, at 429-30 (describing and critiquing administrative law as a field for its infatuation with power and the institutions that wield it at the expense of focusing on the day-to-day work of administration).

410. Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 997 (2011); *see* Resnik, *supra* note 408, at 199-200.

411. Cox & Kaufman, *supra* note 3, at 1816-17; *see* Richard Frankel, *Corporate Exceptionalism: What's Behind the Business Community's Newfound Love of Jury Trials*, 34 WIDENER COMMONWEALTH L. REV. 115, 142-43 (2024).

412. Gowder, *supra* note 383, at 42 ("[W]here those who are subject to the depredations of the executive are least capable, because of their lack of perfumed lawyers and lobbyists, of defending themselves, the avoidance of tyranny requires far more robust protections."); *cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (explaining that heightened judicial scrutiny may be warranted in cases where "prejudice against discrete and insular minorities may . . . curtail the operation of those political processes ordinarily to be relied upon to protect minorities").

413. *See* K. Sabeel Rahman, *The Democratic Political Economy of Administrative Law*, LAW & POL. ECON. PROJECT: LPE BLOG (Sept. 25, 2019), https://perma.cc/J7TX-NMUM ("[A]nti-administrativism in practice has selectively deployed state power to coerce the poor and minorities and dismantled those agencies originally committed to reducing disparities of social and economic power."); Cox & Kaufman, *supra* note 3, at 1816-17 (noting how the public rights doctrine is shaping up to "siphon out of the administrative state . . . patent, property, and securities cases" which tend to benefit moneyed interests, while leaving cases adjudicated by "social-security courts, immigration courts, Medicare courts, and veterans-affairs courts" within the administrative state).

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C. The Path Forward

There are lessons here for both scholars and advocates. For scholars, one of the striking features of the judicial opinions surveyed in this Article is how they incorporate—or, perhaps, independently arrive at—criticisms of hard look review that have long circulated in the administrative law literature. That literature has focused primarily on the impact of hard look review on rulemaking, with critics arguing that the doctrine ossifies and unnecessarily judicializes the rulemaking process.[414]

Some of those critics may be surprised to learn that versions of their arguments appear in the deportation adjudication context. Certainly, it is possible that deportation's unique dynamics—the severity of the penalty, the political powerlessness of the regulated parties, the relative obscurity of the adjudicatory process, and the systemic problems faced by immigration courts and the BIA—would compel at least some scholarly critics of hard look review to reconsider their arguments as applied in this context.[415] And it is also possible that arguments that emphasize the harms of "judicializing" agency procedure miss their mark in the deportation adjudication context, where agency procedures are explicitly designed to resemble court proceedings,[416]

The Supreme Court's decision in *SEC v. Jarkesy* illustrates these regressive theories in action. 144 S. Ct. 2117 (2024). There, the Court took issue with an administrative adjudication that resulted in the imposition of a monetary penalty for a hedge fund manager accused of defrauding investors. *Id.* 2127, 2139. The Court was quick to emphasize, however, that *Jarkesy* should not be interpreted to disrupt agency adjudication of what it called "public rights" cases, which include "the collection of revenue, customs enforcement, immigration, and the grant of public benefits." *Id.* at 2146 (Gorsuch, J., concurring); *id.* at 2132-34 (majority opinion). But if the concern is the evils that flow from "concentrat[ing] the roles of prosecutor, judge, and jury in the hands of the Executive Branch," *id.* at 2139, one wonders if such evils are more likely to manifest in cases involving well-financed hedge fund managers facing financial penalties or indigent, pro se asylum seekers facing deportation, *see also* Frankel, *supra* note 411, at 117-18, 140-46 (noting how *Jarkesy* will primarily help "business defendants" without helping "[o]ther parties in administrative proceedings who may face penalties far more severe than a monetary fine—immigrants facing deportation, parents facing termination of their parental rights, and public benefits applicants fighting to escape the clutches of poverty").

414. *See supra* notes 178-85 and accompanying text.

415. *See* Sohoni, *supra* note 52, at 1571, 1573 (arguing for judicial deference to be calibrated according to the nature of interest at stake in an adjudication); Hoopes, *supra* note 107, at 206-08 (arguing that judicial deference should depend on various factors, including whether agencies are "politically responsive to its litigants," and whether the agency is undergoing a crisis of decisional quality).

416. This is not to say that the APA's drafters did not "contemplate[] some level of judicialization" of informal rulemaking; they likely did. *See* Rubin, *supra* note 180, at 116. My point here is one of degree rather than of kind.

and derive their legitimacy in part from that resemblance.[417] One takeaway here may be that generalist administrative law scholars should more often center deportation adjudication in their analyses and attend to how their doctrinal and policy proposals play out in this context.

The Article's insights can help inform not just the narrow debates around hard look review but also a broader conversation about the value and drawbacks of proceduralism in administrative law. Scholars who emphasize the importance of the administrative state getting things done and advancing the public interest have argued forcefully against the "fetish[ization]" of administrative procedure, usually with a focus on administrative policymaking.[418] Including the deportation adjudication context in the conversation on proceduralism could bring nuance to such critiques. Indeed, grappling with the implications for deportation adjudication is particularly important because anti-proceduralist reforms may be easier to implement in this context given the subordinated and politically disfavored status of noncitizens facing deportation. But these features are also precisely why proceduralist interventions can serve as a valuable check against the arbitrary exercise of state power.

As for advocates, the time to mobilize is now, when it may still be possible to challenge the developments described in this Article before they gain momentum in the lower courts or find a receptive audience at the Supreme Court. As a first line of defense, litigators challenging the agency's deportation decision-making in the circuit courts could argue that the Supreme Court, no less than Congress, does not "hide elephants in mouseholes."[419] And *Ming Dai* was a mousehole: a unanimous opinion in which the Justices gave no indication that they understood themselves to be fundamentally altering the law of judicial review of deportation adjudication.[420] Emphasizing these aspects of the Supreme Court's decision, advocates could argue that *Ming Dai* is more consistent with a business-as-usual approach in the lower courts than an approach that destabilizes the judiciary's quality-control role in deportation adjudication.

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417. Scholars, for instance, have explored how immigration courts have the "trappings of [Article III] courts" even as they "increasingly resemble[] a hierarchical bureaucracy." Jain, *supra* note 80, at 266, 311; *id.* at 311-12, 322 (arguing that these trappings "shield harsh immigration law from appropriate scrutiny" and "mitigate public discontent with the severity of modern immigration law").

418. *E.g.*, Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 350, 400 (2019); *see also* Rodríguez, *supra* note 179, at 96-97 ("[T]he thickening of procedure can . . . begin to render government ineffective and to deprive those who wield power within it from shaping government policies and practices to reflect their considered and value-laden views about what the state should do for the public.").

419. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

420. *See supra* text accompanying notes 247-49, 261.

Such an approach is likely to be particularly salient when parsing *Ming Dai*'s enigmatic invocation of *Vermont Yankee* and its general prohibition on "judge-made procedural requirements."[421] The potential implications of the Court's reference to *Vermont Yankee* are as expansive as they are troubling.[422] But absent some clear indication that the Justices meant for this reference to *Vermont Yankee* to be interpreted broadly, lower courts are best served reading that reference narrowly, as cabined to the Court's rejection of the Ninth Circuit's explicitness requirement for credibility determinations.[423]

Another litigation strategy advocates could consider is to emphasize those parts of *Ming Dai* that confirm the continued vitality of the *Chenery* doctrine in immigration cases.[424] Invoking *Chenery* is likely to be useful in responding to the more radical developments in the lower courts, like the push for rational basis-like review.[425] Such minimal judicial oversight—where courts devise their own justifications for deportation decisions[426]—is at odds with *Chenery*, which demands that agencies offer reasons to justify their decisions and that courts interrogate those reasons, and those reasons only, in reviewing the validity of agency action.[427]

Relatedly, advocates may also consider fleshing out the "[c]onstitutional [f]oundations of *Chenery*" in litigation.[428] The benefit of identifying *Chenery*'s constitutional soil is to foreclose an interpretation of the INA as permitting, or even compelling, rational basis review: If *Chenery* embodies an important separation of powers principle, then Congress cannot legislate around it in the

421. Garland v. Ming Dai, 141 S. Ct. 1669, 1677 (2021) (citing Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978)).

422. *See supra* text accompanying notes 250-61.

423. *Ming Dai*, 141 S. Ct. at 1676-77.

424. *Id.* at 1679 (citing SEC v. Chenery Corp., 318 U.S. 80 (1943)).

425. *See supra* Part III.A.1.

426. *See supra* Part III.A.1.

427. Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 955-56 (2007) (noting that the *Chenery* principle creates a "sharp contrast to the background presumption in constitutional review of legislation" in that "the court reviewing an agency action will not supply or substitute justifying reasons on behalf of the agency").

428. *Id.* at 952; *see id.* at 1020 (arguing that *Chenery* and a focus on agency reason-giving "implements an aspect of the nondelegation doctrine"); Church of Scientology of Cal. v. IRS, 792 F.2d 153, 165 (D.C. Cir. 1986) (Silberman, J., concurring) ("The precept that the agency's rationale must be stated by the agency itself stems from the proper respect for the separation of powers among the branches of government."); Ojo v. Garland, 25 F.4th 152, 180 n.4 (2d Cir. 2022) (Menashi, J., dissenting) (noting that the *Chenery* principle is a constitutional requirement "rooted in the separation of powers").

way that some circuit judges are construing Congress to have done with the INA.[429]

While relaxing the explanation requirement will at some point clearly violate *Chenery*, harder cases will continue to present themselves in *Ming Dai*'s wake. The question the Supreme Court ultimately left unresolved is *how* implicit the BIA's analysis can be while still being discernable and affirmable by a reviewing court.[430] To be sure, this is not a new problem; Judge Friendly identified a version of it some fifty years ago in his classic treatment of *Chenery*, where he urged courts to uphold the principle but "not be obtuse to reasons implicit in the [agency's] determination itself."[431] But on the precise question of how implicit an agency's reasoning can be, Judge Friendly punted, saying only that the answer is "perhaps more art than a science."[432] Anticipating criticism, he defended his position, saying, "[i]f it be charged that this is hardly a precise rule for decision, an answer is that no one has yet devised a satisfactory substitute for good sense."[433]

It seems to me that the *Ming Dai* opinion invites experimentation in the lower courts precisely because the Justices—while not purporting to alter applicable legal standards—failed to exercise "good sense" in the manner contemplated by Judge Friendly. Glossing over the real concerns that the Ninth Circuit raised regarding the BIA's cavalier disregard of the mistreatment Mr. Dai had suffered, the Supreme Court discerned a narrow path to affirmance—a path necessarily predicated on assumptions of good faith and competence from the agency, despite evidence to the contrary.[434] To be sure, the Supreme Court's analysis of the facts in *Ming Dai* is not part of its holding.[435] But it is understandable, if ultimately unpersuasive, that some

429. *See supra* Parts III.A.1-.2 (discussing how some circuit judges have focused on the INA's substantial-evidence provision to argue that it compels more relaxed review).

430. *See* Garland v. Ming Dai, 141 S. Ct. 1669, 1679-80 (2021).

431. Friendly, *supra* note 245, at 222. Relatedly, *Ming Dai* was not inventing a new legal principle when it stated that "a reviewing court must 'uphold' even 'a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" *Ming Dai*, 141 S. Ct. at 1679 (quoting Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974)). *Ming Dai* was quoting a longstanding principle of administrative law. *Id.*

432. Friendly, *supra* note 245, at 200.

433. *Id.* at 222.

434. *See supra* Part II.B.

435. The Supreme Court did not even purport to definitively resolve how the Ninth Circuit on remand should adjudicate the factual question presented by the case, offering only some observations about things "[t]hat might be said of Mr. Dai's case." *Ming Dai*, 141 S. Ct. at 1680; *see also id.* ("[T]he Ninth Circuit should consider whether the BIA found that Mr. Dai's presumption of credibility had been overcome."); *id.* at 1681 ("[Mr. Dai's] later admissions about his family's voluntary return and his decision to stay in this country for economic reasons *may have* outweighed his initial testimony . . . ." (emphasis added)).

circuit judges see in the Court's approach to those facts license to resist rigorous judicial scrutiny in deportation cases.

What counts as "good sense," of course, evades both precise formulation and general agreement. When a court considers whether an agency decision is arbitrary, it is "effectively asking whether the agency's departure from that ideal made a difference to anything worth caring about."[436] And while the Ninth Circuit opinion was written with the sense that there was something worth caring about in Mr. Dai's case, the Supreme Court's opinion was not.

One possible strategy for advocates to navigate this thicket could be to make clearer in their court submissions the system benefit that courts are uniquely positioned to deliver via the reasoned decision-making requirements in deportation cases. Those types of system benefits may resonate with judges, including those who are not as concerned about erroneous or imprecise factfinding in individual cases.[437]

Such an endeavor may be especially worthwhile if a case like *Ming Dai* reaches the Supreme Court again. Although it is possible that the Justices in *Ming Dai* intended for their decision to be a shot across the bow, signaling that lower courts should reel in their review, another possibility is that the Justices did not grasp, and therefore inadvertently gave short shrift to, the added value that Article III courts bring to the factfinding enterprise in deportation cases.[438] The Supreme Court, after all, rarely wades into factual disputes that arise in individual adjudications, and *Ming Dai* was something of an anomaly in that the Court applied the substantial-evidence standard and addressed the fact-bound questions the cases presented.[439]

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436. Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1807 (2021).

437. *Cf.* Fallon, *supra* note 389, at 336 (noting that courts tend to engage in judicial review of the modern administrative state not so much to "guarantee individually correct decisions" but to "identify and police, at wholesale if not at retail, the outer bounds of governmental lawfulness").

438. *Ming Dai* was a unanimous decision, 141 S. Ct. at 1674, and it is possible that not all Justices had the same reasons for signing on to it. One of the enduring puzzles of *Ming Dai* is that its author was Justice Gorsuch, an otherwise "root-and-branch critic[] of the administrative state," *see* Pojanowski, *supra* note 182, at 872, who in other immigration cases has appeared attuned to, and even "distrustful of the executive branch" and its handling of factfinding in deportation cases, *see* Cox & Kaufman, *supra* note 3, at 1808 n.165 (discussing Justice Gorsuch's dissent in *Patel v. Garland*, 142 S. Ct. 1614 (2022)). A clearer elaboration of the stakes could perhaps persuade someone like Justice Gorsuch to reconsider the relaxed approach in *Ming Dai*.

439. *See* Am. Textiles Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 523 (1981) ("[When a statute] places responsibility for determining substantial evidence questions in the courts of appeals" the Supreme Court "appl[ies] the familiar rule that '[it] will intervene only in what ought to be the rare instance when the [substantial evidence] standard appears to have been misapprehended or grossly misapplied' by the court below." (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951))).

Unlike the Supreme Court, application of the substantial-evidence standard is the bread and butter of circuit court review.[440] Advocates could articulate how circuit courts apply versions of hard look review in deportation cases to improve decisional quality at the agency, and this is an endeavor that falters if courts too easily assume good faith and competent adjudication at the agency when the evidence suggests otherwise. Circuit judges, too, could use their opinions to build the normative case for reasoned decision-making requirements as a form of quality control in deportation cases, much in the way that Judge Leventhal's opinions for the D.C. Circuit laid the foundation for hard look review.[441]

While these various strategies are worth pursuing, ultimately, it is also worth being clear-eyed about the extent to which smart litigation strategy can reverse the trends this Article has uncovered. If many in the judiciary today are preoccupied with docket management and worried about a coming deluge of deportation appeals, dialing back the intensity of judicial review to disincentivize future litigation may prove to be an attractive option notwithstanding any beneficial effects of judicial scrutiny.[442] Moreover, if the probureaucracy project is ideologically motivated, then there may be little that advocates can do to arrest the spread of these new developments in the circuit courts.[443]

If judicial review ceases to function as a backstop to agency dysfunction, then the need to identify and advocate for alternative solutions to that dysfunction becomes both more apparent and more pressing. One possibility, to which this Article has already alluded, is the development of quality assurance mechanisms within EOIR like the ones in place at other mass

440. *See supra* Part I.C; *supra* notes 88-91 and accompanying text.

441. *See supra* Part I.D.

442. *See* Cox & Kaufman, *supra* note 3, at 1815 (highlighting the Supreme Court's efforts to "insulat[e] administrative courts from judicial oversight," motivated in part by "docket control" concerns).

443. Of note, of the fourteen opinions discussed in Part III.A above, ten were authored—either as majority opinions or dissents—by judges appointed by President Trump in his first term in office. *See* Palucho v. Garland, 49 F.4th 532, 534 (6th Cir. 2022) (Murphy, J.); Flores Molina v. Garland, 37 F.4th 626, 641 (9th Cir. 2022) (VanDyke, J., dissenting); Rodriguez-Zuniga v. Garland, 69 F.4th 1012, 1014 (9th Cir. 2023) (VanDyke, J.); De Leon v. Garland, 51 F.4th 992, 1008 (9th Cir. 2022) (Collins, J., dissenting); Kalulu v. Garland, 94 F.4th 1095, 1097 (9th Cir. 2024) (VanDyke, J.); Lopez-Benitez v. Garland, 91 F.4th 763, 766 (4th Cir. 2024) (Richardson, J.); Herrow v. Att'y Gen. U.S., 93 F.4th 107, 120 (3d Cir. 2024) (Phipps, J., dissenting in part); Portillo Flores v. Garland, 3 F.4th 615, 640 (4th Cir. 2021) (en banc) (Quattlebaum, J., dissenting); Alexander-Mendoza v. Att'y Gen. U.S., 55 F.4th 197, 200 (3d Cir. 2022) (Phipps, J.); Ojo v. Garland, 25 F.4th 152, 176 (2d Cir. 2022) (Menashi, J., dissenting). It is possible that the second Trump administration will see the appointment of a new group of federal judges who may also find these and similar theories persuasive.

adjudication systems.[444] Such internal mechanisms could substitute, however imperfectly, for the managerial role that circuit courts play in the deportation adjudication system.[445] Other solutions to the politicization of deportation adjudication, like the establishment of an independent Article I immigration court,[446] are also already circulating, but there are questions both about their efficacy[447] and about whether the political will to enact such reforms exists.[448] Finally, because the availability of court oversight has long been central to the perceived legitimacy of agency adjudication,[449] the hollowing out of judicial review could, perhaps counterintuitively, enhance the appeal of more ambitious, even radical, solutions to the deportation adjudication crisis by laying bare the illegitimacy of the system as it presently exists.[450]

Conclusion

Article III oversight plays a vital role in counterbalancing the problems of decisional quality that plague the immigration court system. But judicial review of deportation adjudication is under attack. The immediate catalyst for this attack is the Supreme Court's decision in *Ming Dai*, which has inspired circuit judges in courts across the country to audition doctrinal approaches that would gut the judiciary's crucial quality-control function. If these approaches gain prominence, they could have devastating consequences, undermining the effective administration of immigration law and permanently relegating administrative adjudication to a second-class status. Ultimately, if a probureaucracy project is brewing in the federal courts, then

444. *See supra* Part I.B; Ames et al., *supra* note 8, at 31-40 (describing the SSA's quality assurance programs).

445. For reasons described in Part III.B.1 above, in-house agency solutions may be only imperfect substitutes for vigorous judicial oversight.

446. *See* Musalo et al., *supra* note 106, at 2794-96.

447. *See, e.g.*, Aaron L. Nielson, Christopher J. Walker & Melissa F. Wasserman, *Saving Agency Adjudication*, 103 TEX. L. REV. 1013, 1051 (2025) (detailing what the authors describe as the "serious flaws" of an Article I immigration court model).

448. *See* Note, *Courts in Name Only: Repairing America's Immigration Adjudication System*, 136 HARV. L. REV. 908, 922 (2023).

449. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965) (describing judicial review as a "necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate"); Gelbach & Marcus, *supra* note 24, at 1099 ("The fact that a federal judge offers a backstop against arbitrary decision-making . . . offers something of a psychological salve. Whatever happens within the agency, so the thinking goes, the unfairly denied disability claimant or the immigrant wrongly threatened with deportation can always get justice in an Article III court.").

450. For an introduction to, and defense of, advocacy for deportation abolition, see Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1045-51 (2021).

the opinions this Article has uncovered may turn out to be canaries in the coal mine—early warning signs for how courts could remake the law of judicial review to empower and embolden those bureaucracies responsible for administering justice to some of society's most marginalized members.