LEGAL LACUNA, SOVEREIGNTY, AND DEFERENCE: A RADICAL CRITIQUE OF LIBERALISM AND THE CHEVRON DOCTRINE

by

Jackie Poapst
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Master of Arts
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DEDICATION

To Pop Pop. I wish you were here to read this and disagree with everything I wrote. I will always remember that no matter how tough it gets, life is never worse than fair to middling.

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This was the hardest section of my dissertation to write. I will keep it short to pay homage to several people who have not only supported me through my life, but changed it for the better.

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I honestly never thought a first-generation college student like me would "make it" in academia. Being here has been a constant process of self-questioning and doubt. I thank each and every one of you for the impact you had on keeping my fire lit when times seemed dark.

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This dissertation examines how administrative procedure law operates semiotically to ensure a bureaucratization of civil society, specifically analyzing how this process can be seen in rhetoric surrounding the doctrine of judicial deference. I will make the argument that sovereignty does indeed still function in a hegemonic manner that has utilized the obscurity of the law, such as complex and often contrarily applied substantive canons like Chevron deference, to ensure its continuance. I argue that semiotic bureaucratization has provided sovereignty an arena for power expansion that is, in many ways, impervious to criticism.

CHAPTER ONE: INTRODUCTION

Being a college debate coach means that I am confronted with a wide range of political, philosophical, and domestic issues to research and think about on a daily basis. Each year, the college debate community is given a resolution to debate for the season. Inspired by the political upheaval seen during the Spring 2018 semester, the debate community decided to debate about statutory and judicial restraints on presidential power in certain areas of politics. One of these areas was administrative law, or more specifically judicial deference to administrative interpretations of statutes. Administrative law encompasses a wide array of governance mechanisms, a simple definition being the "branch of law governing the creation and operation of administrative agencies. Of special importance are the powers granted to administrative agencies, the substantive rules that such agencies make, and the legal relationships between such agencies, other government bodies, and the public at large." (Legal Information Institute, 2017). For the purposes of this research and stemming from the inspiration of the Cross Examination Debate Association's annual debate topic, I have chosen to analyze a specific facet of administrative law that has critical administrative weight, the Chevron deference doctrine, so named for Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 468 U.S. 837 (1984).

The Chevron doctrine is a legal tool of interpretation that allows courts to avoid determining the best interpretation of a statute, instead deferring to the executive agencies' assumed expertise on the issue – providing that the legislature has not spoken on the issue and the agency's interpretation is reasonable. These two caveats are normally explained as "steps" to the Chevron process, with Step One determining congressional delegation and Step Two determining reasonableness.

Focusing on Chevron, this dissertation will examine how administrative procedure law operates as a cultural artifact that ensures a bureaucratization of civil society, specifically analyzing how this process can be seen in rhetoric surrounding the doctrine of judicial deference. With the recent nominations of Supreme Court Justices Gorsuch and Kavanaugh, increased focus has been levied on administrative agencies and their relative legal power. However, criticisms of deference from both of these nominees and other legal scholars come from a conservative lens, where government itself is not questioned. Rather it is argued that this specific facet of government "wreaks havoc on separation of powers." Criticisms of deference stem from abstract conservative principles, but not necessarily from an examination of how this doctrine can not only instantiate an insidious, smooth-functioning governmentality within civil society – but also has materially harmful effects on marginalized individuals like undocumented immigrants, who are pushed into a "zone of twilight" when deference is applied to deportation suits.

Beyond single court case research performed by a small group of communication scholars, analysis of Supreme Court legal opinions is largely done within the halls of the

legal academy. While Supreme Court writing and rhetoric seems to fit entirely into the Communication discipline, it is too often avoided—possibly because of the dense subject matter. I believe that an analysis of case law surrounding deference from a communication perspective is a necessary addition to the field, as political communication research has focused too narrowly on the role of communication in elections and the formation of public opinion, neglecting an entire branch of government – the courts and the legal system.

Aside from the theoretical potential for this research, the more pressing need for a critical examination of administrative deference comes from the material effects these cases have on some of the most disenfranchised members of civil society. More plainly, this research will have applicable meaning in the day-to-day processes of legal matters such as immigration. The ideology of the party in power influences the ideological direction of executive agencies, which in turn establishes the backdrop for legal rhetoric concerning agency statutes. Agencies have differing interpretations of the law that shift with every presidency. This creates an unstable political organization that is quite frankly dangerous for individuals who depend upon a certain interpretation of those laws. For example, immigrants are increasingly being deported due to a nationalist and xenophobically inclined Bureau of Immigration Appeals led by a President who has demanded a policy agenda dedicated to decreasing and deterring undocumented immigration through any means necessary, an ideological position that becomes

particularly harmful for immigrants who choose submit themselves to cancellation-of-removal proceedings.[1]

Understanding the potential for double standards within court application of Chevron based upon ideological influences is extremely critical, as there is a certain amount of inconsistency within legal analysis regarding the role of ideology in shaping legal interpretations of Chevron in the courts.[2] Even though there have been numerous empirical studies regarding court ideology (Barnett, Boyd and Walker, 2018; Siegel, 2018), even these studies make rhetorical claims explaining that the "details" of cases are not important to outline when considering court justice comments regarding deference. This silence on the facts of individual cases raises important questions about the ability of these studies to accurately examine ideological influence. Siegel (2018) offers a recent example of this silence:

> Justice Gorsuch expressed his views on Chevron when he was a judge on the U.S. Court of Appeals for the Tenth Circuit, in the case of Gutierrez-Brizuela v. Lynch. **The case concerned an immigration law issue, the precise details of which are**

[1] While this example is an obvious reference to increasing anti-immigration policy and rhetoric under the Trump administration, I would be remiss to point out that these anti-immigration policies did not begin with Trump, but have simply become more front and center in public attention. The interesting component of administrative law, here, is that ideology can be hidden by presidential directive and executive agency statutory construction.

[2] Court ideology is a hot topic within legal analysis. For every study about ideology playing a role in decisions (see Barnett et al, 2018; Czarnezki 2008; Miles & Sunstein 2006; Sunstein et al. 2004), there are just as many claiming the opposite (see Kahan et al, https://scholarship.law.upenn.edu/penn_law_review/vol164/iss2/2/; and David A. Dana, and Michael Barsa, "Judicial Review in an Age of Hyper-Polarization and Alternative Facts" February 14. NORTHWESTERN UNIVERSITY PRITZKER SCHOOL OF LAW PUBLIC LAW AND LEGAL THEORY SERIES • NO. 18-05. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3123331

> **unimportant here,** and the administrative law principle of Brand X, which allows an agency to "overrule" a judicial opinion by issuing a new, reasonable interpretation of a statute it administers, even if that interpretation differs from a prior judicial interpretation. Justice Gorsuch's opinion for the court addressed the Brand X issues raised by the case (p. 950).

Barnett et al (2018) found that subject matter often *did* play an occasional role in the likelihood of Chevron application (identifying environmental cases as being the most likely to receive deference, and employment and immigration as much less likely), but they failed to examine the specific manner that justices were able to justify this inconsistent application.

According to their study (Barnett et al, 2018), there is a higher likelihood that courts apply Chevron deference to an agency's "liberal" interpretations of a statute, and a lesser likelihood that courts grant Chevron deference if an agency's interpretation is conservative – suggesting that political dynamics do play a role in court determination over deference. This is highly ironic, given that the doctrine is meant to prevent political interpretation by the court. Previous studies to Barnett et al. have shown that justice's political affiliation has determined the outcomes of cases that apply Chevron deference (Cross & Tiller, 1998).[3] This may also explain the current juridical climate concerning the doctrine, as most deference opponents are conservative, whereas the deference

[3] Barnett et al. largely examines the Cross and Tiller (1998) study for this claim. It is also important to clarify the distinction between the Cross and Tiller study and the Barnett study, since the Barnett study explicitly says they chose to examine the choice to apply Chevron in the first place – arguing that most studies focus on outcomes, not on initial application.

proponents remain in the liberal camp of the judicial arena. As I will explain further in later sections of this project, I believe this partisan delineation regarding Chevron is a specific reason to analyze the doctrine critically, as Chevron can be argued as a manifestation of the administration state that retains its power due to liberal justifications for its presence, despite its potential negative affect on citizens when their interests oppose the administrative state.

Research Questions

Rhetorical inquiry into the politics of judicial deference is a missing facet of legal analysis surrounding the Chevron doctrine. Most scholarship on Chevron focuses on its scope, rationale, and application (Shane and Walker, 2014). The Barnett et al. (2018) study discussed how judicial decisions regarding whether or not to apply Chevron exert influence how Congress and agencies choose to draft legislation and statutes, but they the authors remain silent on both the justifications made by justices regarding whether or not to apply Chevron and the specific theoretical influences that may be at play in these court choices. In short, I believe a key missing factor in this analysis is that rhetorical justifications in application matter just as much, if not more, for the social and political power exerted by the Chevron doctrine, the agencies receiving deference, and in turn the Courts granting deference.

Through analyzing rhetoric within Supreme court cases citing Chevron, I aim to explore several important research questions. First, does rhetoric concerning judicial deference shift depending upon the party/ideology in power, particularly within the executive? Second, does rhetoric concerning judicial deference shift depending upon the

specific case to which Chevron is being applied? Third, how does the application of Chevron deference to criminal statutes, particularly immigration statutes, ensure a continual tie between administrative and criminal law, and what are the consequences of this tie? And finally, what are the liberal justifications of Chevron/other deference doctrines, and to what extent do these justifications support or restrict work for genuine legal progress?[4]

Conceptual Framework

In the next chapter, I will begin by explicating the history of judicial deference, focusing on the Chevron doctrine and its creation and evolution. I will then discuss the persistent ambiguity of Chevron's application before concluding with an examination of the doctrine's current salience, particularly as conservative legal scholars call for its reform or elimination. Following this chapter, this dissertation will be segmented into five separate chapters that aim to merge Althusser's theory of ideology, semiotic concepts from Barthes and Derrida, and Foucault's notions regarding governmentality and sovereignty. Chapter 3 will examine critical scholarly concepts utilized throughout the dissertation, such as administrative procedure and violence, semiotics and signification, and bureaucratization. Chapter 4 will outline the methodological process I use to analyze the rhetoric and application of Chevron deference within the courts.

[4] While the concept of "genuine legal progress" will be delved into later in this work, I understand that this phrase may seem rather vague. For now, I am referring to legal change with materially beneficial effects for the public writ large, and not just small segments of the public. Genuine legal progress would have material benefits for the population it attempts to serve, without consequences for that same population or other marginalized populations.

The final three chapters will represent my findings from this qualitative textual analysis, focusing on answering the research questions listed earlier in this chapter. These three chapters comprise what I view as my theoretical contributions to the field, with each chapter focused on one of my research questions. The first of these chapters (Chapter 5) analyzes the most commonly cited justification for the existence of Chevron deference—agency expertise—and argues that justifications based on administrative expertise operate in a manner similar to Althusser's notion of the *hail to subject formation*, encouraging subjects to respond to a *call to subalternity*. Agencies are crafted as the divine, interpolating those outside its framework of power to a position of passive acceptance of the obscurity of sovereignty signified as legal lacuna. Using this analysis, I will argue for a recharacterization of Althusser's concepts of the Repressive State Apparatus and Ideological State Apparatuses to best understand the even functions of the Court to be equally repressive and ideological. In Chapter 6, I will apply Foucault's understanding of sovereignty to critique liberal justifications for retaining the Chevron doctrine, arguing that this type of cost benefit analysis allows for a resituating of state violence through expansion of legal bureaucratization.

The final chapter examines the *a priori* doctrinal placement of Chevron within criminal statutes, arguing first that Chevron's application within criminal law ensures a continued and parasitic relationship between administrative bureaucracy and the construction of criminality and deviance. I refer to this as the semiotic bureaucratization of criminality. Using foundational scholarship from semiologists like Barthes, I argue that the meaning of the individual sign of "deference" becomes dependent on its network

of associations with other concepts in criminal law, providing symbolic coherence and tethering of the concepts.

Secondly, I will analyze the manner that Chevron is given a priori placement within administrative interpretation when encountering interpretive tools that would require a different direction of interpretation, arguing that Chevron functions hegemonically within interpretive canons. I will pay specific attention to the court's choice to apply Chevron rather than the Rule of Lenity in criminal cases, which is an interpretive tool that would defer to the most lenient interpretation of a statute to protect the accused from harsh criminal penalties. Inspired by scholarship by Dean Spade (2015), I will examine this form of administrative interpretive sovereignty as a form of administrative violence that ensures a "rigged" game within the courts against defendants seeking reprieve from harsh criminal sentences.

CHAPTER TWO: HISTORY OF JUDICIAL DEFERENCE AND THE CHEVRON DOCTRINE

Providing agencies with the capacity to fill in legislative gaps was largely something that began from an economic perspective, with the increased power of the treasury department and other agencies under the New Deal (Schnee and Seago, 2013). While a certain level of deference to agency expertise has been embedded in the fabric of jurisprudence within the United States since its foundation, before Chevron, judges used their power to ensure that the courts agreed with the interpretation of the agency (Siegel, 2018).

With the expansion of governance and development of more complex agency power dynamics in the United States, the Supreme Court was faced with a dilemma – should the answers to questions of interpretation for specific cases be provided by those with "expertise" in the matter, or should the Supreme Court still exercise interpretive control? Calls to defer to what an agency articulated as the correct interpretation of the law for issues under their purview increased, finally culminating in what is now considered the "landmark case" for the judicial doctrine of deference – *Chevron U.S.A. Inc., v. Natural Resources Defense Council*.[5] As Bamzai (2017) writes, "*Chevron v.*

[5] Judicial deference as a concept is a legal doctrine that provides that a reviewing court must "defer" to an administrative agency's reasonable interpretation of an ambiguous statute or regulation. There are several different cases that provide differing types/levels of deference, such as Chevron, Skidmore, and Auer.

Natural Resources Defense Council provides that a reviewing court must "defer" to an administrative agency's reasonable interpretation of the organic statute that it administers" (p. 1).

Many scholars articulate the Chevron case as being an unwitting landmark case, largely because most legal analysts at the time did not assume that the decision in this case would craft a legal doctrine that has served as the bedrock for court cases regarding agency interpretations of statutes since the ruling (Werntz, 2017; Merrill, 2014). To this day, the Supreme Court still cites the Chevron doctrine in a large number of cases, to the point of abuse according to a large number of conservative legal authorities. Despite Chevron's capacity to serve as a bureaucratic loophole for administrative ambiguity, scholars on the liberal side of legal scholarship have remained largely silent regarding criticisms of the doctrine.

Chevron's Establishment

To begin investigating the shifting rhetorical dynamics relating to the Chevron doctrine by the Supreme Court, it is necessary to highlight the establishment and evolution of the doctrine itself. Again, it is critical to note that Chevron itself was not initially predicted to be a landmark case. At the time, the case seemed relatively innocuous, a decision narrowly focused on the question of whether the Environmental Protection Agency or the courts should interpret the Clean Air Act Amendments (Bamzai, 2017).

At its heart, Chevron is meant to provide interpretive leeway to agencies when encountered with ambiguous statutes, insofar as the agency had the authority to interpret

that statute in the first place. When applying Chevron, courts follow a two-step process. First, they determine (at Step One) whether Congress has already addressed the question raised by the interpretive issue. In cases where Congress has explicitly voiced an interpretation of the statute and how it should be applied, courts should abide by the congressional interpretation and give the agency no deference (Werntz, 2017). Thus, in cases where Congress explicitly interprets a statute, the administrative agency cannot ask courts to defer to its expertise (Werntz, 2017). If the Court finds that Congress either explicitly or implicitly delegated authority to the agency, they must then decide if the statute itself was ambiguous with regard to how the statute should be applied, enforced, or executed. As long as the agency was determined to have the authority to interpret the statute (based on Congressional delegation of authority), ambiguous statutes pass through the first step of Chevron.

In the second step, if a statute is found to be ambiguous, the courts must then determine if the interpretation defended by the agency is a reasonable reading of the statute. Even if the agency's reading is not articulated as the *best* reading, so long as it is a *reasonable* interpretation, the agency should be afforded deference for their interpretation (Werntz, 2017).

As explained earlier, before Chevron courts operated in a position of de novo ambiguity, allowing them to decide on a case by case basis the legitimacy of administrative actions and interpretations of statutes. The two-step test was a means to generate clarity in what was otherwise a continually complex and subjective area of ruling. As Werntz (2017) writes,

> Prior to Chevron, there were at least two lines of precedent, one requiring courts to engage in full de novo review of agency decisions, and the other one according agencies deference under certain circumstances. Courts chose which tack to take on a statute-by-statute basis, considering factors such as "the degree of the agency's expertise, the [technical] complexity of the . . . issue," whether the agency's interpretation was long-standing, consistently-held, and contemporaneous with the passage of the statute, and whether the agency had rulemaking authority (Werntz, 2017).

The process of de novo review was identified as a legal mess, ensuring lack of consistency and unpredictable paths for cases, to scholars and legal advocates of the time, Chevron was heralded as a method of precision that rectified the lack of objectivity in de novo review.

Step One

The first step of Chevron has received the largest amount of focus in scholarly analysis (Shane and Walker, 2014). This is not surprising, since the initial intent of Chevron was to provide the means to move away from do novo review of cases regarding statutory interpretation. However, despite what may seem like a clear step, Chevron's Step One still falls into a long legal debate regarding textualism and purposivism. As mentioned before, in order for a statute to pass through Step One, the court must decide first if congress has spoken on this issue previously (to determine whether interpretive authority has been delegated to the agency) and then decide whether the statute itself is

ambiguous. Only after determining that Congress has not spoken on the subject and the statute is ambiguous (to warrant interpretive leniency) can the court move onto Step Two.

Yet, scholars began to question how the court would determine whether Congress has efficiently spoken on an issue to prove non-delegation, and even more open for subjectivity, whether the statute itself is ambiguous. It is important to note that while all justices must determine whether a statute is ambiguous, they choose to do so using potentially radically different frameworks of analysis—namely, *textualism* and *purposivism*. As Werntz (2017) explains:

> Judges frequently spar over the approach used to determine whether the statute is clear or ambiguous. While all judges use the same basic tools to interpret statutes—the statute's text and context, history, traditional usage, precedent, purpose, and consequences that flow from the interpretation—they differ in emphasis. There are (at least) two camps, the textualists and the purposivists. The textualists, who emphasize the language and structure of the law, lean heavily on dictionaries and canons of interpretation, but tend to eschew reliance on legislative history or the statute's broad legislative purpose. Conversely, the purposivists avoid using canons of interpretation and search for Congressional intent in context and legislative history (Werntz, 2017).

Isolating the unambiguous intent of Congress is difficult without looking at historical context. As Schnee and Seago (2013) explain, identifying a statute as clear and unambiguous would seem like a simple test, but it is not so in practice. Having to look to the historical foundations of a statute to determine intent behind construction and

statutory language creates a difficult and often contradictory path. Courts have routinely differed on whether judges should limit themselves to the statutory code itself to determine congressional intent (Tax Court in *Carpenter Family Investments* as example) or if the court should draw upon a certain amount of legislative history (Court of Appeals in *Grapevine Imports*, along with the Supreme Court in *Mayo*) (Schnee and Seago, 2013).

Most legal scholarship thus focuses on the inherent ambiguities of Step One. The Congressional delegation component of the first step requires an agency to have a certain level of delegated authority to interpret a statute. If Congress has already spoken on the preferred interpretation of a statute, this interpretation will always outweigh any claims made by an agency. If the court finds that an agency lacked interpretive authority, they may still qualify for Skidmore level deference, a lower level of deference gives courts significantly more power in the interpretation game since agencies have to persuade the court regarding their interpretation (Dodge, 2017).

However, if the courts find that the statute itself is unambiguous, the decision will lock in all future agencies to that specific meaning, thus making Step One a critical portion of the deference process for not only that current agencies' interpretation of the statute, but for all future potential interpretations as well (Werntz, 2017). Contrarily, a statute that makes it past the first step of Chevron can be reinterpreted by that same agency in a different manner later, and receive deference yet again (even for an entirely different interpretation), so long as it too meets the Step Two reasonableness test.

Another reason that most scholarly analysis on Chevron rests in the Step One process may be due to the overwhelming statistics regarding agency success during the

Step Two process. According to Werntz (2017), agencies that make it past Step One are almost always granted deference, making for a much less exciting area of study than the more contentious section of the Chevron doctrine.

Step Two

As explained previously, once at Step Two, the court must determine whether an agency's interpretation of the law is reasonable. More specifically, "if Congress left an explicit gap, then a court must defer to the agency's construction unless it is 'arbitrary, capricious, or manifestly contrary to the statute.' However, if the gap is implicit, then a court must defer to a construction that is 'reasonable'" (Werntz, 2017). Some scholars argue that lax judicial review at Step Two lets agencies wantonly shift policies without justification, simply because deference provides agencies with way too much legislative authority to fill in policy gaps.[6] According to Sharkey (2018), "the agency need not explain nor justify its policy-relevant choice among competing viable statutory interpretations" (p. 2380). In short, as long as an agency's interpretation could be considered a "viable" interpretation (and the word viable here is used very loosely), the agency's interpretation will pass the Step Two "sniff test." Sharkey (2018) unpacks this danger within Step Two more clearly, arguing that if the second step of Chevron basically operates as a formality. In short, it does not actually exist as a material stop-gap to agency interpretive overreach:

[6] I must give credit and thanks to the Georgetown University debate team for this succinct wording of lack of judicial review at Step Two.

> …at Step Two, the court deferred to the agency's interpretation, explaining that "[b]ecause the EPA's construction is one of the two readings we have found is reasonable, we cannot say that it is 'arbitrary, capricious, or manifestly contrary to the statute.'" According to the court, "[a]ll that matters is whether the regulation is a reasonable construction of an ambiguous statute. In other words, there must be two or more reasonable ways to interpret the statute, and the regulation must adopt one of those ways." But this effectively renders Step Two a nullity—all of the work is done at Step One; having determined that there is ambiguity such that two or more interpretations are within the zone of reasonableness, there is nothing further that the agency must explain or justify with respect to its choice among these interpretations. (p. 2381)

One major problem with the scholarly focus on Step One of Chevron is the dearth of analysis regarding how courts ultimately determine reasonableness. As Werntz (2017) rather adamantly proclaims: "…how does a reviewing court decide whether the agency's interpretation of a statutory ambiguity is reasonable? Notwithstanding the relentless volume of Chevron scholarship, this "question has not received much attention" and there is relatively little authoritative guidance or agreement on this subject" (p. 315B) I would argue this presents an opportunity in the field, not only from a legal perspective, but also from a legal communication lens. Namely, determining the rhetorical constructions of reasonability as represented within court case discourse.

The main point of contention present in scholarship regarding Chevron Step Two is how Step Two's reasonableness review and the Administrative Procedure Act's

arbitrary and capriciousness standard may be potentially contradictory levels of review within two separate deference doctrines (Werntz, 2017; Buzbee 2009). Other scholars mention these levels of reviews as being potentially complementary, arguing for a melding of the two doctrines (Sharkey, 2018; Peckler, 2017; Saiger, 2014). Regarding the relative nullity to the Step Two process, Peckler (2017) argues that adding the hard look standard present in the State Farm review would provide "teeth" to both steps of Chevron, avoiding incentives for agency ambiguity. The APA's arbitrary and capriciousness standard, otherwise known as the State Farm Test, mandates a much higher-level review of interpretations than Chevron's reasonableness test, and predated Chevron – despite never being mentioned in the Chevron decision (Werntz, 2017). In many ways, since the APA's higher standard of judicial review predates Chevron, I would argue that this shows the ability for legal progress against administrative bureaucratization to be overturned.

Deference outside of Chevron

While there are other deference doctrines within legal canon, Chevron still remains the largest instance of juridical leniency present for agencies. However, I would be remiss not to explain two other deference precedents within the courts, Auer and Skidmore. While Chevron covers agency interpretations of statutes, *Auer v. Robbins* addressed the courts' deference to an agency's interpretations of its own regulations.[7] Auer provides the same level of deference as Chevron. However, a third type of

[7] Auer deference is also referenced as Seminole Rock deference, as a former case Bowles v. Seminole Rock & Sand Co. addressed similar issues about agency regulations and deference.

deference is Skidmore deference, which does not provide guaranteed deference to agency interpretations of legally ambiguous statutes or regulations, but still allows for agency interpretations to provide guidance to the courts. Basically, Skidmore gives agencies the opportunity to persuade courts of their interpretation, acknowledging a "certain body of experience" to agencies (Bamzai, 2017). The largest distinction to identify within the individual deference doctrines like Chevron/Auer and Skidmore is, in short, the level of deference, as Lipton (2010) explains:

> Thus, the Court has laid out a fairly coherent framework for different levels of deference to agencies' interpretation of ambiguous statutes. For formal agency decisions, such as formal adjudications or notice-and-comment rulemaking, courts should be quite deferential to agency interpretations under the Chevron doctrine. So long as the agency's interpretation of the statute is reasonable or plausible, the agency's interpretation should not be overruled. For other, informal agency decisions, however, the Skidmore standard operates as a default setting of lesser deference. In other words, "Skidmore is the backstop doctrine that applies when Chevron deference is unavailing." Since the Skidmore backstop governs the majority of administrative decisions, the level of deference indicated by that default setting is crucially important. (p. 2125)

In the 1944 case of *Skidmore v. Swift & Co*., the Supreme Court determined that courts could follow "general principles" to decide how to intervene in ambiguous agency interpretations. Courts did not need to bind themselves to the interpretation of the agency, but could determine whether the agency's recommendations held persuasive weight. This

persuasiveness was measured based on how thorough the investigation into the making of the ruling was, how valid the agency's reasoning was for their interpretation, and whether this interpretation represented overall consistency with the agency's position over time (Yavelberg, 1992). While some scholars view this level of deference as basically no deference at all, others argue that the delegated power an agency holds for a niche area provides their interpretations with relative persuasiveness to justices of courts who view agency interpretations as having persuasion through expertise (Lipton, 2010).

While Chevron is argued as the foundation of deference, largely due to widespread knowledge of the doctrine in comparison to others, it is important to understand how these different doctrines operate in a co-constitutive manner. Many scholars acknowledge that in a world without Chevron, deference would not disappear, but simply shift to a Skidmore level (Adler, 2018; Hessick, 2016; Larkin, 2016; White, 2016). Referencing the earlier discussion regarding justice ideology and choice to apply Chevron, the decision to apply Skidmore instead of Chevron may be a means for justices to shroud their ideology within a perception of deference legitimacy, since Skidmore allows justices a level of interpretive power Chevron precludes (Barnett et al, 2018).

Alternatively, other scholars argue there is so much ambiguity between Chevron and Auer applicability and in the distinction between statute and regulation interpretation that, in a world without Chevron, agencies could simply appeal to courts to apply Auer for the same cases, or resort to more obscure guidance documents to achieve similar results (Johnson, 2017). This points towards the greater need for reflection of

administrative law's ability to shroud sovereign power within legal lacuna, both giving it a perception of legitimacy while also insulating agencies from criticism.

Doctrinal Ambiguity

Since its establishment, there have been many court cases that have shifted the doctrinal balance of Chevron. From the Arlington court determining questions of jurisdictional deference, to the Mead court crafting the "Chevron Step Zero," to the *King v. Burwell* decision clarifying the major questions doctrine, Chevron has been anything besides a clear, unambiguous and stagnant precedent (Siegel, 2018). Since its original ruling, the Chevron case has been cited as precedent in a wide variety of court cases dealing with questions of agency interpretations of statutes. Yet it seems as the cases citing Chevron increase, so do the questions of Chevron's ability to provide clarity to the boundaries of interpretive authority. Despite Chevron's original purpose to provide doctrinal clarity, legal analysis regarding deference remains ambiguous at best.

Clear and unambiguous doctrines are more likely to force judicial compliance. While Chevron was explicitly crafted with the intent to cabin judicial discretion, scholars argue this is not occurring in all cases (Barnett, Boyd, and Walker, 2018; Hickman, 2018; Pierce, 2015). In short, despite its intended clarity of procedure, Chevron's application has been anything but clear. Controversies abound within the court from case to case about how to apply both Step One and Step Two in Chevron (Shane and Walker, 2014).

Amendments to the Chevron process, like the Mead Step Zero test, have magnified lack of clarity concerning Chevron as a whole, particularly since many high-ranking justices like former Justice Antonin Scalia have explicitly condemned the

additional step (Shane and Walker, 2014). Even attempts to streamline understanding how to apply Chevron deference, like characterizing it as a decision tree, continue to fail at ensuring clear application of the doctrine (Shane and Walker, 2014).

Step Zero

In the relatively early years of Chevron application, the Supreme Court was brought a case questioning whether agency actions were being merited Chevron review that should not, based upon a lack of Congressional delegation of authority. In *United States v. Mead Corp.*, the Supreme Court noted that express congressional authorizations should exist, yet courts were sometimes finding "reasons for Chevron deference even when no such administrative formality was required and none was afforded" (Shane and Walker, 2014).

In *Mead* the Court held that in situations where express delegation was not provided to an agency for rulemaking or adjudication processes that the agency should instead only be provided with Skidmore level deference, or the simple "power to persuade" (Shane and Walker, 2014). The Mead decision represented what some would argue as a huge stop-gap on Chevron, morphing the doctrine from a "simple Chevron two-step" to a "more intricate foxtrot" (Werntz, 2017). Now, the *Mead* decision is hailed as a new step to Chevron, the *zero step*.

In *Mead*, the Court decided that in order to qualify for Chevron level deference "in the first place only if Congress delegated interpretive authority to the agency with respect to the provision in question, and the agency has made an appropriate formal ruling with a 'lawmaking pretense'" (Brady, 2011). While the case at hand did not seem

to be one that was drastically change the parameters of deference discussions, those involved seemed to suggest otherwise – Scalia's dissent going as far to say *Mead* had replaced Chevron. The case itself regarded an informal document called a ruling letter by the Secretary of the Treasury that set "tariff classifications for particular imports." In question here was whether the ruling letter identified a Mead Corp day planner as a bound diary subject to a 4.0% tariff or an "other" item subject to no tariff. In the past, the item was categorized as "other," but the most recent ruling letter identified it in the tariffed category.

The Customs Office argued that these classification rulings were deserving of Chevron deference. Although the Court acknowledged that in some cases Chevron was applied to types of informal rulings, in this case, informality and seemingly arbitrary nature of these ruling letters (they can change very frequently with no notice and comment, and often are not even available until you reach the Customs port) meant they were not deserving of Chevron deference. However, the majority identified that this type of ruling procedure should qualify for the lower level of deference, Skidmore, which allows the interpretation of the agency to receive deference through its "power to persuade." In short, an agencies' interpretation can still be deferred to if the Court finds it persuasive. The Court identified that since agencies have relative expertise in their area, their interpretation often holds the most persuasive weight.

Scalia's dissent was quite severe in disagreement, arguing that the Skidmore doctrine died with the establishment of Chevron and that the majority's opinion makes Chevron irrelevant. Oddly, despite the majority's idea that this decision provided

agencies with increased flexibility due to the ability to garner deferral power in cases where they would otherwise not receive it based upon their slim claim to a formal proceeding, Scalia believed that resurrecting Skidmore level deference "ossified" the power of agencies, since Skidmore level deference "locked in" the decision of the Court as the true interpretation:

> Worst of all, the majority's approach will lead to the ossification of large portions of our statutory law. Where Chevron applies, statutory ambiguities remain ambiguities subject to the agency's ongoing clarification. They create a space, so to speak, for the exercise of continuing agency discretion. As Chevron itself held, the Environmental Protection Agency can interpret "stationary source" to mean a single smokestack, can later replace that interpretation with the "bubble concept" embracing an entire plant, and if that proves undesirable can return again to the original interpretation. 467 U.S. at 853-859, 865-866. For the indeterminately large number of statutes taken out of Chevron by today's decision, however, ambiguity (and hence flexibility) will cease with the first judicial resolution. Skidmore deference gives the agency's current position some vague and uncertain amount of respect, but it does not, like Chevron, leave the matter within the control of the Executive Branch for the future. Once the court has spoken, it becomes unlawful for the agency to take a contradictory position; the statute now says what the court has prescribed.

Mead questioned broadly an agency's interpretation and whether it lacked force of law. Chevron scholars like Sharkey (2018) argue that the Step Zero test limits the

applicability of the Chevron framework, both gutting the doctrine and ultimately usurping agency authority. Step Zero initially questioned whether an agency's interpretation lacked a force of law more generally, constraining Chevron applicability to interpretation of statutes, distinguishing those statutes from more informal agency actions that did not contain formal adjudication and notice and comment rulemaking (Werntz, 2017). Agency actions like "opinion letters, policy statements, agency manuals and enforcement guidelines, informal adjudications and amicus briefs" were excluded (Werntz, 2017). However, beyond its initial application as a general question of agency authority based on interpretive *process*, Step Zero has been expanded to question agency authority over particular *areas* of interpretation.

After *Mead*, other cases have introduced expansions to Step Zero, such as the *King v. Burwell* case, which lent into question whether issues that represent critical importance (major questions), economically or politically, under Step Zero were argued as areas of significance that Congress would not implicitly delegate authority for an agency to decide. In short, the Court was hesitant to believe that Congress ever intends to delegate to an executive agency interpretive power where significant political and economic issues are at stake. The King case specifically dealt with the Patient Protection and Affordable Care Act (ACA) and its provision regarding tax credits for individuals. The Internal Revenue Service argued that their interpretation of eligibility for tax credits deserved deference due to ambiguity of the ACA.

The Court invoked the major questions doctrine to deny Chevron application at Step Zero, arguing that the issues at stake were of "extraordinary significance" thus

meaning "Congress had not empowered either HHS or the IRS to receive *Chevron* deference for its interpretation of the ACA." (Leske, 2016) A large push for the invocation of the major questions doctrine in *King* rested on the economic impact that health insurance has on American society, as well as the massive political weight the enactment of the ACA had required in Congress. (Leske, 2016) The Court determined that there was no feasible way Congress could have implied that executive agencies had any authority to determine issues of such a high level of importance for the public.

Ultimately, Step Zero investigates both the explicit and implicit delegation of interpretive rights to an agency, asking whether an agency has legal authority from Congress to answer questions arising under a statute. (Sharkey, 2018) It is in the investigation of "implicit delegation" that Step Zero crafts what some may argue as a necessary constraint on agency overuse of Chevron, but also magnifies a certain subjectivity and convolution to the doctrine. How does a court determine implicit delegation? If issues of relative economic or political importance would obviously not have been granted implicit authority to agencies by Congress, how then does one determine economic and political importance?

Step 1.5

Beyond the moves of *Mead* and *King* (and Step Zero) to constrain Chevron, another step has been crafted called Chevron Step 1.5. However, this half step has in many ways created more administrative uncertainty than clarity. According to Werntz (2017), "at Chevron Step 1.5, if a court determines that the agency failed to recognize

that it was interpreting an ambiguous statutory provision, the court may remand the decision back to the agency to take first crack at interpreting the ambiguous provision."

In short, if an agency has argued that a statute is unambiguous, thus believing that an interpretation should be resolved at Step One, but the court determines that the statute is actually ambiguous, thus technically passing through to Step Two of Chevron process, the Court will not grant deference to the agency as the agency was not operating under the belief that they deserved deference in the first place (Hemel and Nielson, 2016). While the potential for an agency to make this argument may seem counter-intuitive, there are certain circumstances where asserting there is no other way to interpret a statute can provide interpretive power to that statute, since unambiguous statutes bind future Presidential agencies to that meaning. Werntz (2017) continues to explain that if no party in a case invokes this half step, that the court may determine at the first step who had the better reading, making step 1.5 not necessarily guaranteed for each case.

In many ways this half step has been attached by some scholars to the zero step, arguing that it simply extends the zero step to a constraint on agencies who fail to exercise their authority. Dodge explains that the half step takes constraint on deference a step further, citing in later cases like *Negusie v. Holder*, where the court found that "even if the agency has interpretive authority, its views will not be given Chevron deference unless the agency has actually exercised that authority[8] (Dodge, 2017).

[8] Dodge explains: "In Negusie v. Holder, the Court found that the Board of Immigration Appeals ("BIA") had not exercised its interpretive authority under the Immigration and Nationality Act because the BIA mistakenly thought itself bound by an earlier Supreme Court decision."

Canons and Chevron Confusion

Unsurprising to legal experts who remember pouring through administrative law books to pass their final exams, the legal arena is one of nuance and complexity that can be confusing to even the experts. One facet of administrative law that complicates understanding the Chevron process is canons, or default rules for court interpretation. On face, Chevron completely opposes the uses of canons in resolving agency interpretation ambiguity. "Under the preexisting canons regime, courts resolve statutory ambiguity conclusively, by resort to judge-made canonic presumptions. Yet after *Chevron,* when a statute is unclear, the resulting discretion belongs generally to the agency charged with its administration" (Bamberger, 2008, p.66).

There is a universal disagreement in courts how to apply substantive canons, which are policy-based background norms or presumptions, to the Chevron process – questioning whether they should occur at Step One or Step Two, highlighting how the doctrine itself does not bring a large amount of clarity for its application.[9] One example can be seen in respective courts' partisan holdings regarding where the presumption against extraterritoriality fits within the Chevron process (Dodge, 2017). Textual canons, which are guidelines setting forth conventions of grammar and syntax, linguistic inferences, and textual integrity, are largely applied at Step One.[10] However, normative canons, which embody public policies drawn from the Constitution, federal statutes, or

[9] See Anita S. Krishnakumar, Reconsidering Substantive Canons, Chicago Law Review, https://lawreview.uchicago.edu/publication/reconsidering-substantive-canons
[10] See William N. Eskridge, Jr., Philip P. Frickey, 108 Harv. L. Rev. 26, November, 1994.

the common law, have been applied at both steps of Chevron, creating overarching judicial confusion over their role.[11] The normative canon of constitutional avoidance, where the court attempts to eschew ruling on a constitutional issue if there is a way to decide the case on a non-constitutional basis, is often applied at Step One; yet other normative canons are also often applied at Step Two – such as the presumption against preemption of state law, which requires a court to assume that traditional state powers are not preempted by federal statute when interpreting an ambiguous preemption clause. The D.C. District court has ruled even more broadly against courts using normative canons to rule against an agency at Step Two (Dodge, 2017).

Some canons are not applied at all within Chevron cases, as Chevron is seen to resolve ambiguity that would encourage their use – the *Rule of Lenity*, a canon developed to defer to the most lenient interpretation of a criminal statute in order to prevent overly harsh punishment for criminal defendants, and the canon of liberal interpretation in favor of Native Americans and veterans, both developed to err toward interpretations that benefit Native American sovereignty and the welfare of veterans respectively, are a few examples.

The existence of competing canons of interpretation and Chevron magnifies exactly how ambiguous the evolution of legal lacuna surrounding statutory interpretation has become, raising the need for a more critical analysis of this development. The stakes for this are not as simple as "the legal system is confusing." For example, deference regarding criminal statutes creates an ambiguous area of legal precedent that puts

[11] Ibid.

immigrants facing criminal charges in a position of precarity and violence. Immigration detention policies rely on Chevron, basically making the Department of Homeland Security and the Bureau of Immigration Appeals immune to loss in Habeus courts. In short, the ability for immigration agencies to hide behind Chevron's relatively lax definition of "reasonableness" opens the door to violent and dehumanizing detention policies. "Deportation separates individuals from their families and homes," and there is a significant "emotional and mental [toll] of losing a deportation case;" "under current law, criminally convicted individuals facing deportation… must contend with an inconsistent and, perhaps, unpredictable judicial approach to their appeals" (Madigan, 2017). Yet, as long as an agency can prove their interpretation is a way to interpret a statute, the harmful effect of their interpretation is still considered reasonable.

Chevron's Saliency Today

Despite dramatic shifts and inconsistency in the doctrine, Chevron remains the most cited case within administrative law (Barnett et al, 2018; Shane & Walker, 2018; Siegel, 2018). Shane and Walker (2018) highlight the significant amount of Westlaw reports citing Chevron, totaling to more than 80,000 documents, 15,000 cases and nearly 18,000 law review articles, an amount of attention that no other decision has received. Possibly due to the amount of citations, Chevron is an issue of judicial analysis receiving a greater amount of attack within the legal arena, making it a "particularly salient" focus of analysis within administrative procedure (Bamzai, 2017). Several current and former Supreme Court justices have either spoken negatively about how Chevron has been applied (Roberts), or more specifically called for its elimination (Scalia, Gorsuch,

Kavanaugh). Political will is pulling away from Chevron – through both congressional attempts to overturn the doctrine and judicial nominations of anti-deference justices like Gorsuch (and now Kavanaugh). Werntz (2017) describes this point in juridical history as a "brewing tempest" centered on the broad concern over the power of the administrative state and the increasing effect of administrative bureaucratization.

As examined in the previous section, several court decisions have begun to arguably unravel the force of the doctrine, what Sharkey (2018) describes as "Chevron's death by a thousand cuts." From the Roberts court eliminating Chevron's applicability regarding presumptions against extra-territoriality, to the *Mead* rulings' scaling back of processes deserving Chevron level deference, to Scalia's dissenting opinion in the *Mead* case, there was a significant amount of upheaval regarding the level of deference that the court seemed willing to provide to executive agencies within the Chevron framework (Wuerth, 2014). More recently, the courts seem to continue towards a certain "retreat from Chevron," placing new "power canons" into decision frameworks when determining Chevron's breadth[12] (Sharkey, 2018).

Although many scholars argue that the death of Chevron is imminent, there are still a large group of legal analysts who do not see any possibility of Chevron's overruling in the short-term future. The American Bar Association explicitly said jettisoning Chevron "may be a long shot," as enough most likely justices view the doctrine as too embedded in legal jurisprudence to undo (ABA, 2017).

[12] See King v. Burwell and Michigan v. EPA

Yet while conservative entities continue to aim at a devolution of Chevron, liberals maintain that without Chevron, the administrative state could not exist; arguing that allowing the death of Chevron would also usher in the death of the bureaucracy as we know it, with violent consequences (Matz, 2018). Shane and Walker (2014) characterize Chevron as a type of litmus test for administrative legitimacy, making the push by anti-administration scholars against Chevron make a lot more sense.

However, this justification for Chevron raises questions about what exactly a world without the administrative state actually means, and if the claims of guaranteed violence without it is are simply just liberalism's attempts to sustain itself? A claim which I would not argue is too far off base, considering the empirical impact that Chevron has on the actual outcome of cases. According to Barnett et al (2018), applying Chevron does indeed change outcomes, making it much more likely that an agency's interpretation will succeed in court.[13] Taking this a step further, they also explain that application of lower standards of review do not enjoy that same outcome, supporting the grounding for why proponents of deference would cling so adamantly to Chevron. Cooper explains exactly how difficult it is to succeed in the courts against an agency when Chevron is cited:

> Ambiguity is ubiquitous in the United States Code. What the Chevron Doctrine means is that even if you can demonstrate that the agency's interpretation is wrong-at least wrong using the traditional canons and tools of statutory

[13] Also see Walker, Attacking Auer and Chevron Deference: A Literature Review, 16 Geo. J.L. & Pub. Pol'y 103 (2018)

> construction, as the Court does day in and day out - you still lose. You lose unless you can also show that the agency's interpretation is "unreasonable," and that standard provides agencies with an extremely wide range of interpretive authority (Cooper, 2016).

Beyond simply the effect that Chevron has on administrative interpretations and case outcomes, the doctrine has a much larger influence on civil society as a whole. As Saiger (2014) explains, deference is not just a minor doctrine within administrative procedure, the ability for agencies to claim preference for their interpretation of the law spills over to large areas of social organization, "whether and how courts should defer to agencies, when those agencies interpret the statutes that grant them authority to make law, is a complex constitutional puzzle. But any solution to that puzzle also reverberates as a matter of political theory, of jurisprudence, and of public administration." Chevron even affects the way that congress drafts legislation – showing that Chevron is not merely "fiction" but a doctrine that has considerable semiotic weight on the legal register (Shane and Walker, 2014). Chevron as a unit of analysis for administrative law is critical for legal scholarship.

Shane and Walker (2014), citing Gluck, explain six reasons the doctrine has significantly more weight on administrative rule making than other interpretive schemas. First, Chevron occupies a level of precedent that simple "rules of thumb" do not benefit from. Second, Chevron codifies interpretive rules of thumb into the Step One process, arguably creating more weight those tools would enjoy otherwise. Third, Chevron is crafted to ground itself within congressional intent, making its application seem more

justifiable. Fourth, due to its connection to congressional intent and delegation, the doctrine literally encourages a certain direction in the manner that congressional legislation engages in process. Fifth, deference precedent has articulated that application of Chevron for an agency even trumps a prior court ruling on the subject, making agency control of interpretation take priority over judicial control. Sixth, there is an assumption within legal scholars that the courts are not experienced enough in specific statutory grounding to have an accurate understanding of interpretive weight for subjects requiring genre expertise. These six observations craft an effective understanding of why Chevron carries significant symbolic and material weight within the juridical plane.

The question then comes to mind, as mentioned previously, what the stakes are for a world without Chevron? Some would posit this question quite literally, asking whether courts should continue to provide great latitude to administrative agencies where congressional intent is ambiguous or silent or if they should instead take a more active role in challenging expertise and decision-making of agencies? On one hand, we have the conservative legal scholars arguing that this latitude allows for a unilateral executive with no checks on agency administration. On the other, we have the liberal legal scholar, arguing that without the doctrine, Courts would be left to interpret statutes better left in the hands of experts within the statute's legal niche. In some ways, these opinions do not seem very divorced from one another. They ultimately ascribe to a certain liberal notion of the law. As long as we are able to determine the actor best suited to administer the law, both opinions would hold the existence of it to be just. However, when the law seems to exist almost as an anathema, without predictability or equity of application, I would ask if

there is any actor suited to wield power over its interpretation? While this may seem an uncomfortable stance to take for some, in that I am asking one to occupy a position of relative certainty, I unapologetically say this is the place this project ultimately advocates. Since the call of liberalism is a provocative one, justified by what may be seen as the lack of any alternative, we must be continually suspicion of any hails to progress within systems designed to repress the many and empower the few.

Critiques of liberalism do not necessitate unethical libertarian understandings of civil society. Liberalism's entire ability to identify any alternative viewpoint as being "untenable" is exactly what sustains it. Yes, the criticism is an uncomfortable place to be, in that it encompasses a certain liminal space between its epistemological construction and its material manifestation, but I would posit that is important work to do within academic spaces. Requiring a telos for the process of worldmaking ignores that the process of critique can be an important telos in and of itself.

CHAPTER THREE: LITERATURE REVIEW

In order to examine the rhetorical movements within Supreme Court deference opinions, it is necessary to first explicate several theories and concepts that I will be applying within this dissertation. First, I will explicate the concept of administrative procedure, paying special attention to scholars who have argued that the arena of administrative law is one of material and symbolic violence. Second, I will move toward an analysis of semiotics and signification, as it is my argument that within the broader field of administrative procedure that deference operates as a certain cultural artifact that crafts symbols of citizenship, obedience, and civility.

Next, I will outline Weber's notion of bureaucratization, which I will argue is a scholarly complement to my application of deference as a sign of sovereignty. Following my analysis of bureaucratization, I will explain Althusser's concept of interpolation and "the hail" to subject formation, which I believe accurately depicts the manner that sovereignty commands obedience and passivity to legal lacuna. After which, I will explicate the Foucauldian concept of sovereignty and biopolitics, which I believe serves as the theoretical adjustment away from Marxist underpinnings with which Althusser's hail can be read. I will conclude this literature review with a discussion of Derrida's notion of the gift, which I will argue in later chapters forms the theoretical backdrop for

the non-citizen's call to fatalistic optimism for engagement within sovereign administrative law.

Administrative Procedure and Violence

United States code defines administrative procedure as "procedure used in carrying out an administrative program and is to be broadly construed to include any aspect of agency organization, procedure, or management which may affect the equitable consideration of public and private interests, the fairness of agency decisions, the speed of agency action, and the relationship of operating methods to later judicial review, but does not include the scope of agency responsibility as established by law or matters of substantive policy committed by law to agency discretion" (5 USCS § 592).

While legal scholars explain the concept of administrative procedure in respect to navigating its nuance, the application of administrative procedure relevant to this project will be the potential that administrative law has for the creation of ambiguous and nefarious legal lacuna. While the common definition of lacuna is an empty space or gap, my understanding of legal lacuna was largely inspired by Joel Pearl's (2013) description of "temporal lacuna" in their work describing Freud's inability to understand an individual's relationship to time. Rather than being a "gap" in Freud's scholarship, Pearl (2013) explained that Freud's psychoanalytic theory lacked "the ability to understand and interpret beings as entities whose being is temporality" (p. 149). I posit that the inability of administrative law to operate as anything but violent to the subjects of the law creates a legal lacuna, or an inevitable lack.

Gluck et al (2015) argue that the notion of procedure within the rulemaking context is one that current theory and description fails to accurately describe within current legal and juridical standpoints. There is no longer a predictable process of the law – instead, administration has given way to an intense amount of "unorthodox lawmaking and rulemaking" (Gluck et al, 2015). More specifically:

> And so it seems that the Schoolhouse Rock! cartoon version of the conventional legislative process is dead. It may never have accurately described the lawmaking process in the first place. This is not news to anyone in the halls of Congress or the executive branch. But it may be news for law...most of the doctrines, theories, and casebooks had overlooked—or perhaps intentionally ignored—the fact that the textbook understandings that form the basic assumptions underlying the doctrines and theories of both fields are woefully outdated. Just as the now-textbook 1970s model was once itself revolutionary, ours is again a world of both "unorthodox lawmaking" and "unorthodox rulemaking." These unorthodoxies are everywhere and they are not exceptions. They are the new textbook process (Gluck et al, 2015, p. 1794).

Each facet of administrative law works in tandem to provide a certain power with impunity to those who hold the highest offices. "From a democracy perspective, the process loses transparency and public input and sometimes obfuscates accountability" (Gluck et al, 2015, p. 1796). An example that will be explained within later chapters is the most common rhetorical justification for the Chevron doctrine's existence, that of agency expertise. Chevron's exact purpose was to uphold interpretive authority within

agencies, as those offices are considered the most elite and experienced on their specific subject matter, thus ensuring that agencies are able to act with impunity when it comes to constructing meaning behind statutes with very little oversight when Chevron is applied to their interpretations. Since it is rather difficult to garner the political capital necessary to congressionally overturn an agency interpretation once that has received deference in the courts, particularly when the court determines congress had already delegated power to that agency regarding the issue, even the idea of Congressional oversight when an agency begins to overreach their authority seems to be an overly optimistic and impossible conclusion for one to hope.

Gluck's analysis of the new workings of administration and its ushering in of procedure meant to guise power relationships and convergences within the juridical and legal arenas is complemented by critical theorists like Spade (2015) who articulate administrative law as an area that is explicitly carved out to ensure violence against dispossessed people groups. Spade's work, centering around trans abjection within legal arenas, argues that even as political avenues seem to open up for "deviant" subjects, those new constructions of political possibility are done so in assimilative manners that still demand incorporation of bodies into "acceptable" forms of deviance, or else guarantee one's exclusion from legal protections. Spade explicitly discusses the shift in LGBT strategies from Stonewall era resistance protests to institutionalized administrative organizing in the late 1980s, a move that implicitly white washed queer organizing.

Where once activism was led by trans prostitutes outside the Stonewall Inn through bottle throwing protests against police brutality, activism became coopted into

the halls of the institution, only inviting LGBT individuals with relative socioeconomic status and political prestige. Prostitutes, undocumented queers, and any otherwise unsavory parts of the LGBT community were in many ways expunged from the face of movements like ACT-UP. The political potential for deviant subjects became increasingly modified by the ability of those subjects to conform to a certain passive register of their original archetype. As Spade explains (2015), the law became a site of recognition politics with an end goal of assimilation – the activist was always welcome to push for inclusion into the law, but barred from questioning the "fundamental inequalities promoted from the institution" itself:

> Participatory forms of organizing, such as nonprofessional membership-based grassroots organizations, were replaced by hierarchical, staff-run organizations operated by people with graduate degrees. Broad concerns with policing and punishment, militarism, and wealth distribution taken up by some earlier manifestations of lesbian and gay activism were replaced with focus on formal legal equality that could produce gains only for people already served by existing social and economic arrangements. For example, choosing to frame equal access to health care through a demand for same-sex marriage rights means fighting for health care access that would only affect people with jobs that include health benefits they can share with a partner, which is an increasingly uncommon privilege. Similarly, addressing the economic marginalization of queer people solely through the lens of anti-discrimination laws that bar discrimination in employment on the basis of sexual orientation – despite the facts that these laws

> have been ineffective at eradicating discrimination on the basis of race, sex, disability, and national origin, and that most people do not have access to the legal resources needed to enforce these kinds of rights – has been criticized as marking an investment in formal legal equality while ignoring the plight of the most economically marginalized queers. (p. 30-31)

Administrative law becomes a space where assimilation into society is a requirement for access to societal protections to be afforded. In order to qualify for workplace protections, your work must be validated within the law. To be given affordable access to gender affirming healthcare, homeless shelters, etc. your gender status must be properly documented on your license. Submission to the law's control over the self becomes a prerequisite to the law's willingness to provide for your well-being.

Another example of this forced assimilation that will be explained in further detail in the analysis chapters is the call within the juridical context for noncitizens to submit themselves to cancellation-of-removal proceedings, ultimately admitting their illegality in order for the small chance at reprieve from the Bureau of Immigration Appeals and the court system. The odds are guaranteed to be stacked against their favor, but the cancellation-of-removal option is heralded as a last administrative resort before deportation. Only the best noncitizens can pass the cancellation-of-removal muster test, and those who refuse to submit to those trials are damned.

Myths, Meaning, Encoding and Decoding

Once one begins to view Chevron as being part and parcel of a certain material cordoning off of power into a position of impunity, it is necessary to understand exactly

what this means on a symbolic register. I will argue that the Chevron doctrine has become that of myth within American jurisprudence and civil society more broadly. In this next section, I will explain the foundations of Barthes' idea of the myth, while also delving into the theoretical foundations of his complementary scholars within cultural studies and semiotics more broadly.

Barthes and Myths

Barthes' main purpose in *Mythologies* was to analyze and deconstruct the operation of insidious myths. He describes a myth as a second-order semiotic system, one that takes a sign that is already existing and transforms it into a signifier that can then be associated with second-order, ideological meanings. Beyond the obvious connection to our discussions of the importance of symbolism in meaning making, Barthes' criticism of myth also possesses a historical component, in that he objects to the removal of history from language that is ever present in myths. Barthes argues that myths make specific signs seem to be ingrained, omnipresent, fixed and certain; the actual history and specificity of the first-order sign is overlaid with a transhistorical mythology at the second-order, thus transforming history into nature.

In *Mythologies*, Roland Barthes examines the tendency of contemporary social value systems to create modern myths. He looks at the semiology of myth creation, updating Saussure's system of sign analysis by adding a second level, where signs are elevated to the level of myth. At the beginning, he establishes that "myth is a system of communication, that it is a message" (p. 1) Also, "it is a mode of signification, a form" (p. 1) For Barthes ideology functions by linguistically robbing a signifier of its

specificity, denying its complex relationship to the system of signs, which means denying the place of the signifier and turning it to something universal by impoverishing the sign. In this way, "as a form of speech," mythology "naturalizes" things.

In many ways, Barthes description of the myth can be compared to the interpellation of Althusser, described later in Chapter Five, in that it hails to a subject who receives it as a command or like a statement of fact. Myths craft the viewer as being simply there to perform their role in the myth. On a different point of comparison, a myth can also be analyzed from the lens of Durkheim – where they become a social fact.

When considering Chevron's placement within legal arbitration, understanding the relative power that administrative law has to determine the *outcomes* of history is important. While the subject has the agency to submit their case to the law, the conditions with which that case is heard have a material consequence. In a sense, access to the law does not necessarily mean equity under the law when doctrines like Chevron exist that empower experts to act with impunity.

Bureaucratization

While Chevron operates as a particular position within that of administrative procedure, the placement of the doctrine crafts a broader power within governance that becomes that of bureaucratization. In later chapters, I will meld the idea of Chevron's myth status to the broader impact that this myth status has of being a certain semiotic social bureaucratization. As Weber (1922) explains, bureaucratization is the organization of political and economic administrative institutions on the basis of the principles of a bureaucracy. An obvious example of this phenomena within application of Chevron is the

capacity that the doctrine gives to agencies to make targeted interpretive decisions within ambiguous statutes to suit their particular political objective at that time, keeping open the ability to reinterpret those same statutes in oppositional manners while receiving deference for that interpretation as well. "Analyzing the consequences of bureaucratization, Weber devoted most attention to the trend among bureaucratic organizations to achieve a position of autonomy so that the bureaucracy can operate independently from political oversight and popular control" (Wakefield and Fleming, 2009, p. 15).

When thinking over Weber's notion of bureaucratization, I believe it is important to consider the convergence of this concept to Weber's broader theorization regarding power, specifically social power. The best linkage to this argument, in my opinion, is the comparison between Marx and Weber's understanding of power. However, as I will explain later, this notion of power is not lost in the scholarship of Durkheim and Geertz.

The most fundamental difference between Marx and Weber when it comes to understanding social power is the unit of analysis that each uses to determine who has power, what power means, and how society is built and structured. Marx believed that the key unit of analysis is social class, and that power is determined by how classes are related to the means of production. Most questions about the relative distribution of social power could be boiled down to an analysis of class status. Those who controlled the means of production, the owners or bourgeoisie, had the most power in society because they could coerce their workers (the proletariat) into working for their own exploitation while making profit for the capitalists. This coercive power is material in nature. It is the

creation, over centuries, of a system of property relations that enshrine private ownership of the means of production and give owners exclusive rights to all value (goods, money) produced from their property. The establishment of these relations of production creates a situation where the ostensibly "free" contract between worker and owner (both deemed "equal" citizens under law) can be in fact a relation of power and exploitation (where the worker is coerced into selling their labor to the owner to survive, the value of which becomes the owner's private property). Marx emphasizes, "An increased number of labourers under the control of one capitalist is the natural starting-point," (Marx, 1968). Using historical materialism, Marx traces the origins of capitalism and explains how access to material resources is a prerequisite for power within society.

Taking this discussion of power, one can connect that for Marx, individual agency is something that becomes lost within the system of capital for the working class, as they do not own the means of production. Members of the working class do not have an individuality, because the commodity replaces the laborer of significance. The face or agency of the laborer is lost, and the commodity experiences its own sort of agency in this environment. According to Marx, this mode of production produces commodity fetishism, whereby we confront commodities in the market, and in this space they seem utterly independent and detached from their history of social labor. Our experience of the market at the surface seems like a relationship between things, not people. But this illusion of independence conceals the long history of coordinated social labor that produced the commodity and brought it to the store. It is this gap – where the commodity is drained of its true meaning (social labor) that is filled by advertising – investing the

commodity with meanings and significance. The working class are alienated from the collective, a collective with little access to social power or individual choice. The commodity, however, has a singular type of agency, as it has replaced the use value of the laborer, and rises above all other commodities.

In this same vein of thought, the bourgeoisie maintains an individual agency, that is only cemented through the production that the working class provides, and almost always at the expense of the agency of the worker. The function of capitalist competition ensures that even if individual members of the bourgeoisie desired to act benevolently or humanely toward the working class, the nature of coercive competition makes positive treatment of the working class too large a competitive risk to operationalize – thus in a way constraining individual agency by members of the bourgeoisie to actions that treat the working class as machines.

While Marx gives reference to the potential of labor activism and struggle within the material manifestation of capital – in that capitalism contains the seed for its own demise, in the form of an abjected working class with little to lose but their own chains, Marx largely left this story under-theorized. Scholars like Gramsci ultimately picked up the mantle for analyzing the potential of struggle within capitalism, arguing that workers may ultimately identify the roots for dissent when they feel lack of equilibrium in the system.

Weber, on the other hand, analyzes power at the individual level. He understands power to be "the chance of a [hu]man or a number of [hu]man[s] to realize their own will in a social action even against the resistance of others who are participating in action"

(Weber, 310). In opposition to Marx, Weber does not believe that economic or profit potential solely determines power in society; rather, economic power could be a consequence of having other forms of power in society, such as status or honor. In short, economic resources stand alongside other resources as sources of power. The ability to access and control multiple social resources is key to gaining power in a society.

Weber labels the distribution of power throughout society the "status order." Classes, status groups, and parties can all be explained by the distribution of power throughout society. Class is a description of a group's economic power. In contrast, status is a group's power in society due to prestige, such as level of education, race, gender, or other factors that determine a person's level of honor in society. Status groups are often reflected by endogamy, sharing benefits, common traditions, and opportunity hoarding from other status groups. Class power and status power often have overlap, but class does not directly determine status. Marx does not consider status in his analysis. Finally, party is the level of political capital or power an individual has in society. The ability to create social change and build coalitions or associations is a key component of party power. Party reflects the interrelation of the three factors Weber identifies within the status order, "classes and status groups influence one another and the legal order and are in turn influenced by it" (Weber, 1968, p. 318).

Bourdieu explains that "symbolic capital" is the amount of prestige or honor a person has in society, which gives them access to certain opportunities or benefits. "Economic capital," on the other hand, is the amount of monetary or economic power a person has in society (Swartz, 1998). Weber combines an analysis of cultural capital and

economic capital to explain power stratification within society. Marx, on the other hand, only looks at economic capital to explain the power distribution within society.

Although I think Marx explains a massive amount of inequality within society, I think Weber accurately fills in a gaping blind spot of Marxism. Including prestige allows an explanation of *how* the proletariat is created and *which* groups are included. The connections between status, party, and class all explain how power is distributed in very particular groups in society. An easy example is to analyze who has the most power in the United States. White, heterosexual men are typically the most powerful group in society, with the most economic and political power. Marxism would lack the ability to explain why such a *particular* group of individuals are consistently controlling the levels of power. Status helps explain that being white, male, and heterosexual in society are valuable social traits with a particular set of traditions.

The bureaucratization heralded by Chevron represents a certain calcification of power on both the economic and social level. While the subject matter of many cases citing Chevron entails issues surrounding workplace environments, benefits, wages, etc., the conclusion of these cases, as explained in later sections, quite consistently favors neoliberal ends. Beyond this economic direction of case matter, the justifications for application of the doctrine also consistently err towards rhetoric of prestige, arguing for deference considering the relative expertise of certain actors to interpret niche areas of law.

Durkheim argues that the creation of a "social order" is critical to curtail the selfish instincts of individuals to act in their narrow self-interest without the slightest

regard for others. In this sense, agency is a complex concept for Durkheim, and something that is both legitimized and constrained by larger social collectives. While agency is individual, the collective social order crafts how individual agents should act according to social norms, casting doubt on the concept of individual agency existing at all. In *Suicide*, Durkheim (1897) says, "unlimited desires are insatiable by definition and insatiability is right considered a sign of morbidity," which proves that the destruction of individuals as well as society is the inevitable result if order is not mandated (p. 256).

Functionalism is one of the cornerstones of the social order perspective on society: specialization ensures that each individual serves a particular "function" within society. For example, there must be people who are willing to collect garbage, teach, and be in politics in order to ensure order is maintained and societal function continues. Shared values and norms are critical to maintaining an orderly society that requires minimal external policing. Weber's theory of stratification and conflict is explained by the idea that individuals will accept stratification if "they see the system is fair and feel that their own contribution to the work of society is properly recognized," (p. 19). In that sense, an individual will allow their agency/power to determine their own path to be determined by social ordering as long as their individuality is still considered within the collective. A concept very well suited for application to a doctrine like Chevron, which often asks individuals to accept the relative value of placing trust in institutions like executive agencies to accurately interpret a statutes' best function for societal welfare.

Further, Durkheim argues that stratification can be a motivating factor as people seek advancement within society. Society can maintain itself, despite the destruction of

particular individuals because Durkheim believes society is sui generis, or, "of its own essence," because social facts are independent of individuals but still have coercive power on behavior within societies. Social institutions such as law and religion develop, which promotes the smooth functioning of society. Institutions are analogous to organs within a body: each has an important role in making sure the body survives. Institutions, social facts, and functionalism all help explain the concept of "organic solidarity," which helps solve problems within society. Organic solidarity occurs when many connections and relationships are formed within societies based upon both law and human-trust that allow for effective societal problem solving.

In contrast, Weber defends a "conflict model" of society. He argues that society is built and premised on inequalities and stratification, which demands a transformation of societal values and structure. Rather than give individuals within society a drive for advancement, inequality inherently breeds conflict among those who are disadvantaged by the societal system. The more pessimistic epistemological approach of Weber regarding the inevitability of the social collective to be parasitic toward the individual is rather obvious when compared to Durkheim.

Conflict can produce change and has the potential to completely alter the structure of society. Weber argues that stratification occurs in many ways. Societies are divided into class, status, and party distinctions that all contribute to inequality, and thus, conflict within society. For example, class divisions have always caused social strife, and Weber believes that the disenfranchised classes can create revolution by demanding change and shaking the social order. Bureaucracy, or state-based legal constraints are created to

curtail conflict as well as check the stratification of society. Weber argues that bureaucracy is a better method of societal organization because of its "technical superiority." "Precision, speed, unambiguity, knowledge of the files, continuity, discretion, unity, strict subordination, reduction of friction and of material and personal costs – these are raised to the optimum point in the strictly bureaucratic administration," (Weber, 1968, p. 333).

I think Weber's view of society has more explanatory power for how society functions, particularly in contemporary times. Durkheim's perspective of motivation from stratification echoes the myth of the American Dream that any individual can "pull themselves up by the bootstraps" and advance within society, which has proven time and time again to be a false promise in American society where stratification is so pronounced that very little social mobility is possible. Weber also helps explain how society has morphed and transformed with time; most revolutions occur due to societal unrest and unfairness within the status order, for example, the civil rights movement in the sixties as well as the resurgence of women's activism today.

Using these concepts explicated through Weber and Durkheim, I will take a further leap away from Marxism than even Weber's criticism, arguing that instances of bureaucratization through prestige and elitism (present within the bifurcation of power, between the agencies interpreting the law and the individuals affected by the law, allowed by Chevron) removes a capacity for agency for any outside institutional organizations. Bureaucratic agency then becomes the ultimate resource that determines power in society. While this obviously takes a more unidirectional approach to power that would

be divorced even from Weber, I think it definitely positions itself as a deeper criticism of Marx who articulates economic and class power as being the social determiner for agency.

When considering the unit of analysis of power, this dissertation will aim to use the Chevron doctrine as a case study for the relative ability for power to instantiate itself through doctrine, particularly doctrinal ambiguity. The capacity for bureaucracy to sustain itself on a *symbolic* level through sovereign constraints on the agency of both individuals and collective groups within civil society is a necessary consideration to make when analyzing the violent potential that concepts like Chevron have for the material realities that exist today.

CHAPTER FOUR: METHODOLOGY

I collected the data for this project using the lexis case law research database, isolating the specific cases that were decided in the Supreme Court that reference Chevron. To find these cases, I first isolated the Chevron case, and then used the research function in Lexis that allows you to list cases that cite the case you are reading. After narrowing down the results to "Supreme Court only," I was left with 101 cases.

I chose to narrow the cases to Supreme Court opinions both because of size of results (over 7,000 cases have cited Chevron if you include all courts) as well as an attempt to ensure consistency in opinion writers within case analysis. Since I am attempting to investigate the manner with which justices rhetorically situate Chevron, its meaning, and their choice to attach deference based on particularities of the case, I find it necessary to isolate cases in a manner that examines the same court, and often even the same justices, throughout a wide array of cases I will be analyzing.

Procedure

Due to the varied nature of my research questions, I created three specific coding mechanisms within my larger process of coding and analyzing these cases. Before examining the particularities within each case, I separated each of the cases into three categories: Chevron was applied, Chevron failed Step One, Chevron failed Step Two.

My first coding aimed to garner a holistic direction for my analysis. My goal in this coding procedure was to understand the particular rhetoric attached to distinct cases, paying particular attention to whether those cases applied Chevron, and how rhetoric within the cases shifted between the majority writers, the dissenters, and the concurrent writers. Using my three initial coding groups (applied, failed Step One, failed Step Two), I sub-coded each case's majority, dissenting and concurrent opinions into five specific sub-categories: complete agreement with Chevron, partial agreement with Chevron, neutrality with Chevron, partial disagreement with Chevron, and complete disagreement with Chevron. I used these coding groups to analyze whether there was a particular rhetoric used regarding Chevron depending on whether the opinion was dissenting, majority, or concurrent. Once I created these categories, I used thematic analysis within each group, paying attention to specific rhetorical patterns, such as arguments, justifications and/or warrants (Guest, 2012). I identified rhetorical consistencies and divergences, largely aiming to answer the foundational question of how Chevron is justified or opposed.

My second coding took the initial three categories of Chevron applied (CA), Chevron failed Step Two (C2), and Chevron failed Step One (C1), along with the initial sub-categories of Chevron agreement to disagreement, and sub-divided those groups based on the author of the opinions. I also gave each case an identifier based upon agency. My aim with this level of coding was to cross-reference whether opinion authors ultimate Chevron conclusion shifted within those categories depending upon the case/agency in question. My goal of this coding system was to explore my research

question regarding party, ideology, and case specifics. If rhetoric regarding opinion on Chevron used by opinion writers shifts dramatically depending on if they are dissenting, concurring, agreeing with a case holding, this suggests a certain ideological bias. If rhetoric regarding opinion on Chevron used by opinion writers shifts depending upon the agency whose power is being questioned, this once again lends question toward how power is situated within the doctrine, not only from a material level but a symbolic level as well.

My final coding narrowed my codebook to only the cases concerning immigration and the Bureau of Immigration Appeals. I analyzed the rhetoric within the sub-categories of Chevron agreement to disagreement and added an identifier of whether a case ended pro-noncitizen or anti-noncitizen. I compared rhetoric between the pro/anti-noncitizen cases to determine if there was a connection between how intense affective rhetoric appeared regarding Chevron was when the ultimate conclusion was pro/anti-noncitizen.

My overarching aim within each of these coding processes was to develop accurate groupings of texts within these cases that deploy similar themes, symbols of meaning, intensity, and ideological conclusions drawing on insights from Marx's critiques of capital, Weber's critique of bureaucracy, Foucault's understanding of biopolitics and sovereignty, Althusser's concepts of interpolation, and Derrida's explication of meaning and justice. Using those groupings, I deploy a descriptive analysis, using a close reading to identify whether these rhetorical patterns uphold any structural or social phenomena that would merit a theoretical connection to my overarching semiotic and bureaucratic framework.

Crafting My Critical Rhetorical Approach

When asked by fellow academics or researchers to describe my research approach prior to finalizing this project, I often had a quite difficult time concisely explaining where my research fit within the aisles of the library. I would probably identify being a part of the policy debate community as a large reason for why my research interests often bridge across several disciplines, as debate research also encourages due to continued change and evolution of topics. The largest struggle in my research approach has been bridging these scholarly divides in my research foci in a manner that is complementary, rather than incongruent. However, I believe it would be shortsighted not to pay heed to the influence that being a first-generation college student plays in the manner with which I construct my research.

I would argue one's subject position heavily influences the choices a scholar makes in how they choose to construct their work. Being a first-generation college student who was a member of a family with incredibly different political and ideological views as myself meant finding ways to describe my studies and research that could connect my interests in college to things that my family could both understand and appreciate. I quickly learned the easiest way to bridge the gap created between my interests in foreign concepts like critical theory, rhetoric, and legal explication with my family members was focusing on examples and stories. While I may not be able to overcome the barriers to entry in order to discuss what Althusser's theorization of Ideological State Apparatuses means for evolution of theories of Marx with my mother, I definitely could find an example of how the educational system trains students at a young

age to become ready to enter the workforce (a concept that definitely resonates with a blue-collar family).

As an individual who had a large number of struggles concerning entrance barriers when first entering academia, yet still had an intense interest in "high theory" scholarship, I identified quite quickly that I never wanted to write scholarship that was completely inaccessible. In a sense, my *methodological* approach has always been tied to a goal of bridging a gap between "high" and "low" theory. I would define my thematic approach of connecting multiple critical theories to rhetorical examples of their manifestation through a *heavy* emphasis on case study as a method of *bridge-gapping*. The distinction I would highlight between the bridge-gapping approach and thematic analysis/rhetorical analysis/critical analysis/etc. is that in many cases while my bridge-gapping approach may use any of these potential mechanisms for research direction, bridge-gapping requires a teleology of access – the constant desire to endeavor to make the theoretical discussions within the ivory tower as "real" as possible.

CHAPTER FIVE: CHEVRON, SEPARATION OF POWERS, AND THE HAIL TO SUBALTERNITY

This chapter analyzes the most commonly cited justification for the existence of Chevron deference, agency expertise, and argues that justifications based on specific legal expertise operate in a manner similar to Althusser's notion of the *hail to subject formation*, encouraging subjects to respond to a *call to subalternity*. Agencies, and sometimes the courts themselves, are crafted as the divine, interpolating those outside its framework of power to a position of passive acceptance of the obscurity of sovereignty signified as legal lacuna.

Ideological State Apparatuses and Interpellation

Althusser's notion of interpellation stems from his work supplementing Marxist theorization of "the state" and the notion of repressive state apparatuses and ideological production; arguing that Marxist classic treatment of the State is more complex than explained by Marxist theory in general, and pushing for a theoretical supplement:

> In order to advance the theory of the State it is indispensable to take into account not only the distinction between state power and state apparatus, but also another reality which is clearly on the side of the (repressive) state apparatus, but must not be confused with it. I shall call this reality by its concept: the Ideological State Apparatuses. (Althusser, 1970)

Althusser's ideological state apparatuses (ISAs) are the specialized institutional forms that provide supplemental force to the violent (and secondarily) ideological functions of Repressive State Apparatus. The interwoven functions of independent ISAs come together under a unified function, that of the ruling ideology, which Althusser identifies as the ideology of the 'ruling class.' (Althusser, 1970) Analyzing the historical transformation of state power and ideological force, he then contends that the dominant ISA present throughout the bourgeoisie era is that of the school, distinguishing its ideological function as being more dominant than even that of the political Ideological State Apparatus, as the school ISA crafts through apprenticeship the future roles each individual has to fill in society, whether that be the exploited, exploiter, repressor, or professional ideologist. (Althusser, 1970)

Describing ideology, Althusser (1970) explains it as a representation of "the imaginary relationship of individuals to their real conditions of existence" while also having a "material existence." While individuals in some manner craft their relationship to reality in certain imagined connections/relationships, these realizations have material placements, or rather a materially existing "apparatus, and its practice, or practices." (Althusser, 1970) Individuals live "in a determinate…representation of the world whose imaginary distortion depends on their imaginary relation to their conditions of existence…this imaginary relation is itself endowed with a material existence." (Althusser, 1970) In short, Ideological beliefs translate to material practices to support those relationships. Ideological beliefs require action to prove support.

Althusser (1970) further explains that ideology serves a subject forming function, a recognizing function that "hails or interpellates concrete individuals as concrete subjects." Using the religious ISA as an example, Althusser points to the capacity for the divine Subject to hail individuals to subjectivity. A religious subject's existence is predicated on its hail by the "Unique, Absolute, Other Subject, i.e. God." (Althusser, 1970). Ideology then ensures the interpellation of 'individuals' as subjects, crafting their subjection to the Subject, the mutual recognition of subjects and Subject, the subjects' recognition of each other, and finally the subject's recognition of him or herself; and the absolute guarantee that everything really is so, and that on condition that the subjects recognize what they are and behave accordingly, everything will be all right. (Althusser, 1970)

Turning back to Althusser, one must question how the legal-political frame has shifted in a manner that may require a certain re-reading of Althusser's notion of Ideological State Apparatuses, and in turn the Repressive State Apparatus. While ideological functions would command a wholly obedient nature by the subjects, according to Althusser; what then, does that speak to for the legal material realm that has crafted itself as both a repressive route and ideological force? Althusser's distinction between the RSA and ISAs rests in the Repressive State Apparatus serving a primary function of repression and a secondary function of ideology. In Ideological State Apparatuses, Althusser identifies ideology as serving the primary goal, with repression being the secondary and potential outcome. However, I would argue that the Chevron

doctrine points to a convergence of functions within the Supreme Court as equally repressive and ideological.

Expertise and Chevron in the Courts

Sullivan v Stroop

In *Sullivan v Stroop*, the Supreme Court held in favor of the Secretary for Health and Human Services, who "declined to disregard the first $50 of 'child's insurance benefits' received under Title II of the" Social Security Act when determining eligibility for the Aid to Families with Dependent Children program. The case rested on the court determining that the definition of "child support" throughout the act remained consistent regarding support provided by an absent parent. The dissenting opinion of Justice Blackmun, Brennan, and Marshall argued that the conclusion of plain meaning failed to consider the explicit purpose the act defined child support payments as holding, which was payments made for the purpose of supporting a child. They argued the definitional purpose provided made the statute unambiguous. However, they also argued that even if the statute itself could be defined as ambiguous, that the Secretary's interpretation of the statute was an arbitrary and unreasonable one, considering the arbitrary nature of when payments for a child could be disregarded when determining eligibility for aid provisions – an interpretation that "arbitrarily deprives certain families of a modest but urgently needed welfare benefit."

The statute in question allows for the first $50 of child support payments to be disregarded, as mentioned above, when determining eligibility for the Aid to Families with Dependent Children Program. Because other sections of the Act referenced child

support payments as being payments made by an absent parent, the majority argued that Title II benefits were not considered child support. The majority did not apply deference at Step One, determining that the statute was unambiguous and that the agency had adopted the correct interpretation of the statute.

Justices Blackmun, Brennan, and Marshall dissented, arguing that parents still were required to set aside portions of their paycheck for the Title II benefits, operating with the same function as payments made by an absent parent. The dissenting opinion believed that the Secretary's interpretation was not "compelled by the language of the statute," in turn agreeing the initial statute was unambiguous, but unambiguously in favor of child support payments including any payment made to support a child, no matter the source. However, Blackmun explained in the dissent that even if the interpretation were to pass through Step One of Chevron, that it should fail Step Two as being an unreasonable interpretation of the statute. They pointed out that since the intent behind the aid program in question was to provide for children in need, that the arbitrary exclusion of payments from the definition of "child support" served a rather gratuitous outcome that should be denied deference.

Despite the majority ruling deciding this case without reference to deference, arguing that the Secretary's interpretation was the plain reading of the statute itself; it is important to notice that *plain reading* is never as simple as the majority claimed it to be in this case when they stated "we think the Secretary's construction is amply supported by the text of the statute…we need go no further." Ample support does not necessarily mean clear and unambiguous. Rather, the court's favor for a specific reading of a statute

may potentially shift the balance of scales in favor of isolating a statute as unambiguous, lending some skepticism of what the Chevron process does at all to protect the disenfranchised within the courts, especially when justices can identify subjective meaning as objective, or even if Chevron has the capacity to ensure consistency in rulings, which is isolated as one of Chevron's primary functions. Even in cases where Chevron is not applied, it seems as if the court still chooses to err toward their own interpretation of statutes, raising the question of if Step One and Step Two are quite frankly a blurred single step of "Do I agree? If so, pass go and collect $200." In which case, it may be that the only thing the Chevron doctrine does it to place a veneer of legitimacy to juridical subjectivity – the exact consequence that Chevron is purported to avoid.

In an interesting comparison, in *Washington State Department of Social and Health Services v Guardianship Estate of Keffeler*, the Court found that the "State's use of Social Security benefits to reimburse itself for some of its initial expenditures" did not violate "a provision of the Social Security Act protecting benefits from 'execution, levy, attachment, garnishment, or other legal process.'" In *Keffeler*, the Court was tasked with deciding whether the state of Washington was permitted to use social security monies to reimburse itself for payments made for the Washington foster children system. The majority opinion explained the practice of Washington as basically depositing Social Security money for each child into a trust, and then emptying the account after each money to offset payments made for that child during that month by the state:

> When the department receives Social Security benefits as representative payee for children in its care, it generally credits them to a special Foster Care Trust Fund Account kept by the state treasurer, which includes subsidiary accounts for each child beneficiary. When these accounts are debited, it is only rarely for a direct purchase by the State of a foster child's food, clothing, and shelter. The usual purchaser is a foster care provider, who is then paid back by the department according to a fixed compensation schedule. Every month, the department compares its payments to the provider of a child's care with the child's subsidiary account balance, on which the department then draws to reimburse itself. Since the State's outlay customarily exceeds a child's monthly Social Security benefits, the reimbursement to the State usually leaves the account empty until the next federal benefit check arrives.

The *Keffler* Court argued that deference should be given to Washington's Department of Social and Health Services' interpretation of the statute as allowing for creditor repayments. In response, the foster children respondents claimed that as the representative payee of the Social Security benefits, that the payee was required by the Social Security Commissioner to "find that a beneficiary's interests would be served," thus requiring the state to maximize resources from the benefits for the foster children. The majority agreed that this could be an interpretation of the statute, but the language of "best interest" was ambiguous and thus Chevron would be applied since the DSHS's interpretation was a reasonable execution of the statute.

This move in the Court, I would argue, bolsters the conclusion that in cases of economic benefit for institutions, the burden for receiving protections for benefits occupies a much lower register of proof than for that of individuals operating within the system. In both cases, "plain reading" was cited to ignore Chevron application at the expense of foster children and for the benefit of institutions, despite both statutes seeming to be quite ambiguous (how is it that 3 justices could disagree that something is a plain reading in *Sullivan*, and we still consider it so?). In *Keffler*, Chevron was applied, yet the phrase regarded as ambiguous could have been identified as a plain reading if following the "contextual" nature of plain reading used in the *Sullivan* court. If the intent behind Social Security benefits is to provide for the future welfare of the children in question, the functional garnishment of this trust for the state to pay for that child's current welfare seems antithetical to the purpose of the benefit; especially considering that out of the 10,578 foster children in the department's care, some 1,500 of them received OASDI or SSI benefits, and those not receiving benefits were not required to pay money for their care by the state. In a sense, qualifying for benefits ultimately forced some foster children to pay for their state provided care, while others received that same care at no expense. Considering the children who qualify for those benefits are often the most disadvantaged children in society, I would argue that precluding them from access to future economic savings by depleting their trust for present care is a willfully violent act.

Pension Benefit Guaranty Corp v LTV

The two most common scholarly justifications for Chevron are agency flexibility and expertise. However, in the early period of Chevron's existence as precedent, most

justifications in Supreme Court opinions fell into the category of the efficient and expedient processing of decisions by agencies – largely in line with what I would characterize as defense of agency flexibility. Ironically, this defense at times was supported at the expense of expertise. For example, in a case regarding whether the Court of Appeals was correct in ruling that the Pension Benefit Guaranty Corporation (PBGC), a United States government corporation in charge of the administration and enforcement of the Employee Retirement Income Security Act (ERISA), had enforced an arbitrary and capricious interpretation of a statute when they reissued pension plans under ERISA to prevent the corporation from having to pay out plans due to a company bankruptcy, the Supreme Court overturned this ruling on the grounds that PBGC should not be expected to be averse in all bankruptcy law that could interact with pension plans:

> The PBGC points up problems that would arise if federal courts routinely were to require each agency to take explicit account of public policies that derive from federal statutes other than the agency's enabling act. To begin with, there are numerous federal statutes that could be said to embody countless policies. If agency action may be disturbed whenever a reviewing court is able to point to an arguably relevant statutory policy that was not explicitly considered, then a very large number of agency decisions might be open to judicial invalidation.

While the Court of Appeals had identified PBGC's failure to understand the consequences of their decision for pensioned employees working for a bankrupted company as reason to reject their interpretation, the Supreme Court felt that expecting

agencies to account for public policy when interpreting statutes placed too high a burden on the agency, and granted their interpretation deference at Step Two.

Considering the defenses of the Chevron doctrine in the first place, I would argue it is an untenable position to occupy to provide deference to agency interpretations due to those agencies having expertise in their field, yet excusing agencies when their interpretations fail to account for the interactions their field has with public policy. The question becomes, what exactly is being protected when we allow interpretations to succeed that are both untested for accurateness due to the process of Chevron and also not truly grounded in an assumption of correctness due to the expertise of the interpreter? It seems the only thing being protected is a certain sanctified notion of bureaucracy needing to run "on time." The justification for Chevron, then, is not simply deference to expertise, but deference to the agency's need to function efficiently, without being slowed down by the complaints of citizens.

Pauley v Bethenergy Mines

Considering the Court's willingness to eschew the need for agency expertise in the *PBGC* case, it is interesting that the next deference case decided on by the Supreme Court heavily focused on the need for deference to agency expertise. In *Pauley v Bethenergy Mines*, the Court decided to defer to the Department of Labor's interpretation of a statute covering Black Lung health benefits for coal miners; specifically arguing that in instances of extreme administrative complexity, deference to an agency's expertise is a necessary act:

> It is precisely this recognition that informs our determination that deference to the Secretary is appropriate here. The Benefits Act has produced a complex and highly technical regulatory program. The identification and classification of medical eligibility criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns. In those circumstances, courts appropriately defer to the agency entrusted by Congress to make such policy determinations.

It is in this instance of rhetorical inconsistency within the Court that I would argue there is still present a certain level of *ideological* consistency. It seems no matter the means for justifying it, the outcome remained consistent – agencies were provided the ability to interpret law in a manner that prevented economic harm to the agency. Fewer monetary constraints were placed on the ERISA corporation in the *PBGC* case, just as higher obstacles for eligibility for benefits were deemed acceptable in the *Pauley* case. While workers were disenfranchised, the governmental institutions responsible for their aid flourished. In each instance, the Court was required to deploy radically oppositional conclusions about the purpose of Chevron deference, yet for a similar teleological goal.

Further, the ability of the Court to rhetorically distinguish between two seemingly contradictory justifications for deference (flexibility and expertise) points to the converging functions of the Court: the ability to both repress those subjected to its power and interpellate those individuals as *subjects* through the conveniently placed ideological conclusions that it makes.

The Need for Political and Legal Nihilism

Holly Farms Corp v. Nat'l Labor Rels. Labor Bd.

A case I argue accurately portrays the fundamental issues with the Supreme Court having *any* amount of power over interpretation rests in the consistency of these cases to have dissenting opinions which often wholeheartedly disagree if an initial statute is ambiguous, thus deserving of deference. In *Holly Farms*, the majority determined that a statute within the National Labor Relations Act defining agricultural labors was ambiguous enough that the NLRB's interpretation of Holly Farms' live-haul crews as protected non-agricultural employees was a reasonable interpretation of what constituted an agricultural worker (the statute excluded agricultural workers from protections). While this decision granting deference to the NLRB extended bargaining protection to the live-haul workers of Holly Farms, the dissenting opinion of Justice O'Connor, Thomas and Scalia argued quite the opposite, identifying the statute as unambiguous, and the live-haul crew as meeting the explicit definition of agricultural workers.

While this instance of victory for the working people may seem to run counter to Althusser's notion of repression and ideology functioning to ensure the continued progress of production, the ability for the Court to point to small moments of victory as justification for itself serves both a repressive and ideological function. The Court system exists to place hope for redress, and in order for that institution to maintain its relative coherence within that symbol of hope – there must be quotidian instances of progress to ensure the relative divine nature of the system itself.

This schism of interpretation, I would argue, suggests that whether deference exists for agencies or not, legal arbitration inherently mixes in potentially violent ways with subjective ideology. While Chevron would make one assume that determining the presence of ambiguity is a rather objective feat, the consistent objections between court justices over statutory meaning shows it is anything but objective. How then, can any amount of predictable protection exist for those who are subject to the law? Is there any potential juridical forum that could resolve an issue of subjectivity when it seems objectivity simply is determined by the sitting majority at the time? I would point to this case to argue there is likely not a system that we could imagine that could avoid this phenomenon. A rather pessimistic conclusion, yes. However, I would conclude that it is wholeheartedly necessary to operate from this point of pessimism to understand the lived realities we all face when encountering the law.

DOC v US House of Reps

Where deference fails to be applied represents an important area of analysis, simply to begin questioning what interpretations are deemed outside the boundaries of reasonable or having authority. Drawing upon the history of vote counting and census apportionment, the majority in *Department of Commerce v. United States House of Representatives* determined that the Census Bureau was not entitled to use statistical sampling to resolve "undercounting" in the census. After decades of data pointing to the high rates of census undercounting for minorities, children, and renters, an amendment to census procedures was adopted and planned to be enacted in the 2000 census to address the "chronic and apparently growing problem of undercounting." Several counties,

including my hometown – Bucks County, Pennsylvania – filed suits claiming the plan to utilize statistical sampling to resolve undercounting violated the Census Act and the Census Clause of the Constitution.

When taken in context, the argument for these residents seems simple, the counted became worried that resolving disparities in the census procedure would dilute their vote. However, this perspective fails to consider that the status quo apportionment rates allow for a saturation of that vote solely because the uncounted are diluted already. The uncounted receive no apportionment in the status quo, providing greater weight to those who *are* counted precisely because their uncounted neighbors are excluded.

Rhetoric by the Court majority suggests agreement that the already counted must be protected from the potential consequences of an equitable apportionment system. The majority identified data regarding the presence of uncounting as "unverifiable" and "hypothetical" despite the Census Bureau presenting the court with numerous methodological studies with internal validity, and isolated the risk of apportionment on the currently counted as the only "real" consequence that could be proven: "The same distinct interest is at issue here: With one fewer Representative, Indiana residents' votes will be diluted. Moreover, the threat of vote dilution through the use of sampling is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.'""

While acknowledging that congressional directive regarding apportionment procedures could be construed as ambiguous, the majority opinion relied on census history as context against resolving census disparities: "Absent any historical context, the language in the amended § 195 might reasonably be read as either permissive or

prohibitive with regard to the use of sampling for apportionment purposes…Here, the context is provided by over 200 years during which federal statutes have prohibited the use of statistical sampling where apportionment is concerned." It seems an odd history to appeal to in this context, when these same uncounted minorities at one point would have historically only counted for 3/5th of a single vote.

As Justice Stevens, Souter and Ginsburg explain in their dissent, Congressional amendments to census law dictated that "The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the 'decennial census date', in such form and content as he may determine, including the use of sampling procedures and special surveys." Yet analysis of the allowance for sampling procedures in this amendment are ignored within the majority opinion in favor of a history of vote mismanagement for those of minority status. I would argue that this cherry-picking of Congressional support and intent by the majority to bolster congressional representation of counties like my own that are largely Republican, white, and suburban proves just how high, if not impossible to overcome, the barrier for positive representation within the law is for marginalized groups in the United States. Even when interpretations seem to unambiguously favor inclusion, some benchmark is crafted to ensure legally supported exclusion. The wheels of progress are definitely turning, but the question is who is represented within the definition of progress.

On one hand, this could be presented as an argument for liberal justices who would use (or abuse) Chevron for more progressive ends. However, I would argue this is

a dangerous position to take. The assumption that a pre-determined ideological bent of an individual justice can justify the presence of a system that gives any ideology "power of interpretation" can be a tenuous and violent slippery slope. Even liberal justices end up making violent applications of the law, or acquiescing to the demands of sovereign and conservative presentation of doctrine. For example, Justice Ginsburg, often heralded as the modern voice of liberal dissent within the court, has willingly given into demands from conservative institutionalism to frame her opinions in a way that pleased the court:

> In a draft of her Bush v. Gore dissent, Ginsburg alluded to possible black-voter suppression in Florida, which sent Justice Scalia into a rage, accusing her of using provocative "Al Sharpton tactics." In a move that could hardly be described as steadfast, she acquiesced to Scalia and removed the footnote. (Uyehara, 2019)

For the court, any claim to impartiality and sticking to the law and the facts of the case is a ruse, a rhetorical mist meant to obscure the true role of the Court as a mechanism for exerting power in pursuit of an ideological goal. The question then rises of what exactly that goal is, and whether it changes depending upon a shifting composition of court leadership? My qualm with erring towards a conclusion to this question that assumes relative benevolence of liberal ideology is the broader concern that this rests on an assumption that court justices have differing goals for the function of the Court. Applying the understanding of ISAs from above in this chapter, justices working within the court system have an ultimate higher calling that often trumps their potential individual bias, which is to act as a guarantor of the smooth-functioning of power relations provided by court interpretation. The result, often, means that the courts strive to

incorporate the ideological tendencies of sovereignty into the grammar and execution of individual justices.

Beyond the concern of how the hands of sovereignty train justices to act as an entity for the State, another issue with concluding in favor of a more liberalized court is the question of who gets power in the first place? In many ways, I see this dissertation as a case study of a manifestation of power's practice. Inevitably, the chairs are even stacked against judges having access to that bench in the first place. Yes, a bench filled with liberal justices would probably be a better one than conservative justices…but there is a broader question of how power is gained, who gains it…and then, on another track…how power affects decisionmakers anyway? Even the most liberal politicians become moderate once they gain power, as it makes them more likely to retain power. While most discussions regarding the political capital of "retaining seats" references elected positions, there is still an entire discipline of legal scholarship that discusses the notion of political capital for Supreme Court justices, showing that decision making calculus on the behalf of justices still takes into consideration how certain decisions within cases may affect their approval ratings. (O'Donnell, 2019; Ura, 2017; Devins and Fitts, 1997; McGinnis 1993)

With that consideration in mind, I am unsure how the court bench itself allows for the sustainability of liberal ideology, when those judges' ideological tendencies in many ways shifts with the power they gain. Actors are affected by the ideological strains of governance that inevitably tether themselves to positions of power, exemplified in instances like Justice Ginsburg, who can be identified as incredibly liberal yet make

statements about how protests like Colin Kaepernick's national anthem protest were "dumb." (Hauser, 2016) People in power will identify potential constraints on the system of power as an attack on themselves, not just the institution – including protection of symbols of sovereignty like the flag and national anthem.

Utah v Evans

When the *DOC v HOR* decision is read alongside a later Census Bureau case, *Utah v. Evans*, involving whether the Bureau's use of imputation methodology violated sampling exclusions, there is a seeming distinction without a difference between the two statistical methods. Yet, imputation was determined in *Utah* to be functionally different in purpose and operation from sampling; leading the Court to rule in favor of the Census Bureau's interpretation. The interesting difference that I would isolate between the definitions provided for imputation and sampling according to the identified experts who spoke to the Court was the type of information that was collected and for what purpose.

Imputation was identified as a process that used information regarding property characteristics and residential counts to apply to similar buildings or properties in cases where that information was unavailable. To distinguish this definition from sampling, the Court identified statistical sampling as a methodology that used a smaller segment of a population's characteristics to determine the demographic layout of the larger population of an area. I would argue that the functional result of both methods of Census taking was the same, as apportionment shifted up or down in certain areas based upon the new information. I would further argue that the real distinction that exists between these two methodologies was the intention behind their initiation. Statistical sampling in *DOC v US*

HR was meant to resolve undercounting for marginalized populations, whereas imputation was a tool for the Census Bureau to increase efficiency and ease in the census system. Breyer explains in the majority opinion:

> Bureau employees (who may also obtain information on addresses not listed). Occasionally, despite the visits, the Bureau will find that it still lacks adequate information or that information provided by those in the field has some- how not been integrated into the master list. The Bureau may have conflicting indications, for example, about whether an address on the list (or a newly generated address) represents a housing unit, an office building, or a vacant lot; about whether a residential building is vacant or occupied; or about the number of persons an occupied unit contains. These conflicts and uncertainties may arise because no one wrote back, because agents in the field produced confused responses, or because those who processed the responses made mistakes. There **may be too little time left** for further personal visits. And the Bureau may then decide imputation represents the **most practical way** to resolve remaining informational uncertainties.

While agency efficiency continues to be represented as a positive facet deserving of Chevron protection, mechanisms of structural accessibility and inclusion are identified as a threat to the political and electoral system the Census was supposed to preserve in the first place. In *DOC v HOR* the Court served what I would argue was a primary function of repression, aiming to ensure representation within the political system disproportionately favored some at the expense of marginalized groups. Yet, in *Utah v.*

Evans, the Court's primary function was much more ideological, identifying the smooth and easy flow of democracy as a necessary ideal to uphold despite potential inconsistencies with previous rulings.

United States v Mead Corp

As described earlier in this dissertation, in *Mead*, the Court decided that in order to qualify for Chevron level deference "in the first place only if Congress delegated interpretive authority to the agency with respect to the provision in question, and the agency has made an appropriate formal ruling with a 'lawmaking pretense'" (Brady, 2011). While the case at hand did not seem to be one that was drastically change the parameters of deference discussions, those involved seemed to suggest otherwise – Scalia's dissent going as far to say *Mead* had replaced Chevron and completely hamstringed the ability for agencies to reclarify previous interpretations of statutes as suiting the context at that time.

The benefits of ongoing agency reclarification prescribed by Scalia sound like an ideological nightmare if one considers the continual shifts in ideology that Executive agencies have seen over the past several presidential terms, but I do not point this out to necessarily praise the ruling of the majority in this case. While providing Chevron level deference to informal documents seems like a dangerous path to take, considering the current Executive branch's proclivity to pronounce policy changes via Twitter, providing similar posts or informal documents with Skidmore level deference does not seem to be a much better path to take.

The majority in this case acknowledged that an agency's "expertise" on an issue already created a cognitive bias towards said definition being persuasive, "an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency," suggesting the barriers to deference within a Skidmore world are not much different than that of Chevron. More specifically, regarding this specific instance, the majority claimed Skidmore deference applicable because the Customs Office had a "highly detailed" policy and "specialized experience to bear on the subtle questions in" the particular case. Those rather vague rhetorical choices could apply to numerous types of informal documents, particularly in a Trump administration that views a 250-word limit as being highly detailed enough for major policy announcements and climate deniers having specialized experience to serve as leaders of the Environmental Protection Agency.

The Courts as RSA or ISA?

In the justifications for and against the application of Chevron, we witness expertise serving a hailing function, akin to interpellation, for divine-level power of the institution. The Courts, whether deferring to agencies or choosing to uphold plain readings of statutes, directly manifest interpretation of the law in ways that leave individuals with no choice but to recognize its power and submit themselves as subjects to it. Yet, in many examples of the cases where Chevron comes into force, the interplay between the ideological function of the Court and the repressive operation of the Court became impossible to untether, and equally difficult to identify which (ideology or repression) serves as a secondary function of the Court.

I find it important to consider the manner with which the Courts in these cases operated to serve a certain hailing nature to objectification under the Sovereignty of the law. Interpretations of the law, such as plain readings, ambiguousness, reasonableness, etc. invite/force the participants to the Court process to admit relative divinity of the actors within the Court to properly adjudicate the law. Chevron itself serves a similar ideological function, to ensure the proper interpretation of the law. While it may be a simple theoretical conclusion to identify the Supreme Court as the Repressive State Apparatus and administrative law as an Ideological State Apparatus, I find this distinction lacking considering the inexplicability of detaching one from the other. What is the Supreme Court without legal interpretation, and what is legal interpretation without the Supreme Court? The domains of the two seem impossible to separate. The Court itself functions repressively, in that it can monopolize the justifications for violence. Yet the manner in which it does that cannot be decentered from the Court's capacity to ideologically sustain itself. The Court uses Chevron to lend its arbitrary uses of power a veneer of legitimacy and rationality. These highlights instances of contradictions and double-standards in how the Court applies Chevron identify how the majority can twist the doctrine in whatever way they wish to find the outcome that best suits their political and economic needs. In this sense, Chevron allows the Court to conceal its vast arbitrary and unchecked repressive power under an ideological veneer of rationality and prudence.

CHAPTER SIX: LIBERALS GET THE BULLET TOO

In this chapter, I will apply Foucault's understanding of sovereignty in criticism of liberal justifications for retaining the Chevron doctrine, arguing that this type of cost benefit analysis allows for a resituating of state violence through expansion of legal bureaucratization.

Biopolitics and Sovereignty

Foucault describes biopower as technologies of power that foster, make or grow life. The historical emergence and coming to dominance of biopower is why Foucault does his genealogies, identifying the life of humans as a central political question, isolating the specific techniques focused on fostering life and making influence over life a political question (Rabinow and Rose, 2003). In isolating biopower as a technology, he continues this analysis to biopolitics, explaining biopolitics as population focused, where the population is both a political and biological entity (Foucault, 1975). Biopolitics thinks about overall application or concern for a population, where there is less concern about freak incidents that may affect that population, but rather more on the ongoing things that sap a population of its strength and vitality (Foucault, 1975). Ultimately, biopolitics in many ways becomes focused on regulation or discipline.

Discipline or anatomopolitics, then, is the bipolar nature of biopower into two poles or techniques, concerns with the human body, biological being, subject/citizen, or

self. Then concerns of the individuals and the development of movement and articulation of bodies as a subject or self (Rabinow and Rose, 2003). This concern blends into Foucault's discussion of the panopticon, or the use of visibility and surveillance as a technology of power, along with his idea of the creation of docile bodies – in short, bodies that become more subjected politically as they become more skillful (in terms of normative assimilation).

Ultimately however, the most relevant Foucaudian concept regarding administrative violence, Chevron, and liberal justifications for its continuance rests in Foucault's understanding of state racism, or the capacity of the state to make live and let die. Foucault (1975) isolates state racism as the putting to death of part of a population so that the overall population can live. I will argue that liberal justifications for Chevron rest on the notion of allowing the population to live (and in many terms this population becomes purely symbolic, divorced from the *actual* population, and thus simply a biopolitical investment in the sovereign as a representation of "the people") by allowing large swaths of it to die.

For example, in order for liberal scholars to justify the beneficial outcomes achieved by providing the EPA latitude to interpret environmental statutes in environmentally friendly ways, a choice must be made to excuse the violent interpretations made by other agencies when interpreting statutes. Even more complicated is the heralding of Chevron as being a protection for EPA environmentally friendly policies while ignoring that many of the interpretations made by the EPA that have been granted Chevron deference have been anything but pro-environmental. It is in

these moments that the cost benefit calculation for Chevron takes a symbolic turn, entrenching sovereign power while doing very little to challenge the material parameters that allow that violence to continue. State racism through Chevron allows the positive outcomes of a few cases to take root as gospel, divorcing any attachment from the material harm that had to exist in other cases where the doctrine was attached in order for those positive moments to be achieved.

In certain ways, this conclusion stems from a tying in of Foucault's repressive hypothesis, explained in *History of Sexuality*. Foucault (1976) describes the repressive hypothesis as the immaterial reality of oppression and belonging, where in order to imagine oneself as the free person, there must be an oppressed against which to suture the meaning of freedom. "Subjects and institutions create themselves semantically." (p4)

Repression, then, becomes the link between power and oppression, we are not able to free ourselves without significant cost. In many ways, he argues this occurs on the discursive plane, the apparatus that makes knowledge and meaning. Being able to imagine liberation affirms a model of oppression that preserves the system, because we imagine ourselves as being free of it. Foucault explains that while there is not necessarily an organized system of meaning, it becomes drawn out and incorporated into power devices. It is true that it would be impossible to not experience or see two acts as different (meaning/symbolism), but there is an internalization of meaning present that makes it important to understand the construction of identity through discourse.

This construction of identity through discourse also created categories of identity that formulated individual connections with others, or divisions between groups. How we

live this power is in and through ourselves. It is not just power organizing things in a way that looks and feels bad, but also things that look and feel good, the affirmative – that which we want. In other words, identity is not only constructed through opposition, but also though affiliation and identification with something positive. Meaning is derived through identification in certain bifurcated notions of category – how oppressed to how liberated. While it may be difficult to grapple with Foucault's theorization of sexuality as having a certain connection to legal discourse and Chevron, the semantic register that he describes has an interesting corollary when tied to the idea of the creation of those with legal power and those with not, and the ability for liberal justifications to exist for Chevron at the expense of large swaths of people. In order for government to exist, there must be those that suffer from said government. In order for judicial systems to exist, there must be those who become free and those who are abjected.

In Foucault's (2003) lecture series, he explains the notion of subjugated knowledge, or a hidden history – history that has been lost or suppressed (or history from the "losers' perspective"). Subjugated knowledge operates as disqualified knowledge – knowledge that does not count as such. He argues that there is a connection between scientific authority and the production of the inauthority of subjugated knowledge.

> The triumph of science is one of the key pieces for understanding the moment in history that we are in today. How this happens, how we get some things as science and some as subjugated knowledge is very important. (p. 10)

One can possibly identify development of legal interpretive doctrine as a certain scientific authority, but one with even more power than the expertise attached to testable

science. Agencies are crafted as the authority of knowledge within a certain area of expertise, and all interpretations that would run contrary to theirs become identified within legal avenues as "less than." The agency's ability to identify as the only authority over knowledge in a specific area detaches their interpretations from any possibility of testing those interpretations, functionally becoming a scientist whose hypotheses have no expectation of being taken through the scientific method for validity.

This then raises a necessary level of inquiry to power and its reaches; or rather power and its application, rather than its intention. Foucault points out that it is not necessarily as important to understand what power claims it is trying to do, but what is it actually doing in its practices. While justices may claim they are trying to preserve the best outcomes for agencies, or retain agency flexibility to best suit citizens, in practice these justifications may serve a more nefarious outcome – shielding agencies from criticism, allowing agencies to exact repressive laws, etc.

Foucault provides a reaction to what he felt were the political limits of actually existing leftist formations in France at the time of his writing, arguing that we cannot call for more rights, but "we should be looking for a new right that is anti-disciplinary and emancipated from the principle of sovereignty." (p. 39) In a sense, his concern is a rationalization of government practice. I would argue that these concerns can rather obviously be connected to the symbolic possibility attached to Chevron – largely upheld by liberal ideologues as the bastion of political hope within politics. "Without Chevron, how would government function?," "if Chevron ceased to exist, so would the

environment," etc…all serve as a liberal rallying cry to support a system that is never liberating for all.

Race, Colonialism, and Chevron in the Courts

Alexander v Sandoval

Deference seems to be a standard only available when agencies are enforcing interpretations of statutes that ensure the dispossession and discrimination of individuals the Court deems outside the boundaries of the law. In *Alexander v. Sandoval*, the Court's majority decision refused deference to Department of Justice's interpretation of Title VI of the Civil Rights Act at Step One, arguing that the DOJ had promulgated a regulation under the statute that did not allow a private individual to sue for disparate-impact discrimination. In short, the majority concluded the statute itself was clear, and that Congress explicitly meant to exclude suits based on claims of disparate-impact discrimination.

In this case, Alabama had amended their constitution to declare Alabama's official state language to be English, and to "advance public safety" they began to "administer state driver's license examinations only in English." Sandoval argued that this created a disparate-impact that excluded license access to non-English speakers.

Title VI Section 601 reads that individuals should not "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" covered by Title VI." Section 602 granted federal agencies the authority to issue "rules, regulations, or orders of general applicability" to enforce Section 601. Operating under Section 602, the DOJ

"promulgated a regulation forbidding funding recipients to 'utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin.'" The question arising in this case was whether Section 601 defined discrimination broadly to include disparate-impact claims or narrowly to exclude them. The majority found that the intent of the statute was to define it narrowly.

While the majority opinion explicitly conceded that the DOJ was authorized to initiate that regulation, and that "English-only policy had the effect of discriminating on the basis of national origin," they ultimately concluded that an individual could not use private rights of action to sue for violation of the regulation, since it did not violate Section 601, but only Section 602. The Court acknowledge that previous case precedent identified that Section 601 only allowed for private action suit only in cases of intentional discrimination (as opposed to claims based on disparate impact arguments). While a large portion of the majority opinion focused on proving that private action suits under Section 601 only applied in cases of intentional discrimination, missing from this analysis is a point where the Court made any move to craft a rhetorical or definitional distinction between disparate-impact discrimination and intentional discrimination. If we harken back to the Alabama law, I can only wonder how "public safety" could be at risk if license examinations were administered in non-English languages? On that note, how can we think of an English-only statute as anything but *intentionally* discriminatory?

In short, in order to draw a sharp line between disparate-impact and intentional discrimination, the majority specifically chose to focus only on what was on the page of

the statute, willfully ignoring the context in which the policy was made. They chose, in other words, to accept Alabama's stated justification ("public safety") on its face, and ignore all historical and political context leading up to the statute and the clearly disparate consequences of the statute once it became law. This rhetorical shift allowed them to adopt a pose of judicial rigor and dispassionate analysis, while in fact they were embracing a strategy of willfully ignoring obvious attempts to discriminate and oppress.

The Court claimed "we do not doubt that regulations applying § 601's ban on intentional discrimination are covered by the cause of action to enforce that section. Such regulations, if valid and reasonable, authoritatively construe the statute itself." Interesting, let's remember the beginning of the opinion: "We do not inquire here whether the DOJ regulation was authorized by § 602, or whether the courts below were correct to hold that the English-only policy had the effect of discriminating on the basis of national origin." How exactly does one determine that deference cannot be provided to this interpretation, as it is not a reasonable execution of authority if the majority has admitted to not determining if the regulation itself was authorized or if that policy in question was discriminating? Furthermore, how does one then feel capable to determine that the initial statute does not qualify as disparate impact discrimination if they have not determined if the disparate impact standard is not a reasonable execution of the DOJ's authority to enforce the original statutory section?

To this point, we will remember the original statutes' areas of protections: "excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity." An English-only requirement for licensing

seems to meet each of these standards, non-English speakers are excluded from participation in driving, denied the benefits of vehicle use, and targeted for exclusion within the Alabama Department of Motor Vehicles. The blanks that fail to be filled with legal analysis have been filled with ideological conclusions of what intentional discrimination entails, with no attempt to identify those blind spots in analysis as such.

While an optimist would point to the dissenting opinion, which outlines a similar view to much of the criticism I hold above – the point I would raise in rebuttal would be that it seems not to matter what ideological exclusion prevails, whether that be in conservative refusal to apply Chevron or liberal demands to abide by the doctrine. A hope that at some point in time the ideological leanings of justices will shift to allow differing representations to prevail proclaims a zealous attachment to a future that seems both yet to come and too far off from those who suffer from the institutionalized and juridical mechanisms to contain progress and stifle change. The assumption that a Court in the hands of liberal justices would exact freeing potential assumes the law was ever created for freedom in the first place.

Foucault's description of the violence within the liberal welfare state comes into play here. While a more liberalized understanding of power may seem beneficial to many, providing access to safety and protection for all, the costs of that protection are still demanded through regulation and obedience of those who receive it. In order to access the common goods provided by the liberal welfare state (i.e. housing, healthcare, food, etc.), one must be willing to submit themselves to the surveillance apparatus of the

state. Even the most benevolent versions of modern state control have justified the worst forms of governmental tyranny over its citizens in the pursuit of overall public good.

In the dissenting opinion, Justice Stevens was highly critical of the strict textual approach made by the majority, both highlighting that Chevron should have been applied to the broad interpretation of the statute as including disparate-impact claims and that the implicit Congressional intent of Title VI was to provide redress for instances of discrimination, no matter the type. Taking a contextual approach, he harshly criticized the majority's obsession with small portions of the text of the law, arguing that it bankrupted the intent of the statute. He explains:

> Ultimately, respect for Congress' prerogatives is **measured in deeds, not words**. Today, the Court coins a new rule, holding that a private cause of action to enforce a statute does not encompass a substantive regulation issued to effectuate that statute unless the regulation does nothing more than "authoritatively construe the statute itself." This rule might be proper if we were the kind of "common-law court" the majority decries, inventing private rights of action never intended by Congress. For if we are not construing a statute, we certainly may refuse to create a remedy for violations of federal regulations. But if we are faithful to the commitment to discerning congressional intent that all Members of this Court profess, the distinction is untenable. There is simply no reason to assume that Congress contemplated, desired, or adopted a distinction between regulations that merely parrot statutory text and broader regulations that are authorized by statutory text.

While an optimistic reading of this dissenting opinion would be to claim hope in the juridical process of the future where more court justices siding with Stevens' ideology would "shift the balance of power," I am hesitant to place faith in this political hope that is yet to come for several reasons.

First, the arrangements of the courts are predicated on those in positions of power within the legislature and executive branch. Assuming a liberal court that is able to check the forces of conservativism provides a theory of relief with no real mechanism for achieving it. Considering the ability for Presidents to pack the courts with conservative justices who align with their ideology on issues like racial disparity, disassociating the radical potential of court checks on conservativism from the ever-real power of conservativism outside of the courts seems naïve. Despite delay in appointments, the one area that Trump has focused on fast-tracking nominations has been the courts – crafting a conservative overhaul of our judicial system that many say is unprecedented with long term effects:

> While Trump has lagged behind other presidents in political appointments, the streamlining of the judicial-selection process has helped him deliver a historic number of judges to the federal bench. In 2017, the Senate confirmed 12 of Trump's appeals court picks — the most for any president in his first year in office. This year, the Senate has already confirmed 12 appellate judges and, according to a Republican Judiciary Committee aide, hopes to confirm at least four more. (Zengerie, 2018, p.1)

I would argue that just like the soldier becomes the perfect specimen for war, the liberal justice becomes a docile body within the court. The court's ability to sustain themselves as a bastion of legal integrity is only insomuch as they are able to have majority, dissenting, and concurring opinions that provide a veneer of neutrality and respectability to the legal process. The smooth functioning of biopolitics can only continue when the Court is represented as having an ideologically pluralist oversight capacity to other sectors of sovereignty. In this case, while contextual interpretation allowed for liberal ideology to advocate for a broader interpretation of discrimination in the dissenting opinion, a contextual interpretation of a law like "Stand Your Ground" in a future case could allow for the increased extra-judicial killings of black children like Trayvon Martin (Lopez, 2018). In fact, the August 2019 trial of Michael Drejka, a man citing "Stand Your Ground" as defense for shooting an unarmed Black man named Markeis McGlockton in a parking lot, may be the exact case that allows for an expansion of interpreting the contextual reasoning of Stand Your Ground (Lanee', 2018).

Second, I would argue we must examine the direction that Stevens would support more clearly. The power of the court cannot be divorced from the laws that court is asked to interpret. While a move to support disparate-impact claims through contextual enforcement of Title VI and VII can provide access to the courts to seek redress, the question becomes "access for whom?" Stevens' blanketed endorsement of Chevron application and contextual reading of discrimination opens the door for reverse-discrimination claims to have standing in the court. The disparate impact standard doesn't prevent courts from ruling in favor of white people who claim reverse discrimination—

any remedies for disparate impact will always be perceived by white people as *disparate treatment*, and Title VII *prohibits that too.* An example can be seen of white individuals winning Title VII disparate impact suits here:

> Earlier this Summer, the Supreme Court of the United States handed down its highly anticipated ruling in Ricci v. DeStefano, 129 S. Ct. 2658 (2009). The controversial case, previously argued before Judge Sonia Sotomayor of the United States Court of Appeals for the Second Circuit, drew national media attention when she was recently nominated to the Supreme Court. The case presented the issue of whether the city of New Haven, Connecticut, fearing a disparate impact lawsuit by minority firefighters, discriminated against White firefighters when it set aside results of its promotion examinations because the White firefighters substantially outperformed the minority firefighters. By discarding the results, and thus not promoting the White firefighters, the Supreme Court found that the City violated Title VII's prohibition of disparate treatment based on race, thus, reversing the lower courts. (Blank Rome, 2009, p. 1)

Furthermore, the outcome of a successful disparate-impact suit would be to secure race neutrality of effects, preventing suits that push for remedies that aim for "race conscious equality." The liberal response to societal racism becomes a wishing away of the historical foundations of American society, a post-racial response akin to the claims of many when they say "I don't see color, so I'm not racist." Primus (2010) explains:

> Justice Kennedy's majority opinion spoke of the danger that a system of disparate-impact liability, if not properly limited, might "tend to perpetuate race-based

considerations rather than move beyond them." To prevent that scenario, "Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision." And in those cases where courts do find disparate-impact liability, they must strive to design remedies that "**eliminate racial disparities through race-neutral means**" rather than through the use of "racial targets or quotas[.]" Otherwise, the **disparate-impact standard "would set our Nation back in its quest to *reduce the salience of race* in our social and economic system."** (emphasis added)

As Chin (2012) explains, “legal remedies can only address extreme instances of injustice, ignoring "the business-as-usual forms of racism that people of color confront every day and that account for much misery, alienation, and despair” (p. 372). Yet propagating a world of judicial redress through a liberated court fails to account for the fabrics of racial violence that exist on the everyday, quotidian, register. We may be able to have a Supreme Court filled with nine justices of liberal ideology, but what can that court do when the balance of ideology within society as a whole has not changed. To borrow from afropessimist scholars like Wilderson (2010), the understanding of the American liberal as being the hope for racial progress in the United States ignores the fact that all white liberals still benefit from a system where antiblackness continues without true material change. The ideological racialized underpinnings of society extend far beyond the mechanics of power at the institutional level. Thus, liberal justices do not provide much hope in a world where those same justices benefit from “business-as-usual” forms of racism.

Finally, the assumption of a court system that can augment discrimination through incremental suits assumes a capacity to access those terrains that is extremely divorced from the material realities that structural racism places on the agency of marginalized groups, particularly Black folks, in the first place. First, a case of severe enough consequence must be identified, requiring an instance of discrimination to occur for any court action to trickle down to the parameters of social life. That individual or group must be willing to overlook decades of racialized law making and court interpretation to identify some modicum of hope that this case will be the one that finally succeeds in the courtroom (Peresie, 2009).

Second, individuals choosing to go to court to appeal their case must have a significant amount of economic and educational privilege to have access to the court room. Assuming they are able to find a lawyer to perform that work pro bono, they must also have the ability to take time off work, find childcare, etc. to successfully defend their case and rely upon a lawyer outsider's ability to take ownership of their narratives of discrimination in the court of law, which can be a violent process of reappropriation in and of itself (Alfieri, 2007). Finally, once that case reaches court, they must be able to overcome statistically proven implicit and explicit bias in jurors and justices. (Goldhill, 2017; Selmi, 2017; Kang, 2012)

The question then comes to mind of whether the cost is simply too high for disenfranchised groups to place hope in a system that seems structurally rigged against them? For the one case that may be able to overcome all those barriers to find successful redress, there are countless others that will not. Drawing from the Foucauldian concept of

state racism, the ability to identify the potential success for some within Court adjudication processes only exists due to the inability for others to access the same level of representation within the Court.

While an outsider's perspective may be that it is important to operate within hope for that potential for victory, that seems to be a privileged stance to take considering those who have to suffer from the lived reality of the mental exhaustion, labor, and defeat that very well may come out of that process. I cannot help but think of the countless mothers of black victims of police shootings who sat in the jury for the trials of the officers who killed their dead children and how often those cases ended without a guilty verdict; mothers like Valerie Castile who sought redress within the court and found no justice.[14]

Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ

Interpretive power over law can often operate in a nefarious manner where ambiguity is identified, even where it potentially may not exist, as a tactic of over-coding. What I mean by over-coding is the explicit interpolation of the legal enterprise as an entity so ambiguous it necessitates a certain subjective operation of the legal code. The necessary question, then, is exactly what ideological direction this tactic normally takes. In the example of *Zuni Public School District v. Department of Education*, the law was over-coded as ambiguous in order to justify the exclusion of certain native schools from

[14] See Valerie Castile's post-trial interview reaction to the not guilty verdict in the case against her son's killer, police officer Jeronimo Yanez, https://www.youtube.com/watch?v=w1DV_EDSoF0

the initial statistical method that determined whether New Mexico had equalized their funding of state public schools.

Being that New Mexico has a large amount of tribal and federal land that is ineligible for property taxes, the federal government offers subsidiary funding for school districts with a large amount of non-taxable areas. Over time, the state used this as a justification to offset state funding of local school districts who received federal aid. To counter this shift, the federal government enacted restrictions against offsets. However, provided an exemption to this restriction for states that could prove their funding was equitably distributed. In order to prove equitable distribution, a state needed to identify their districts in descending order by comparing the district with the greatest amount of expenditure per-student with the district with the least amount of expenditure per-student. As long as the difference is not greater than 25%, the state's funding is considered equalized. However, the regulation adds a "discard" function, allowing the Secretary of Education to discard "[school districts] with per-pupil expenditures . . . above the 95th percentile or below the 5th percentile of such expenditures."

In New Mexico, the Secretary of Education disregarded the top 5% and bottom 5% of total students within the state from the calculation, which resulted in the discarding of 17 districts from the top spending districts and 6 districts from the bottom, representing 23 of the 89 total districts in New Mexico. Two largely tribal represented school districts, Zuni and Gallup-McKinley, in New Mexico brought suit against the New Mexico Department of Education, arguing that the exemption allowed for a discarding of the top and bottom 5% of *school districts,* not the top and bottom 5% of students within

the state. They argued that following the "discard by district" formula outlined in the regulation, fewer districts would have been excluded from the algorithm, and New Mexico would not have succeeded in proving equalized funding; whereas under the population-based model, New Mexico was under the 25% distribution requirement rate.

Oddly enough, one of the only two judges to side with the tribal school districts was Justice Scalia, arguing that the exemption stated clearly "school districts with per-pupil expenditures" thus preventing states to change the calculation to population-based discard at Step One of Chevron. The majority argued the exemption was ambiguous as they didn't explain what population to use to determine the 5% of districts at the top and bottom of the districts to exclude, thus qualifying the New Mexico Secretary of Education's interpretation of the statute to mean percentage of pupils in the state. While I agree with Scalia's reading of the statute to clearly say "school districts" thus not requesting a certain population of students to be discarded, but rather the top and bottom 5% of school districts, I want to also criticize the conclusion by the majority that this interpretation deserved deference under Step Two.

As explained earlier in this dissertation, in order to receive deference an agency's interpretation must be considered a reasonable interpretation of the statute. While this does not require the agency interpretation to be the best reading, the Court must still determine if that statute is a reasonable one. The question then comes to *how exactly the Court determines reasonableness.* While this determination is largely ambiguous for Chevron, the ultimate conclusion within administrative law is that the reasonability standard requires a determination of "whether the agency considered the matter in a

detailed and reasoned fashion and whether the interpretation is arguably consistent with the underlying statutory scheme in a substantive sense."[15] I would argue that since the original intent of the statute was to ensure the funding protection and educational opportunities of native tribal students who are often disenfranchised by governmental policies and experienced large amounts of poverty on reservations, any interpretation that makes it easier for a state to wash their hands of unequitable spending allocation by *discarding more native school districts* from their algorithm violates the heart of the statutory purpose.

The process in *Zuni*, as well as the outcome, provide several points of analysis when considering the doctrines like Chevron, the Court itself, and institutions as a whole. First, the function of each of these facets of law are always already violently biopolitical, serving little other purpose beyond protecting the privileged at the expense of the already marginalized. At many points in this case, the majority justices seemed almost incapable of evaluating a funding algorithm. Scalia's dissenting opinion ironically takes them to task for this, as explained above. Their incapacity to determine the correct reading of the algorithm lead them to simply define it as ambiguous, and then cite Chevron as a mechanism to answer this identified ambiguity. Chevron as doctrine replaced any methodological investigation of the algorithm, almost like a heuristic to replace structured analysis. Heuristic based reasoning, in this instance, served to subjugate any knowledge that attempted to parse through the complexity.

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[15] Step Two of Chevron v. Natural Resources Defense Council, ABA Administrative Law Section, Project on the Administrative Procedure Act, Scope of Judicial Review Section, Elizabeth Magill, University of Virginia School of Law. Third Draft: June 2001, http://www.americanbar.org/content/dam/aba/migrated/adminlaw/apa/chevronscope3.doc

Second, even without Chevron, one must question what would have occurred in this case when a group of justices seems entirely ill-equipped to parse through the language of a statute with relative complexity. A world of increasing statutory complexity then requires an arbiter, which the Courts have identified themselves as being unwilling to fill. The subjugation of knowledge allows agencies to claim an almost universal scientific authority over such complexity. In short, the juridical realm itself, in its authority to interpret the law, will almost always choose the interpretation that invests in the smooth functioning of the administrative state.

Carcieri v. Salazar

A potential response to this dissertation may be that a large portion of my critique of Chevron seems to also be an implicit criticism of legal institutions writ large. While that conclusion may not have been where I intended for this project to go, I have to agree that a significant crux of my analysis regarding deference ultimately questions how sovereignty operates nefariously in all contexts. Chevron, and interpretive power more broadly, are simply a single facet of the mechanisms that political institutions utilize to retain power within themselves. I would point to the history of *Carcieri v. Salazar* to exemplify this conclusion.

In *Carcieri*, deference was ultimately not awarded, yet the case still shows the power the legal arena in general has to use interpretive powers to exact sovereign control over lived realities for individuals caught in its path. Using a single word in the Indian Reorganization Act of 1934, the Court concluded that the Narragansett Indian Tribe did not "meet" the definition of an Indian – denying them a specific land protection provided

under that statute. The particular statute, covering the authority of the Secretary of the Interior "to acquire land and hold it in trust 'for the purpose of providing land for Indians'" defined "Indian" as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." In a rather odd call towards strict textual interpretation, the Court identified the term "now" to mean only tribes recognized during the year that the statute came into effect – despite the statute still operating as law at the time of the case.

The Court outlined the history of the Narragansett Tribe in the majority opinion, explaining the rather bloody and colonial trauma inflicted on the tribe. First, largely killed off during King Philip's war in the 17th century and then forced to assimilate into the local population and give up tribal authority and most of their land in the late 19th century, the Narragansett Tribe was continually refused assistance and restitution by the Federal Government. Finally, after more than fifty years of prolonged dispute with the government for land restitution, they reached agreement with the government to relinquish "past and future claims to land based on aboriginal title" in exchange for 1,800 acres of land in Rhode Island. Five years after the establishment of Indian Reorganization Act of 1934, the Federal Government formally recognized the tribe, determining that "the Narragansett community and its predecessors have existed autonomously since first contact, despite undergoing many modifications." I find the word "modifications" an interesting and sanitizing one for the history explained above, but more egregious than this instance of historical white washing is the conclusion by the court considering the path toward recognition that the Narragansett tribe underwent.

Recall earlier that the tribe was forced to assimilate into the local community of Rhode Island and later convinced to give up their aboriginal rights to land. The tribe was both broken by colonization and then refused restitution by the sovereign power that initiated its killing off in the first place. After all of this, that government refused to recognize the tribe for over fifty years – a fight for recognition that began before the creation of the statute in question in the first place. Yet, citing a temporal phrase in a statute regarding native protections, the United States government was able to literally choose the parameters for what is considered "Indian." For the colonizer to not only possess the power of colonization, but also the legal force to predetermine those who can be interpreted as colonized shows the inherent complexity of legal sovereignty. While the colonized must seek out legal protections to live in the world that settler colonialism forced upon them, they are faced with the overwhelming symbolic force of the law – where that same settler colonial institution can determine who is enough of an *outsider* to the law to fit *within* its legal protection.

In this way, I would argue that the legal arena is one meant to arbitrarily exclude in order to both sanctify the sovereign's power to protect while calcifying access to that protection in the first place. The *Carcieri* case is one that I think effectively highlights the inability of the Court to act in a redemptive manner for disenfranchised groups when interpreting law that was never meant to be redemptive for those groups in the first place. Chevron was rejected in this case at Step One, the majority arguing the word "now" within the statute provided a plain reading that precluded applicability of the statute to tribes that were not considered tribes at the time of the Act's establishment. They

referenced other sections of the Act which used the phrase "now and thereafter" to prove Congressional intent for the authority over the statute to only apply to tribes presently included as such in 1934, since there were textual distinctions made in other sections to refer to future tribes.

Beyond plain reading, however, the majority also cited context of the Act's creation, specifically a letter from the Commissioner of Indian Affairs, John Collier concerning the Act which explained that "Section 19 of the Indian Reorganization Act of June 18, 1934 provides, in effect, that the term 'Indian' as used therein shall include—(1) all persons of Indian descent who are members of any recognized tribe *that was under Federal jurisdiction at the date of the Act*.""[16]

It is here where we can witness that whether the Court applies Chevron as a tool to interpret ambiguous statutes or not, their position of authority to interpret law strategically places the Court as a perfect specimen to ensure the legitimacy of quite illegitimate laws. Prior to the establishment of the Act in question, the Narragansett tribe fought earnestly for recognition, had their land rights violated, their sovereign identity forced into assimilation, and their tribe functionally exterminated. While the Act itself seems a benevolent one, when the state is able to enact laws on behalf of some tribes while explicitly carving out exceptions for the tribes they have refused to recognize as such, the effect of this law can be argued to be anything but benevolent.

In the face of what I would argue is state racism, via the intentional subjugation of tribes for the benefit of the order of the institution which only existed due to those tribes'

[16] Cite the case

suffering, what then is the function of the court? In this case, the Court overturned a ruling that identified the law as ambiguous and ruled in favor of the Secretary of the Department of the Interior's ability to set aside land for the Narragansett tribe, instead choosing to identify the language as both unambiguous through a strict textual approach as well as a contextual reading of Congressional intent. It is here I point out the purpose of the Court will be to find whatever tool exists at their disposal to ensure the furthering of sovereign intent. I would also point to *Carcieri's* failure to identify alternative tools of interpretation, which would have encouraged a different ruling altogether. For example, despite being one of the few cases dealing with Chevron's impact on Native rights, the Court failed to acknowledge the canon which directs courts to adopt the interpretation of a statute that would be liberally construed in favor of Natives.[17] While the Court definitely has tools of liberation at their disposal, they are often remiss to use them if adoption of those tools would infringe upon the power of the institution.

For the dispossessed, I would argue that histories of violence and the empirical failings of both liberal and conservative courts may indeed function as subjugated knowledge in light of the overwhelming push to think about the potential for the future to be different than the past.

[17] Bryan v. Itasca County, 426 U.S. 373, 392 (1976) (quoting Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918)). Among broader statements of the canon is the following: "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985).

Disability and Chevron in the Courts

Barnhart v Walton

Consistent with this turn to neoliberal justifications for denial of benefits, in *Barnhart v. Walton*, the Court granted deference to a Social Security Administration interpretation of disability that prevented a former teacher diagnosed with schizophrenia from receiving disability insurance benefits and Supplemental Security Income. This interpretation defined disability as only occurring when something prevents you from monetary gain, "a claimant is not disabled 'regardless of [his] medical condition,' if he is doing 'substantial gainful activity.'"

This economization of disability points to an objectification of subjects under the law for the purpose of continued sustainability of organizational profit, and raises the question of what purpose these agencies fill in the first place if agencies are able to determine the literal confines of an individual's identity.

Chevron U.S.A. v Eschazabal

While *Chevron U.S.A. v Eschazabal* may be considered an employment case, considering it was a question regarding whether the Chevron company could terminate an employee whose disability would be affected by exposure to toxins in the oil refinery; I believe juxtaposing the Court's ruling in *Eschazabal* to the *Barnhart* ruling is necessary to see the paternalist manner with which interpretation of disability protection statutes operates for individuals who are supposed to receive protection. In *Eschazabal*, Chevron sought the Court to agree with the Equal Employment Opportunity Commission's interpretation of the Americans with Disability Act of 1990 concerning "business

necessity" and an individual's "direct threat" to the workplace. Specifically, the Act said it is a business necessity to require "an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." Chevron argued that this allowed an employer to refuse continued employment for individuals whose disability placed that individual at further health and safety risk in the workplace.

Citing the various levels of "administrative experience" that the EEOC had, the Court argued the EEOC was best suited to determine the most *reasonable* reading of this statute. Going further, in an odd equivocation with the individual's disability in question (Hepatitis), the Court referenced the risk for the workplace if "Typhoid Mary had come under the ADA, would a meat packer have been defenseless if Mary had sued after being turned away?" The Court's rhetorical choice to compare an individual's Hepatitis to Typhoid Mary is telling regarding their perspective regarding the purpose of the legal regime for disease prevention, considering the historical imprisonment of Mary Mallon, including forced testing on her body and coercion to undergo gallbladder surgery, along with her failed legal fight to win her freedom from quarantine after five years of imprisoned conditions.[18]

However, beyond that problematic comparison, the Court's agreement with Chevron's concerns regarding the potential negative impact Eschazabal's employment could have for the company all seem to be the economic cost/benefit calculations against hiring individuals with disabilities that the Americans with Disability attempted to protect

[18] Ingliss-Arkell, E. (2014) What the City of New York Did to "Typhoid Mary" Was Pretty Horrific, https://io9.gizmodo.com/what-the-city-of-new-york-did-to-typhoid-mary-was-pre-1674812001

against in the first place: “to avoid time lost to sickness, excessive turnover from medical retirement or death, litigation under state tort law, and the risk of violating the national Occupational Safety and Health Act of 1970.” In this sense, the appeal to concern for Eschazabal’s personal health risks due to toxins exposure seem to operate as an expressed care for the employee with the implicit intent to protect the company itself from the fear that people with disabilities would be a perpetual economic drain on the company and a danger to the health and safety of the company itself. In order to allow for the economic well-being of society as a whole, interpretations concerning disability and the workplace needed to be made as favorable as possible for the company, despite the consequence for those pushed to the periphery of sovereign inclusion with this calculation.

Neoliberalism and Chevron in the Courts

Cornelius v Nutt

The Civil Service Reform Act represents an attempt to preserve “the ability of federal managers to maintain ‘an effective and efficient Government,’’ and strengthen ‘‘the position of federal unions” and make “’the collective-bargaining process a more effective instrument of the public interest.” *Cornelius v Nutt* asked whether an agency should be given deference to their interpretation that “harmful-error” by an agency during disciplinary action only refers to error that was harmful to the employee, not to the union. In short, at stake was whether the decision to ignore the union-negotiated termination process constitutes a “harmful error,” or whether this term only applies to the action decision itself (termination). The Supreme Court determined that while employees of the General Services Administration were not provided with a union representative during an

interrogation of their wrongdoing, their termination would have occurred even with the union representative present. Thus, the agency's interpretation was consistent with the Civil Service Reform Act's collective-bargaining process and the act writ large.

However, an interesting facet to note is how this interpretation focuses on the first intent of the Civil Service Reform Act, the ability for federal mangers to have an effective and efficient government, while ignoring language within the act that attempts to isolate unions and the collective-bargaining process as being an "effective instrument of public interest." Specifically, the majority opinion stated that they rested their decision on remaining "faithful to the central congressional purposes underlying the enactment of the CSRA." Yet, when identifying those purposes, only isolated the ability for civil servants to be hired and fired more easily as preserving "the ability of federal managers to main 'an effective and efficient government.'"

In responding to the concern of this decision harming the second purpose of the CSRA, namely enforcing procedures arrived at through collective bargaining and strengthening the position of federal unions, the majority opinion argued that when agencies violate these procedures "with prejudice to the individual employee's rights, any resulting agency disciplinary decision will be reversed." Meaning that if individuals have their rights violated, they always have the ability to access the courts for redress. Yet this seemingly reduces the purpose of unions, which is to be a collective protection rather than protections for individual employees, and also rhetorically diminishes the power of unions to place significant constraints on agency overreach and inconsistency. Further, it seems a rather hollow promise made to union employees that are losing a suit *based on a*

violation of their collective bargaining rights that they can always come to the courts if an agency enforced an interpretation that violates their collective bargaining rights.

The Supreme Court ultimately criticized the petitioners' claim that they were due a different definition of "harmful error" – namely that they appealed the agency's disciplinary decision using the grievance and arbitration procedures outlined through their collective-bargaining agreement. The petitioners agreed "harmful error" applied to error that determined the outcome of a grievance. However, they argued that since the arbitration and grievance procedures were of significant relevance to the benefit of the union, no matter the outcome of the case, that "harmful error" should also incorporate union interests concerning their collective bargaining agreement. The Supreme Court majority opinion outlined that this conclusion would result in 'inconsistency and reform shopping that Congress sought to avoid" as "an employee with a claim that the agency violated procedures guaranteed by the collective-bargaining agreement would tend to select the forum -- the grievance and arbitration procedures -- that treats his claim more favorably."

The question I raise is what type of inconsistency the court is attempting to avoid? While the inconsistency of "forum shopping" by aggrieved employees of unions is identified as a form of radical unpredictability for employers and agencies that must be avoided, the likelihood of agencies woefully violating their collective-bargaining agreements with unions seems to be identified as an inevitability that cannot be redressed. While arbitration inconsistency on behalf of agency employees is deemed a cost that must be avoided under the Civil Service Reform Act, the likelihood of agency failures to

abide by agreements with unions is identified as a *consistent inconsistency*, in that it remains consistent that agreements with unions are preserved as false agreements that provide little protections for employees represented by those unions.

In order for the agency to exist, the union's power (and convergently, the worker's power within the agency) must by repressed and deprived of true function. The agency's ability to retain its own coherence rests on its capacity to monopolize the frameworks of discipline and organization, often through a sovereign control over the *direction* of unpredictability of the law. The creation of pathways of redress for the union employee within that sovereign arrangement quite literally ruptures the control that agencies, and thus the state, have over the legal realm.

Crandon v US

While the Rule of Lenity has been identified as a mutually exclusive interpretive doctrine in immigration courts, whose presumption has been in favor of Chevron instead of Lenity; this has not always been the case when Chevron and Lenity are brought into criminal cases. In *Crandon v. United States*, the United States attempted to find five Boeing executives criminally liable for violating a provision of the Criminal Code that "which makes it a crime for a private party to pay, and a Government employee to receive, supplemental compensation for the employee's Government service." The unanimous court argued that the Criminal Code is written in "plain language" to refer to governmental employees, and since the employees in question were still Boeing executives when they accepted a lump sum from the company to retire early in order to supplement what would be a pay cut for a position within the Executive Branch, the

employees did not violate any laws. While this conclusion rested upon seeing the statute as unambiguous within Step One, the Supreme Court opinion also mentioned that even if the statute were to be ambiguous it should still be decided in favor of the Boeing executives, due to the Rule of Lenity:

> Moreover, because the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage. To the extent that the language or history of § 209 is uncertain, this "time-honored interpretive guideline" serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability.

While the court has remained completely hesitant to use the Rule of Lenity to grant reprieve to immigrants appealing for stay of deportations, it seems all too willing to justify rulings that benefit high-powered executives who leave the corporate world to work for the Executive Branch. Criminality is isolated for those outside the boundaries of citizenship, and the penalties associated with strict interpretation of ambiguous statutes only identified as harsh and undue when those incurring them occupy a position of power within administration, governance, or the market.

Adams Fruit Company v Barrett

Another example of a case that many would isolate to justify the existence of Chevron would be *Adams Fruit Company v Barrett*, where the Supreme Court decided that a Florida workers' compensation law did not prevent migrant agricultural workers from seeking private actions under the Migrant Seasonal Agricultural Worker Protection

Act. The reason we should be hesitant to herald the *Adams Fruit Co v. Barrett* decision as proof of the justice and potential within Chevron is simply due to what the actual point of the case was, namely questioning jurisdictional authority. The introduction to the court opinion crafts a tone of justice for the imperiled migrant worker, forced to ride in an overfilled van that proceeded to crash.

Yet, the outcome of this case did not guarantee remedy for these workers, it simply removed a legal barrier for them to be able to seek compensation under a federal migrant protection act. The first paragraph of the opinion points to this rather simply, "we must decide whether exclusivity provisions in state workers' compensation laws *bar* migrant workers from *availing themselves of* a private right of action." Quite simply, the parameters of this case of much narrower than one may initially assume. Post-*Adams Fruit*, migrant workers can appeal for federal workers' compensation. There is, however, little guarantee they will win those cases. This is a classic case of how the legal system defines justice in extremely abstract ways that do nothing for real people. Yes, migrants now have formal access to apply for workers' compensation, but do they have practical access? Do they have the resources and help they need to speak and be heard in this venue? Will they be deported if they do so? On the legal books, there is an abstract guarantee of fairness and justice under the law. In reality, we have nothing at all.

Ft. Stewart Schools v Federal Labor Relations Authority

In *Ft Stewart Schools v Federal Labor Relations Authority*, a case questioning whether schools owned and operated by the United States Army were not subject to bargaining under Title VII of the Civil Service Reform Act of 1978 or the Federal

Service Labor-Management Relations Statute, the court held that these schools were required to bargain over wages and benefits. An interesting case to juxtapose this positive ruling for collective bargaining and unions with would be the *Cornelius* decision. While collective bargaining is held in high esteem in the *Ft. Stewart* case, the *Cornelius* case witnessed a sacrifice of collective bargaining in lieu of retaining effective governance for employees. In *Ft. Stewart*, collective bargaining was sustained for employees of an Army elementary school.

The question then arises of who has access to workers protections like collective bargaining and who does not? In the *Cornelius* case, deference to preserving effective governance took priority over protecting the sanctity of unions. The distinction I would raise here rests in the facet of collective bargaining in question. While the *Cornelius* case requested a court to prioritize union protections for firing processes, the *Ft. Stewart* case requested protections for hiring. While the *Cornelius* workers were identified as the "bad employee" who falsified video feeds to protect themselves from accusations of alcohol consumption at work, the teachers advocating for bargaining over wages in *Ft. Stewart* were the ideal *potential* employee, since bargaining for wages is an intrinsic part of participating in the neoliberal economy.

The conclusion made in *Cornelius* rested quite certainly on the Court's desire to "remain faithful to the central congressional purposes underlying the enactment of the" Civil Service Reform Act. Deference to the Merit System Protection Board's interpretation of the harmful error rule was deemed critical to maintain the ability for the act to "preserve the ability of federal managers to maintain an effective and efficient

Government." The ability to fire employees whose work performance was deemed "unacceptable" was then identified as an important mechanism for maintaining governmental efficiency. While the Court acknowledged an ambiguity in the phrase "harmful error," they argued any lack of clarity in the statute must be deferred by the Board's interpretation to provide for the most efficient federal working environment. The ability to fire employees was identified as a necessary outcome, thus despite a large number of defenses concerning collective bargaining violations by the employees in question were disregarded in favor of the plight of the agency forced to retain "bad employees."

On the other hand, in the *Ft. Stewart* case, the Court chose to ignore Senate and other Congressional statements concerning the statute that reported the duty to bargain as excluding proposals concerning wages and fringe benefits:

> Petitioner discusses at great length the legislative history of the Statute, from which it has culled a formidable number of statements suggesting that certain members and committees of Congress did not think the duty to bargain would extend to proposals relating to wages and fringe benefits. A Senate Report, for example, states unequivocally that "the bill permits unions to bargain collectively on personnel policies and practices, and other matters affecting working conditions within the authority of agency managers. It excludes bargaining on economic matters" … A House Report recounts that the bill "does not permit bargaining on wages and fringe benefits." To like effect are numerous floor statements by both sponsors and opponents.

In light of these statements of Congressional intent, the Court argued that Congress was uninformed concerning the exceptions in the statute, and this legislative history should be disregarded. Where in *Cornelius*, legislative intent served a specific function, in *Ft. Stewart*, legislative intent was ignored in favor of what the Court identified as the most important function of the act, which was to sustain the ability for unions to collectively bargain over "conditions of employment." The majority argues that wages cannot be divorced from conditions of employment, going so far as to state that "wages are the quintessential prerequisite to accepting employment." When considering the concept of collective bargaining, certain facets of it can and indeed must, be protected and precluded for the efficient and economic potential of the agency operating within the system of production. In order for the agency to sustain itself, good workers must be hired and bad workers must be fired. It seems that the Court deployed a methodological approach in *Cornelius* and *Ft. Stewart* that would be rejected as corrupt within any academic circle, which is to come to your conclusion first and then perform your research in a manner that guarantees agreement with that conclusion. They identified the need to fire (let die) in *Cornelius* and the need to hire (let live) in *Ft. Stewart* as intrinsic goods for productive processes organized in and through the modern state, and then chose any approach to statutory interpretation that suited that conclusion.

Edelman v Lynchburg College

Claims of progress within the Chevron doctrine often seem to be tied to potential for employees to have access to redress within legal procedure. In *Edelman v Lynchburg College*, the Court sided in the favor of the Equal Employment Opportunity

Commission's interpretation of what constituted a timely "filed charge" – an interpretation that was in favor of the employee claiming employment discrimination by Lynchburg College. While the majority decision avoided application of deference, claiming the interpretation was the most reasonable interpretation of the law, thus even without deference would have been the Court's interpretation, the concurrent opinion argued that the initial statute was ambiguous, so the EEOC's interpretation under deference did not need to be the most reasonable. These distinctions made within the two opinions are not the point that I believe warrants analysis, however. Instead, a broader attention towards what was actually accomplished in the outcome of this case is required, as I believe it points to the true potential that juridical progress has.

It is necessary to acknowledge that the Court's ruling in favor of the EEOC's interpretation, and thus the interpretation benefitting the employee, did not guarantee that Leonard Edelman would win his suit against Lynchburg College for discrimination. Instead, the Court determined that Edelman's initial complaint letter fit the requirement for timely filing of a charge, allowing the case to continue. In this sense, the Court shows a consistent capacity to err in favor of individuals having the opportunity to submit their claims to the law, yet the facets of these specific cases show the relative incapacity for the law to guarantee true protections for individual success in their submission to said law. In short, when Chevron is used to provide individuals redress, it usually only provides formal access to justice, not real or practical access to justice.

In this sense, the Supreme Court's legal process represents a guise for potential that may never be reached. While the Court is progressive in terms of allowing

individuals to enter the procedural process, when cases concerning an individual's claim for redress are in question the outcome seems to be less than desirable (see *Barnhart v. Walton; Chevron U.S.A. v. Eschazabal*; and *Cornelius v. Nutt*). So, in that sense, cases like *Edelman* serve a certain ideological purpose; allowing institutions to overcome concerns regarding material abjection within the legal arena by oppressed peoples with insignificant procedural amendments to said law.

AMTRAK v Morgan

A few deference opinions after the *Edelman* decision, the Court decided on another Civil Rights Act case, *AMTRAK v Morgan*. In this case, the Court determined that the timelines for filing discussed in the *Edelman* case also allowed for employees to include actions that were conducive to the creation of a hostile work environment to include instances of hostile work environment that occurred prior to the 300-day filing requirement; as a hostile work environment requires more than a single instance of negative behavior, but a process that magnifies behaviors into an environment of hostility.

Following my analysis above, however, this case did not guarantee a resolution of the discrimination claim in the favor of the employee; but rather, ensured procedural integrity to the claim process. To support this point, the Court explicitly identifies this case as not precluding protections for accused employers of workplace hostility, explaining that their "holding does not leave employers defenseless against employees who bring hostile work environment claims that extend over long periods of time." Pointing out one potential area of protection for employers, the Court identifies that they

could take use of the laches defense, "which bars a plaintiff from maintaining a suit if he unreasonably delays in filing a suit and as a result harms the defendant. This defense "'requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" However, somewhat problematically, the Court magnifies this failure to explain what the definition is for proof of lack of diligence and prejudice, as well as what consequences were incurred for the employee's claim if laches defense was applied successfully.

The explicit unwillingness in the Court to identify these circumstances serves as an area of legal ambiguity for employers that I would argue is almost always advantageous to employers, as proven by most of my previous analysis of the danger of legal ambiguity. Ambiguity guarantees a level of subjectivity that ensures an unstable legal arena for those seeking redress through the juridical process. Power of interpretation within ambiguity leads to subjective conclusions regarding concepts like disability (*Barnhart*), congressional intent (*Cornelius* and *Ft. Stewart*), and even what constitutes a "plain reading" of the text (*Sandoval* and *Carcieri*).

U.S. v. Boyle

In *U.S. v. Boyle*, the respondent paid their taxes late because his lawyer that he had hired to prepare and file the tax return in execution of his mother's will failed to file on time. Despite Boyle's attempt to abide by tax law by hiring a lawyer to process the claim, the court found it was still the taxpayer's responsibility to ensure payment was filed on time. While Chevron was not identified in the opinion as huge factor in analysis (it is only mention is a footnote), the Court recognized that the terms "willful neglect" of

payment and "reasonable cause" for not filing on time were not defined in tax code, but "the relevant Treasury Regulation calls on the taxpayer to demonstrate that he exercised 'ordinary business care and prudence' but nevertheless was 'unable to file the return within the prescribed time.'"

Throughout the majority opinion, numerous cases were cited that could provide defense for Boyle's late filing. First, in *Rohrabaugh v. United States,* the respondent also hired an attorney to execute a probate matter and consistently inquired on the status of the filing with the attorney, which mirrors the actions of Boyle. The *Rohrabaugh* court identified the holding in their case to be narrow, and recommended future cases by decided on a "case by case basis." The *Boyle* court refused this notion of case by case justifications for late filing, arguing that a line must be drawn that supported prompt and consistent filing of taxes due to the importance of prompt payment for the overall tax regime.

The Court also recognized several other cases that held "reasonable cause" to be "established when a taxpayer shows that he reasonably relied on the advice of an accountant or attorney that it was unnecessary to file a return, even when such advice turned out to have been mistaken" such as *United States v. Kroll, Commissioner v. American Assn. of Engineers Employment, Inc., Burton Swartz Land Corp. v. Commissioner, Haywood Lumber & Mining Co. v. Commissioner, Orient Investment & Finance Co. v. Commissioner*, etc. The Court agreed that a taxpayer does not have the sufficient expertise to contradict the advisement of their attorney, who would be justifiably identified by the taxpayer of knowing the correct legal actions to take.

However, these cases were rejected since any taxpayer should have sufficient knowledge of due dates to pay taxes on time. This conclusion runs contradictory to the *Rohrabaugh* court's argument that a taxpayer has no reason to doubt their experienced attorney who claims to be taking all necessary actions to ensure the effective execution of their estate filings.

Ultimately, erring to agency interpretation of statutes regarding payment of taxes within specified deadlines was an implicit recognition of deference to the IRS throughout the entire opinion. I would argue the impetus for deference in this case was the free flow of economic wellbeing for the state, supported by the unanimous courts' willingness to disregard other cases that could have encouraged an opposite ruling in order to protect the ease of governance, "fixed dates… are often **essential to accomplish necessary results**. The government has millions of taxpayers to monitor… Any less rigid standard would risk encouraging a lax attitude toward filing dates. **Prompt payment of taxes is imperative to the Government**, which should not have to assume the burden of unnecessary ad hoc determinations" (US v. Boyle, Section III). *Emphasis added*.

National R.R. Passenger Corp. v Boston & Me. Corp.

In *National R.R. Passenger Corp. v Boston & Me. Corp*, Chevron was cited to provide deference to Interstate Commerce Commission's (ICC) order requiring conveyance of a section of railroad track running through Vermont from the Boston and Maine Corporation (B&M) to Amtrak. Amtrak used their statutory condemnation power, citing that the track had been neglected and maintenance failures were causing significant delays to their passenger service. Amtrak wanted to acquire the track and begin working

with a different railing company to upgrade and rehabilitate the section. The Court of Appeals determined that Amtrak's condemnation authority was limited to "property that was necessary, in the sense of indispensable, to Amtrak's operations" citing the language in the statute that reads "required for intercity rail passenger service." However, the Supreme Court argued that the term "required" does not mandate a strict or narrow reading like "necessary," but could mean "useful or appropriate."

Using a very simple application of deference, the Court identified the ICC's definition as reasonable and thus warranting acceptance: "this case turns on the need for deference to the ICC, not Amtrak. There is nothing in the cases B&M cites contradicting the rule of judicial deference to an agency's statutory interpretation, even when the statute is one authorizing condemnation of private property. In short, the principle advanced by B&M does not prevail over Chevron's rule of deference." However, the important theme I would raise from this case is the manner that the Court propped up neoliberal control over markets by in a sense providing broad eminent domain authority to a private company largely controlled by public resources. Despite B&M's request that the Court evaluate this case through legal precedent that warranted a limited understanding of eminent domain authority by private companies, the Court's response largely skirted this question – claiming that Amtrak was not being given eminent domain authority, but instead the ICC's interpretation of statute was being provided deference. A simple glance back at the beginning of this opinion can shed light on the nefarious nature of this rhetorical shift. The opinion begins by outlining the establishment of Amtrak, "a private, for-profit corporation created by Congress in the Rail Passenger Service Act of 1970."

Not only that, but the opinion even isolates that despite not being "an agency or instrumentality of the United States Government," after its creation Amtrak "has been supported over the years by congressional appropriations." In short, although Amtrak is a private corporation, because it is funded in part by Congress, the court ruled it was "reasonable" for the ICC to award Amtrak the (public) power of eminent domain.

The blurring of lines between privately ran but publicly funded and established warrants significant criticism, as this case shows the slippages of authority that exists when private companies ultimately have the support of executive agencies. Neoliberalism, in this sense, functions to ensure the continual flow of markets for those that are institutionalized. Further in the opinion, the Court seems to cement this claim when it highlights a Congressional amendment to the statute passed during this dispute meant to solidify Amtrak's claim for condemnation. When both administrative procedure and legislative choices are crafted to ensure that deference to administrative interpretation of statutes could also be explained as deference to federally established private corporations, the ability to claim a disconnect between industry and the law seems suspect.

Environment and Chevron in the Courts

Chem. Mfrs. Ass'n v. NRDC

A common heralding cry for Chevron is its capacity to aid in environmentally friendly statutory interpretation and bolster the regulatory power of the Environmental Protection Agency. An important note from the case of *Chem. Mfrs. Ass'n v. NRDC* is that a "win" for EPA does not necessarily mean a win for pro-environment readings of

statutes. The outcome of this case allowed for a case-by-case variance for pollutant levels, which one could argue is decisively not pro-environment. Not only that, but the justifications for deference found within environmental deference cases also often take a more ideological route, not only justifying regulation of the environment but also a certain level of inefficient governance by these institutions. For example, in identifying that the EPA was warranted deference to their interpretation that the Clean Water Act's prohibition of "modifications" from toxic pollutant standards did not preclude them "from issuing 'fundamentally different factor' (FDF) variances from the toxic pollutant effluent limitations of the act," the Supreme Court identified the word "modify" as having close to no statutory meaning.[19] While the claim here was that deference allowed the agency's interpretation due to the ambiguity of the statute, the court argued that "the availability of FDF variances makes bearable the enormous burden faced by EPA in promulgating categories of sources and setting effluent limitations." Thus, I would argue the rhetoric justifying deference is often ideological in nature – an intent at making governance easier for the institution, but not necessary guaranteeing the best framework for governance.

For example, when the court is able to identify that "this view of the agency charged with administering the statute is entitles to considerable deference; and to sustain it, we need not find that it is the only permissible construction that EPA might have adopted but only that EPA's understanding of this very 'complex statute' is a sufficiently

[19] "Any interested party may seek an FDF variance to make effluent limitations either more or less stringent if the standards applies to a given source, because of factors fundamentally different from those considered by EPA in setting the limitation, are either too lenient or too strict." See Chem. Mfrs. Ass'n v NRDC

rational one to preclude a court from substituting its judgment for that of EPA," what exactly does this position do for governance as a whole? Agencies are entitled with the power to willfully interpret even the clearest statute as "vague" if it suits their purpose, and Chevron gives them cover from the Courts questioning these interpretations. In short, agencies craft statutes as vague for the express purpose of isolating specific cases that are not necessarily included due to the initial ambiguity of the statute.

Considering from the Court's willingness to disregard a word like "modify," I would argue that ambiguity becomes willfully manufactured. Due to the unstable nature of signs (arbitrary, cultural, polysemic), ambiguity is always present in any law. Therefore, a motivated justice can always interpret a legal statute as being ambiguous, particularly if they are only looking at the letters on the page. Likewise, a motivated justice (perhaps even the same justice) can treat those exact same signs (via a process of willful positivism) as stable and transhistorical, and deny any ambiguity whatsoever. The sign in this case simply becomes a referent to something "real." Both of these avenues become options for a justice depending on which interpretive choice best suits their predetermined ideological conclusion. A justice can identify a statute as ambiguous, acting as a legal post-structuralist or post-modernist, or identify those same signs as unambiguous, becoming the legal positivist. I would argue that all judges choose which role to act as depending on which best serves the needs of the administrative state most effectively.

Arkansas v Oklahoma

Providing agencies like the EPA the means to effectively regulate environmental risks is a commonly cited benefit to the Chevron doctrine. Yet an interesting factor of many deference cases regarding EPA interpretations of statutes is they could be considered decisively anti-environmental. For example, in *Arkansas v. Oklahoma*, the Court granted certiorari to a Court of Appeals case regarding the issuance of a discharge permit for Arkansas that Oklahoma requested to be overturned due to its potential violation of Oklahoma state law concerning Illinois River water quality standards. Throughout the case, the Court identified factors that seemed to swing decisively in Oklahoma's favor, such as identifying that "in issuing the Fayetteville permit, the EPA assumed it was obligated by both the Act and its own regulations to ensure that the Fayetteville discharge would not violate Oklahoma's standards."

However, the ultimate findings determined that the EPA's decision to grant the permit should not be considered arbitrary and capricious, since they operated within their expert authority to determine that water quality in Oklahoma would not be affected in a negative enough manner to outweigh to potential benefits of the permit issuance. Despite recognizing that Oklahoma was likely correct in citing a severe present risk for the Illinois River, the Court deferred to the EPA's research regarding the permit's effect on future environmental risk for water stream quality:

> In sum, the Court of Appeals made a policy choice that it was not authorized to make. Arguably, as that court suggested, it might be wise to prohibit any discharge into the Illinois River, even if that discharge would have no adverse

> impact on water quality. But it was surely not arbitrary for the EPA to conclude -- given the benefits to the river from the increased flow of relatively clean water and the benefits achieved in Arkansas by allowing the new plant to operate as designed -- that allowing the discharge would be even wiser. It is not our role, or that of the Court of Appeals, to decide which policy choice is the better one, for it is clear that Congress has entrusted such decisions to the Environmental Protection Agency.

The critical point to analyze here, however, is the material impact that these ideological conclusions have concerning agencies like the EPA's ability to investigate environmental effects in environmentally beneficial manners. In a government where coordinators of agencies have often served in the industries they are supposed to regulate, should we begin to be skeptical of the validity of these agencies' statistical findings? The liberal defense of Chevron rests on a touching but misguided faith in administrative agencies—most of which are already "captured" by the industries they are supposed to regulate (Waldman, 2019). This phenomenon of regulatory capture is true even in Democratic or liberal administrations, where advocates may have a seat at the table (within agencies like the EPA) but the loudest and most powerful voices are still those from industry and commerce.

Further complicating the ability for Chevron to have true positive effect for environmental issues is seen in cases like *Massachusetts v. EPA*, where the EPA argued against having authority to regulate climate change causing emissions. While the Court erred against this conclusion, remanding the case to the EPA to determine its discretion to

regulate carbon dioxide and other greenhouse gas emissions, the original argument by the EPA lends question into the ability for effective environmental regulation to occur in an arena of agency unwillingness.

Solid Waste Agency v United States Corp of Engineers

I would argue that it should not be considered coincidental that the first environmental case where deference failed to be applied to an agency's interpretation of the Clean Water Act was still consistent with the anti-environmental application of deference in *Chem. Mfrs v. NRDC* and *Arkansas v. Oklahoma*. While deference to agencies in those cases seemed to be a logical choice when the outcome had a potentially harmful effect on the environment (pollution variance permits and sewage permits), in *Solid Waste Agency v. United States Corp of Engineers*, the majority decision of all conservative justices erred against deferring to the United States Corp of Engineers' interpretation the Clean Water Act that encompassed waters inhabited by migratory birds (Migratory Bird Rule). Solid Waste Agency requested a permit to "develop a disposal site for baled nonhazardous solid waste" on a 533-acre parcel of land that had once been a mining area but had been abandoned, allowing it to evolve into a forest and wetlands area with a "scattering of permanent and seasonal ponds" varying from "one-tenth of an acre to several acres" home to 121 different species of birds.

In supporting their argument that the Corps had taken their regulatory power too far in identifying the wetlands as protected by the Clean Water Act, the Court consistently chose to refer to the wetlands as "an abandoned sand and gravel pit" – arguably seeming to rhetorically distance themselves from the evolution that had taken

place in that area, including the acres wide wetland spaces that were home to so many species of birds. While the dissenters in this case, Justices Stevens, Souter, Ginsburg and Breyer argued that the Corps' interpretation of the statute as including waters critical to migratory birds fell in line with the heart of the Clean Water Act, proving it reasonable and deserving of deference, the majority seemed to already have an opinion settled of what can and cannot count as waters – and a former sand and gravel pit just was not it. I find this historical moment in the Court a necessary one to unpack, as it shows that in a vacuum divorced from ideology – the notion of deference may not be a completely awful one. However, ideology is an intrinsic part of interpretation within the Courts (and institutions writ large). Therefore, whether deference is granted or not seems to be less of the question, but rather – when is deference granted and declined for merits investigation; and also, is the choice to grant or decline deference consistent with an ideological trend? For the environment, at least, it seems for the first couple decades of Chevron's existence that there was a distinct anti-environmental trend.

While in some cases, conservative justices approach interpretation using positivist tools of statutory interpretation, identifying clarity where others see ambiguity (i.e. a pit can never be a waterway), in others they become ardent deconstructionists – seeing only ambiguity and contradiction where others see clarity of meaning, such as in *Chem. Mfrs. Ass'n v. NRDC* where the word "modify" suddenly lost any plain meaning.

In cases where the EPA has taken firm steps to regulate the environment, the Court seems drastically more likely to refuse Chevron application; such as in *Michigan v. EPA* where the Court used consequentialist frameworks to determine that emissions

regulations must take into count the economic costs of regulation. They refused to provide the EPA deference to its interpretation of emissions regulations that failed to consider the cost of regulation, arguing that "one would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits."

The Clean Air Act provides the EPA the authority to promulgate regulations on "sources whose emissions fall short of these thresholds (area sources) if they present a threat of adverse effects to human health or the environment warranting regulation." Congress expanded this authority over emissions onto regulation of power plants if the EPA found regulation of power plants to be "appropriate and necessary." In an interesting rhetorical move, the Court adopted a blatant positivist role in interpreting the phrase "appropriate and necessary" to deny the EPA's interpretation deference, arguing that the statute was clear when it used the word "appropriate," and that word cannot be divorced from economic costs: "*read **naturally** in the present context, the phrase "appropriate and necessary" **requires** at least some attention to cost"* (Michigan v. EPA, Section II).

The Biopolitics of "Reasonableness"

I would argue there is a definitive ideological theme present within Chevron cases surrounding the "reasonableness" justification. In some cases, denying individual claims for redress is crafted as reasonable when these claims interrupt the steady operation of state agencies, such as the EEOC in *Eschazabal* and in *Sullivan, in which* an agency, interpretation was deemed reasonable despite its very unreasonable harm to children attempting to qualify for state benefits.

In others, reasonable seemed to signify something entirely divorced from reasonability, a rhetorical substitution for "any *possible* interpretation" when determining if an interpretation passed through Step Two. In fact, every majority opinion that passed an agency interpretation of a statute through Step One of Chevron also pushed it through Step Two. Is there, then, *any* interpretation of an ambiguous statute that can be considered unreasonable if the bar is so low for an agency to succeed?

In some cases, this theme of reasonability means using Chevron to support the claim that the agency has "reasonable" concerns about the individual's claims for redress. In others, when the agency actually sides with the individual, the Court may step in to deny the agency the deference it needs. In these cases, they will say the smooth functioning of the administrative state is explicit in the statute itself, such as *Sandoval* where despite references to the reasonability of the interpretation in favor of a broad reading of discrimination, the Court remained stalwart in their defense of a plain reading of the statute at the expense of individuals desiring redress for disparate claims of discrimination under the law.

CHAPTER SEVEN: LENITY, CHEVRON, AND THE "GIFT"

In this chapter, I will analyze how the court rhetorically justifies the hierarchal placement of Chevron, a tool of analysis in favor of governmental entities, over tools of analysis like the Rule of Lenity, which would place favor in interpretation for criminal statutes to the defendant, instead of the institution. Some scholars have advocated for a broad shift in this hierarchy, pushing for the incorporation of substantive canons as "traditional tools of interpretation" into the Chevron Two Step process – thus incorporating the Rule of Lenity into the deference regime. (Rabb, 2018; Das, 2014; Soares, 2014; Slocum, 2008)

In particular, identifying Lenity as superseding Chevron would shift the balance of power in immigration cases toward the noncitizen, as the Supreme Court currently holds that Chevron takes precedent for immigration decisions. Rabb (2108) argues that this precedent has a devastating chilling effect on circuit court immigration hearings, and that a clarity of the Lenity framework within Chevron is key to reverse this confusion. Das (2014) and Soares (2014) further impact this, explaining that Chevron application in immigration detention and removal cases is not just a deferral to immigration agency, but a deferral to the lawfulness of detainment and deportation. Immigration deportation policies rely on Chevron, basically making them immune to loss in cancellation-of-removal proceedings. While the court process is promoted as a potential avenue of

reprieve for noncitizens, the status squo Chevron over Lenity framework is one of cruel hope for noncitizens who apply for cancellation-of-removal, but enter the courtroom with literally no chance.

The existence of competing canons of interpretation and Chevron magnifies exactly how ambiguous the evolution of legal lacuna surrounding statutory interpretation has become, raising the need for a more critical analysis of this development. The stakes for this are not as simple as "the legal system is confusing." For example, deference regarding criminal statutes creates an ambiguous area of legal precedent that puts immigrants facing criminal charges in a position of precarity and violence. Immigration detention policies rely on Chevron, basically making the Department of Homeland Security and the Bureau of Immigration Appeals immune to loss in Habeus courts. As Madigan (2017) writes, "deportation separates individuals from their families and homes," and there is a significant "emotional and mental [toll] of losing a deportation case" (p. xx). Further, she notes, "under current law, criminally convicted individuals facing deportation… must contend with an inconsistent and, perhaps, unpredictable judicial approach to their appeals." (Madigan, 2017)

This final chapter examines the *a priori* doctrinal placement of Chevron within criminal statutes, arguing first that Chevron's application within criminal law ensures a continued and parasitic relationship between administrative bureaucracy and the construction of criminality and deviance. I reference this as a semiotic bureaucratization of criminality. Using foundational scholarship from semiologists like Hall, Fiske and Barthes, I argue that the meaning of the individual sign of deference becomes dependent

on its network of association with criminal law, providing symbolic coherence and tethering of the two concepts. Secondly, I will explicate the hegemonic placement of Chevron as a substantive canon superseding other possible canons of interpretation, namely the Rule of Lenity, to make two seemingly contradictory arguments. Using scholarship by Derrida, I will examine this form of administrative interpretive sovereignty as a form of administrative violence that ensures a "rigged" game within the courts against defendants seeking reprieve from harsh criminal sentences.

Deconstruction

Jacques Derrida is considered to be one of the greatest post-structuralist thinkers. Ironically, he would have never categorized himself as a philosopher, because he saw modern philosophy as being problematic. Derrida introduced a concept coined *deconstruction* as an ontology against natural conceptions of truth. Philosophy, being deemed as the search for truth, often operated in ways that reinforced dominant ideologies, creating an other and pushing this other into the periphery (Derrida, 2002).

But before delving into the particulars of deconstruction, one must first understand the connection of the author to their work. According to Derrida, there is a complicated dynamic between one's work and one's life. The subject and the systems with which they engage are not passive. Thus, the philosophy and life of an author cannot be divided (Derrida, 2002). With this in mind, this chapter will begin with a brief biography of Jacques Derrida, then explain deconstruction, followed by an application of Derrida's work to several important rhetorical works.

Derrida Biography

Jacques Derrida was a Jew born in Algeria in 1930, a time where anti-Semitism ran rampant. As a child, he was expelled from his school because he was Jewish, and forced to endure violent racist treatment from his classmates while leaving the school. Understanding this piece of Derrida's background is important to connect his fatalistic conception of domination and subordination, as well as his deep emphasis on ethical relationships toward the other (Derrida, 2002).

Growing up, Derrida's relationship with his parents was strained. He writes that this was due to the binary relationship created when he was forced to solely engage in Jewish communities because of the anti-Semitism everywhere else as well as his mother's fall into mental health problems (Derrida, 2002).

However, an even more interesting facet of Derrida's background is his quirkiness. Derrida published his first book when he was only fifteen years old, about a theft of a diary and a blackmail to return it (creating an interesting connection to his understanding of dominant textual relationships). He also pretended to learn Hebrew so that he could "read" it but not "understand" it (Derrida, 2002). These two examples are just a small insight to the inner-workings of Derrida's mind.

In 1953, Derrida met his wife, Marguerite, when he attended a class with her younger brother. They married four years later. Marguerite was a psychoanalyst, and while Derrida asserted that he had no interest in psychoanalytic theory, his notion of logocentrism and natural presence seems to have a connection to it in many ways.

Derrida died in 2004, but he left in his wake a substantial contribution to poststructuralist theory and literary criticism. However, according to Derrida (2002), connecting his work to just an addition to philosophy is not close to what he desired:

> Philosophy died one day in history, or has always been feeding itself on its own agony. It has always opposed itself to what is considered "non-philosophy." Beyond the death of philosophy, or even because of it, thought has a future. Or, the future, has a future.

Deconstruction as Process

When asked to define what exactly constituted 'deconstruction,' Derrida often chose to skirt the question. The obvious reason for this being that the simple act of defining what deconstruction *is* creates a necessary outside of what deconstruction *is not*. On the other hand, there may have been other reasons – maybe he just did not feel like suffering ignorance. However, in *A Letter to a Japanese Friend,* Derrida opted to expound on deconstruction to navigate the convergence and divergence of thought in translation (Wood & Bernasconi, 1985).

Derrida initially chose the word "deconstruction" while writing *Of Grammatology.* The term was influenced by the Heideggerian word *Destruktion,* which signified "an operation bearing on the structure or traditional architecture of the fundamental concepts of ontology or of Western metaphysics" (Wood & Bernasconi, 1985, p. 2). While Derrida chose this term, he often argues that the word was more so imposed on him, as he does not think it is very beautiful. Because of its close connection

to the word "destruction," deconstruction is often confused for an annihilation of negative reduction similar to Nietzschean demolition (Wood & Bernasconi, 1985). However, the word "deconstruction" in French means to disarrange the construction of words in a sentence, or to disassemble the parts of a whole – deconstructing a machine to transport it elsewhere.

While this definition strays from the sole negative connotation of "destruction," Derrida still argues that the etymology of "deconstruction" posits is as something that only concerned models of regions of meaning, and not the "totality of what deconstruction aspires to" (Wood & Bernasconi, 1985). Deconstruction should be not constrained to simply a linguistico-grammatical model. In fact, the drive to reduce deconstruction to a model is what allows for the permeation of misunderstandings concerning deconstruction (Wood & Bernasconi, 1985).

At its heart, deconstruction is associated with what is now coined as "poststructuralism." Structuralism at that time was dominated by linguistic models and "so-called structural linguistics that was also called Saussurian – socio-institutional, political, cultural, and above all and from the start philosophical" (Wood & Bernasconi, 1985). Poststructuralism arose as a means to undo, break down, decompose and desediment those structures as a means to understand how they were fashioned, and to reconstruct these systems to this end; taking aim at claims to truth and systems of theory and explanation that posit stable, transhistorical knowledge – viewing claims to Truth as inherently violent (Wood & Bernasconi, 1985).

One important factor that Derrida stressed is that deconstruction is not analysis, critique, a method, an act or even an operation. Analyses require regression to a simple element or origin; critique implies a decision, choice, judgment or discernment; methods reduce deconstruction to a domestication by the academe; and acts or operations imply a passive subject (Wood & Bernasconi, 1985). Rather:

> Deconstruction takes place, it is an event that does not await the deliberation, consciousness, or organization of a subject, or even of modernity. It deconstructs itself. It can be deconstructed…the word "deconstruction" stems from the fact that all of the predicates, all the defining concepts, all the lexical significations, and even the syntactic articulations, which seem at one moment to lend themselves to this definition or to that translation, are also deconstructed or deconstructible. (Wood & Bernasconi, 1985, p. 4)

Ultimately, attempts to define what deconstruction is or is not completely miss the point, as it limits ontological understanding. Deconstruction, instead, attempts to delimit ontology and open minds to possible substitutions for its context – thus Derrida's decision to constantly substitute, replace and by determined by others, like "parergon," "differance," "pharmakon," and "supplement" (Wood & Bernasconi, 1985). As Derrida (Wood & Bernasconi, 1985) explains: "What deconstruction is not? Everything of course! What is deconstruction? Nothing of course!" Deconstruction is a word, essentially replaceable in a chain of substitution, from one language to another – "a word

can be found to say the same thing and an other, a word that is also more beautiful." (Wood & Bernasconi, 1985, p. 5)

Differance

Derrida explains that the Latin for difference is rooted in two understandings. First, that difference is a sort of economic calculation, in the sense of a detour, delay, reserve – to temporize or take recourse either consciously or unconsciously (Derrida, 1982). The more common definition that Derrida focuses on is that which is not identical or that which is the other. In any sense, difference in this context guarantees some sort of interval or production of space between the elements and their 'other' (Derrida, 1982).

Something that Derrida is well known for is his rejection of western linguistic phoneticism, what he calls logocentrism. An instance where he deconstructs language is his choice to create words with constructed meanings. One example of this is "*differance."* Derrida uses the etymology of difference to argue that difference as the word can never be both of these definitions, the divergence *and* the economic calculation. To combat this paradox, *differance* "compensates economically – this loss of meaning, for differance can refer simultaneously to the entire configuration of its meanings" (Derrida, 1982).

So, with two concepts that seem incredibly irreconcilable, how can they be joined? Derrida uses the example of signs and writing. Signs ultimately are used as the referent, or the meaning – taking the place of what cannot be present. The sign is the

signifier for the absence of the present. The present that cannot be presented. A deferred presence. Yet, just as the signifier defers, it also establishes a divergence from the presence. Showing the present to be unpresentable, the sign questions the meaning of presence in the first place (Derrida, 1982). In a sense, an example could be sign language. Sign language can be used when voice (or hearing) is not present, signifying that those concepts are not *necessary* for presence or being. A substitution exists that diverges from that presence while simultaneously deferring its absence.

Ultimately, Derrida argues difference as inherent to language, articulating that there are several consequences to this inevitability:

> Essentially and lawfully, every concept is inscribed in a chain or in a system within which it refers to the other, to other concepts, by means of the systematic play of differences. Such a play, differance, is thus no longer simply a concept, but rather the possibility of conceptuality, of a conceptual process and system in general.

"Difference or rather differance is not simply a characteristic of 'reality' or of language for Derrida, but a condition of possibility, that is, what 'produces' differences" (de Ville, 2009). Differance produces by means of something that is not simply an activity, effects of difference (Derrida, 1982). However, I do not want this to create confusion over some sort of production or beginning being differance. As Derrida (1982) explains: "Differance is the non-full, non-simple, structures and differentiating origin of

differences." This confused me (Jackie Poapst) when I initially began to read the connection of differance and presence or being. However, once an explanation or connection is made to language and intelligibility, this concept became more tenable. Derrida uses Saussure's writing on the extension of language to the sign:

> Language is necessary in order for speech to be intelligible and to produce all of its effects; but the latter is necessary in order for language to be established historically, the fact of speech always comes first…retaining the framework of this requirement we will designate as differance the movement according to which language, or any code, any system, or referral in general is constituted 'historically' as a weave of differences. 'Is constituted,' 'is produced,' 'is created,' 'movement,' 'historically,' etc., necessarily being understood beyond the metaphysical language in which they are retained, along with all their implications. (Derrida, 1982, p. 9)

In short, differance in all its functions is what makes signification possible. Language divides itself into a series of sounds and signifiers, each different than the other. The world is symbolically divided as well into a series of signified/meaning, each different than the other. Language then, is about the conventional association of those two systems of difference with one another. Relations exist between and through each presence and element, allowing for marking or traces for past, present and future elements. The future and past exemplify differance concerning the presence or absence thereof, creating relation to not only what something is, but what it is not (Derrida, 1982).

Convergence of the future and past modify how the present is understood, or not understood.

The specific differences articulated from deferral produce themselves from differance. The question that is absent, or divergent, is the concept of deferral. Ultimately, what defers, who defers, and even, what is differance (Derrida, 1982)? Consider that these concepts are posed as questions. In order to answer, one must understand that these concepts are posited as questions, and question why they are naturally understood as questions. We must detour from blind acceptance of "natural" and instance begin to understand what *is conceived as* natural, and why.

> If we accepted the form of the question, in its meaning and its syntax ("what is?" "who is?" "who is it that?"), we should have to conclude that difference has been derived, has happened, is to be mastered and governed on the basis of the point of a present being, which itself could be something, a form, a state, a power in the world to which all kinds of named might be given, a what, or a present being as a subject, a who. (Derrida, 1982, p. 11)

All of these concepts root themselves in how language relies and makes knowledge or ideas intelligible – allowing for the effects of word to be produced. In many ways, differance connects to what Nietzsche characterized as "force," it is the "active and moving discord of different forces, and of differences of forces" (Derrida, 1982). These forces create an ontology of being, allowing for a determination of

hierarchy of being that Derrida explains as a trace. That which is peripheral is still deeply connected – more or less than – a text's properties or presence (Derrida, 1982).

Thinking through this concept of differance enables an unraveling of the symbols and logics present that allow certain systems of meaning to persist. Deconstruction situates the scholar in a position to critically follow the pathways that specific productions of knowledge take within representation to craft both particular and universalizing meanings. The deconstructionist traces representations to identify the *unexamined*, the assumptions and premises at the heart of those representation's systems of meaning. It is there where the deconstructionist can find and expose the fundamental reliance a claim and segment of knowledge may place on a transhistorical, metaphysical Presence – whether that be God, progress, etc. that consequently relies on the banishment of othering of a transhistorical, metaphysical Other.

Supplement

Derrida explains another concept of deconstruction in *Of Grammatology:* the supplement. This concept is one that he evolved from Rousseau to discuss connection and relationship between nature, culture, and writing. The supplement is both within and without the text. It can show the insufficiency of the natural, providing an addition that enhances what was initially conceived as natural. In a way, this aspect of the supplement presents a danger to presence and being, as it shows there is a lack that the present fails to fill, making this conception of natural impure (Derrida, 1987).

Yet, similar to differance, the supplement is both addition and substitution. The supplement can provide a fulfillment to the present, making it absolute and signified, satisfied in accomplishing itself. This conception makes the supplement's significance determined by that of its master, or natural presence. The presence becomes privileged over that which augmented its existence (Derrida, 1987). On the other hand, the supplement can also function as a substitution to the present. This substitution is not just dominant and subordinate ordering, but also one that proves the present was inadequate and requires a replacement rather than an addition. This risks the dangerous supplement that was explained above. The danger of this substitution is a continued reliance on dominant understanding of presence and being, the natural presence (Derrida, 1987). However, the present, or those who spin the conception of it, are, as Derrida articulates, blind to their supplement – insinuating that this relationship may not be one of subordination (Derrida, 1987). This blindness to supplements is ultimately what allows for natural presence to possess its authority, and continues the ignorance toward the inevitability of the supplement. An example of the supplement can be seen in the effect of colonization on structures of meaning, the colonizer infiltrated indigenous culture and practices, creating an insidious presencing that both aimed to redact and replace the customs and meaning for native groups. The force of colonization crafted a violent tethering to native life and survival, both inside and outside native cultural creation.

Ultimately, Derrida's conception of the supplement questioned the entire formation of signification proffered by scholars like Saussure and Rousseau, arguing that

in order for a sign to have coherence, the signifier must also exist. In order for an original to be characterized as such, its supplement must also exist. The notion of natural ordering of things must be cast into disarray, according to Derrida, as the existence of disorder must be present in the first place for one to understand the concept of hierarchy and order. For example, for one to be able to explain democracy as being the best form of governance, there must be the authoritarianism supplement to create that hierarchy in the first place. Authoritarianism is the supplement to democracy in this example, the other that democracy defines itself against. Without its referent, the representational meaning behind a democracy ceases to exist. Authoritarianism is the other that is always banished in the construction of democracy, but also always present.

Using Derrida's concepts of deconstruction and supplement, I would like to examine the positioning of habeus trials for noncitizens when Chevron is literally crafted to supersede opportunities for justice (i.e. Rule of Lenity) within these trials.

Immigration and Chevron in the Courts

Jean v Nelson

In *Jean v Nelson*, a group of undocumented and unadmitted individuals from Haiti sued the Immigration and Naturalization Service for denial of parole on the basis of race and national origin. The Court of Appeals remanded the case to the District Court, but also concluded against the claims of the petitioners, arguing that the Government's plenary authority to control the Nation's borders meant that "discrimination concerning parole would not violate the Fifth Amendment to the United States Constitution." The Supreme Court concluded the Court of Appeals "should not have reached and decided the

parole question on constitutional grounds" citing the doctrine of constitutional avoidance, which encourages courts to avoid decisions that would require interpretation based on the constitution if the case can be decided in a different manner.

While this case was not about Chevron, but rather about the Administrative Procedure Act – I would argue it is still an important case to note because of the reference to Chevron in the dissent, which if analyzed in a similar manner in the majority opinion could have forced the majority to decide on a constitutional question instead of choosing to opt for avoidance. In Justice Marshall and Brennan's dissent, they argued that Chevron deference has been consistently granted to INS interpretations that entailed a level of discrimination based on ethnicity and nationality, thus proving that a need to evaluate INS actions as violating the Fifth Amendment was necessary. In short, the dissenting justices highlighted that while constitutional avoidance may be justified in an instance where there is not a consistent trend toward discriminatory actions by an agency, the track record of interpretations by the INS that discriminated based on ethnic and national origins and consistently received deference required constitutional intervention.

It important to identify that this dissenting opinion highlights a pointed criticism of Chevron, albeit an inferred one. Marshall and Brennan explain that the INS has numerous statutes that they interpret in discriminatory manners, and correctly identifies that these interpretations are granted deference under the Chevron doctrine.

If the majority had adopted Chevron as the standard, deciding on constitutional issues like the 5th amendment would have been required. In order to avoid those

questions, they chose to decide over other means, in effect allowing discrimination based on national origin to continue.

In conclusion, while these Chevron protected interpretations may warrant an evaluation of their constitutionality; when the court is given the opportunity to criticize the type of interpretations that warrant Chevron, they deploy other tools of interpretation like constitutional avoidance to allow these actions to go unchecked. While this instance of constitutional avoidance may not seem as extreme to some, when considered in the light of interpretive tools that are ignored when their use would take precedent over Chevron (such as the Rule of Lenity), it is interesting to note the court seems to have an incentive to deploy interpretive tools that retain the interpretive flexibility of Chevron.

INS v Cardoza-Fonseca

Proponents of Chevron may point to more liberating examples of its application as justification for its existence. One example of these would most likely be the *INS v Cardoza-Fonseca.* In this case, the Supreme Court decided that the Bureau of Immigration Appeals failed to distinguish between the Immigration and Nationality Act's requirements of demonstrable threat to life or freedom for deportation relief and the Refugee Act of 1980's broader requirements of a well-grounded fear of persecution for asylum eligibility. They remanded the case back to the BIA, under the direction that the appeal for asylum be adjudicated using the broader definition of eligibility, namely "well-grounded fear" instead of demonstrable proof of threat to life or freedom.

However, within this narrative of progress, there exist two important facets deserving of analysis. First, while the majority and concurring opinions all erred toward

the BIA's interpretation failing to meet the first step of Chevron, in that Congress expressed an intent to distinguish between the Immigration and Nationality Act's requirements of demonstrable threat to life or freedom for deportation relief and the Refugee Act of 1980's broader requirements of a well-grounded fear of persecution for asylum eligibility, thus vacating the agency's ability to interpret; the dissenting opinion of Justice Powell and Justice White determined that the BIA's interpretation passed through Step One, and granted the interpretation deference under Step Two due to its reasonableness. Despite Chevron's mandate for deference to be avoided under Step One in cases where Congress has identified interpretive jurisdiction to lie within the legislature, Powell and White seemed to eschew this entirely – using the common justifications for Chevron's existence in the first place, agency expertise, as proof that the BIA had the jurisdiction to determine what these pieces of legislation meant:

> The Court then argues that such a position is inconsistent with the language and history of the Act. But this has never been the BIA's position. Thus, it is useful to examine the BIA's approach in some detail before evaluating the Court's rejection of the BIA's approach. After all, the BIA is the tribunal with the primary responsibility for applying the Act and the greatest experience in doing so (INS v. Cardoza-Fonseca, Powell and White dissent, Section I).

The question then rises what this doctrine does for decisions when justices interpret its steps as serving different purposes. A doctrine meant for objective clarity seems to give way to subjective decisions that are justified by the relative credibility of the agency pleading their case. In other words, when some judges can apply Chevron in

one manner, and other judges a very different manner, how does the doctrine provide any clarity? While this was obviously the dissenting opinion, it warrants analysis due to the nature of the court itself. While in this case, Powell and White served as the case's minority opinion, the tides of the court continually shift depending upon who holds each seat. Obviously, no standard has the capacity to ensure interpretive consistency, simply considering the temporal shifts in individuals who occupy the seats of the Court. Thus, claiming Chevron provides for this function is very much an empty promise. Following this narrative, it is important to understand the Court as functioning as a site of political power. Those who seize the court can use it as an instrument, interpreting standards like Chevron in whichever way they wish. Given the court's position within a larger structure of institutional power, the mobilization of legal ambiguity to further the interest of state power and capital accumulation becomes an inherent facet of court function.

Another key facet of this case to analyze is how agencies react to court demands. Hailing a court decision as closing the door on failures is naïve at best. According to Maggio (1994), even seven years after the ruling the INS had still failed to consistently apply the court ruling, isolating new obstacles to more inclusive interpretations that created a massive backlog in asylum claims:

> Now, seven years later, there remains an institutional resistance within the INS to the application of Cardoza-Fonseca's mandate that an asylum applicant need only present enough evidence to show that persecution is a reasonable possibility. The INS has yet to explain adequately to its Asylum Corps the difference between the

burdens of proof of a "clear probability" and a "reasonable possibility" of persecution creating a backlog in asylum cases and new injustices.

While many may isolate this as a simple question of the wheels of progress within bureaucracy being slow, a deeper critique of agencies may be required. Despite continual juridical intervention, the ability for agencies to continue to operate with relative impunity after said interventions lends into question whether progress is truly occurring.

INS v Aguirre-Aguirre

When considering deference application to the INS regarding immigration statutes, it is necessary to consider under what conditions the INS, along with the law in general, identifies eligibility for stays of deportation. In *INS v Aguirre-Aguirre*, the Court unanimously decided that the BIA receive deference for their interpretation of a statutory exclusion for stay of deportation when the immigrant committed a serious non-political crime in their home country prior to illegal entry into the United States. While U.S. Code dictates that "the Attorney General shall not deport or return any alien…to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion" there is a provision in place to exclude eligibility to those who have "committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States."

Aguirre was a Guatemalan immigrant who appealed a BIA decision of deportation on the grounds that the crimes he had admitted to committing in Guatemala were political in nature, being protests of Guatemalan laws. The BIA decided against

Aguirre by applying a measuring test between the political aspect of the offense and whether the "crime is grossly out of proportion to the political objective or if it involves acts of an atrocious nature." The Court granted the BIA's interpretation of Aguirre's crimes as grossly out of proportion and atrocious with deference, as they erred in favor of the BIA's original authority to utilize this measuring scale, despite what they isolated as potential Congressional intent to follow international law within the Refugee Act which would have defined atrocious and serious non-political crimes in a narrower manner. Interestingly enough, the Court even recognized BIA's willingness to abide by this interpretation:

> We do not understand the BIA to dispute that these considerations -- gross disproportionality, atrociousness, and comparisons with previous decided cases -- may be important in applying the serious nonpolitical crime exception. In fact, by the terms of the BIA's test (which is similar to the language quoted by the Court of Appeals from the U. N. Handbook) gross disproportion and atrociousness are relevant in the determination. According to the BIA, "in evaluating the political nature of a crime, we consider it important that the political aspect of the offense outweigh its common-law character. This would not be the case if the crime is grossly out of proportion to the political objective or if it involves acts of an atrocious nature."

The question then arises of how exactly the BIA defined grossly disproportioned and atrocious acts. Before delving into the specific case opinion details, I find it necessary to outline my initial qualms with the writing of this unanimous opinion. While

the case itself rested on determining what a serious nonpolitical crime entailed, the details provided regarding the acts made by Aguirre and their reasoning were less than extensive. Because of my overall disappointment in lack of explanation in the opinion, I decided to visit the recording of the oral arguments for the *Aguirre* case. Within the first few sentences of the oral arguments, the lawyer representing INS admitted that their accounting of the crimes committed by Aguirre in Guatemala may not be an accurate representation – as Aguirre said the translation of his description of his crimes was inaccurate. Despite that this case rested on interpreting the crimes Aguirre committed to determine whether they precluded the BIA from withholding deportation, INS waved away the concerns regarding the accuracy of the crimes with a promise that the defendant had access to an appeals trial to determine those particularities.

However, the distinction between INS' claims of the crimes and Aguirre's was a quite serious one. While the INS claimed that Aguirre had admitted to stoning civilians while protesting bus fares, Aguirre had responded to this translation of his admissions saying that stones had never been thrown at civilians but instead were thrown at the side of buses. Since the grounds to deny a withholding of deportation are crimes of serious and violent nonpolitical actions that can be considered disproportionate and atrocious, understanding the verity of the crimes at hand before ascribing them under this category seems a necessary prior question.

Considering the capacity of the supplement to instantiate the meaning of an initial sign, I find it necessary to uncover another facet of this case that was present in the oral arguments yet (unsurprisingly) absent in the written opinion, which was the initial

reaction of Justice Scalia to the case at hand. Very early in the opinion, Scalia commented that "I find it quite incredible that we are adopting an interpretation that takes into this country people who commit any crime at all… so long as it's for a political reason, and so long as it's not disproportionate." He continued to explain that the only crimes he viewed as political crimes were those that were rhetorical challenges to fascist policies by the government, such as political reporting. Material manifestations of protest were broadly positioned, even before oral arguments, by Scalia to be precluded from the definition of political crimes. Scalia even went so far as to say he didn't "care about what the Handbook says," referring to a UN Handbook clarifying the definition of a serious political crime, claiming that the plain meaning of a nonpolitical crime was the opposite of a political crime…and a political crime is a crime whose motivation is not the crime itself. However, directly after this Scalia concludes that crimes that entail violence, no matter what the motivator, should be enough to bar an immigrant from entry into the country:

> Scalia: But when you're committing a crime that is independently criminal... murder, rape, whatever... the fact that you're doing it for a political motive, why should that make any difference as to whether we want those people in this country? We don't allow those things to be done for political motives in this country. Do we want to admit immigrants who have that philosophy?
>
> Patricia A. Millett: Well, that is a choice again for Congress and the executive branch, particularly Congress to make.

Scalia: Well, **all Congress said was, nonpolitical crime, and that's a perfectly reasonable interpretation of what a political crime consists of.** In fact, I think it's the more normal one. It's not, you know, well, I murdered somebody, but it was proportionate. It was really sort of necessary for my political goal. We're admitting people on those bases?

Scalia seems to oscillate between claims of plain reading and ambiguity, but the ideological conclusion for both approaches is rather clear: any immigrant who committed any violent crime—with violence defined quite broadly—should be precluded from the United States. The relative confusion over which acts of violence should be considered a political crime became complicated further when the INS' response to whether Hitler's assassin would be defined as committing a political crime, to which they responded yes. Yet, apparently assassins of American presidents were deemed to have committed nonpolitical crimes directly after that response. While INS representation aimed to avoid the ideological trap these responses laid for her, the problematic conclusions continued when she functionally conceded that a political crime was only acceptable when the individual was coming from a country that the United States disagrees with in principle. While violence against Saddam Hussein becomes a political crime, violence against the Queen of England is not defined as such.[20]

The arguments continued within the oral argument regarded the relative subjective nature of a nonpolitical and political crime. The INS admitted there is no real bright line for definition of the term that can be divorced from international context,

[20] This is not a hypothetical example on my part, but rather an explicit one made in the oral arguments.

which identified crimes with the initial target being innocent civilians should be precluded from nonpolitical crimes. Following the discussion that I mentioned earlier, it seems in order to then determine if Aguirre's actions fit this depiction of being violence initially targeted at innocent civilians, one must determine whether actions like the stoning of bus goers happened in the first place. Particularly since very quickly after this discussion, INS admitted that no on disagreed over the actions of Aguirre being political crimes, but rather that the seriousness of the crimes made them disproportionate.

Despite outlining the intense financial strain Guatemalan bus laws had on impoverished workers in the country and the failures of the government to investigate a large amount of student deaths in Guatemala as well as acknowledging there was a large amount of political oppression occurring by the government of Guatemala, representatives for INS asserted that any protest which entailed violence affecting civilians was disproportionate. This conclusion was rhetorically consistent with the unanimous written opinion of the Supreme Court, which also seemed to rhetorically situate any violent action in protest of the government as being "disproportionate and atrocious." While international law regarding atrocious crimes suggests *massive* violence against innocent civilians, the primary target of Aguirre's violent protests was governmental. He and his protest group focused their political protests against governmentally controlled bus rates initially on the burning of approximately 10 buses. The "assault on citizens" performed by Aguirre encompassed beating passengers with sticks who refused to leave the primary target of the protests, the buses, so that protesters could set them on fire. The rest of violence performed by Aguirre and his protester cohort

focused on targeting the police, who Aguirre identified as failing to do anything regarding the unsolved murders of students in Guatemala. The rhetorical slippage present crafts a dangerous conclusion for the potential of any violent protest. Would a formal rebel fighter for the TNC in Libya who was often forced to violently fight against civilians in Libya who were Qaddafi loyalists be deemed ineligible for a withholding of deportation? It seems any instance of protest that has unintended violent effects on civilians becomes identified as "serious and disproportionate," regardless of the amount of violence the protesters of that country may have experienced to inspire the protest in the first place.

While Aguirre's protests were definitely violent in nature, and citizens ultimately became the target of violence when they refused to allow the burning of buses to occur, it seemed to be the Court's opinion that this violence against bus goers fit the level of atrocity the United Nations suggested when they were referring to crimes like mass murder of civilians. The rhetorical equivalence in this case of any form of protest that entails violence with atrocious behavior requires questioning, especially considering the unanimous ruling by a largely white court. At what point are instances of political persecution large enough for the American court's ideological barometer to warrant violent reactions?

When evaluating the Court's justification for the BIA to have deference in the first place, we may reach a conclusion regarding why the court felt comfortable identifying any violent protest as non-political:

> We have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials "exercise especially sensitive political functions that implicate questions of foreign relations." ... A decision by the Attorney General to deem certain violent offenses committed in another country as political in nature, and to allow the perpetrators to remain in the United States, may **affect our relations with that country or its neighbors.** The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.

Rhetorically situated in this claim is the hierarchal positioning of governmental legitimacy and sovereignty within the international order over the health and well-being of individuals suffering at the expense of sovereignty. The needs of the state regarding foreign policy supersede the rights of the individual to live free of political violence. The Court identified themselves as wholly unwilling to supersede into interpretations that could place the national security of the United States at risk, instead passing the interpretive authority to that of the executive. This shirking of interpretive responsibility is not simply a neutral response to this case, I would argue. The ultimate conclusion values national security as a reason to forgo the interpretive oversight of the Court in the first place, tacitly admitting that any justifications made by the executive citing national security should have monopolizing interpretive weight by the executive itself.

It seems then that one can only have a violent response to governments that the United States does not have diplomatic relations, proven by the comments I mentioned earlier between INS representation and the justices over whose assassination is legitimate

and whose is not. Historically, we can witness similar governmental choices that had drastically oppressive and unethical consequences, whether that be American support of Syria despite chemical weapons use against its citizens, continued trade with China despite its imprisonment and violence of political dissidents, etc.

Negusie v Holder

Falling into what I would argue is a trap of cruel optimism within the law is the *Negusie v. Holder* case. Daniel Girmai Negusie escaped to the United States from an Eritrean prison where he had been forced to work at as a guard when he refused to fight in the Eritrean/Ethiopian war. Quite a prisoner himself, as a guard in the prison Negusie was coerced to work in a prison where persecution was a common practice. Upon determining Negusie's involvement, albeit forced, in persecution of prisoners in Eritrea, the Bureau of Immigration Appeals denied his application for asylum, citing statutes barring applicants from asylum if they had participated in the persecution of others. Negusie received a deferral of removal under a different statute, but the BIA's decision to deny asylum was taken to the Supreme Court. There, the Court determined that the BIA had incorrectly cited former caselaw to come to their conclusion that the exclusion to asylum for those who persecuted others still applied to those who did so under duress. The Court remanded the case to the BIA, ordering them to interpret the statute without the incorrect application of law.

A passive reader of the *Negusie* case may conclude that justice was done. Chevron was not granted to an agency who was incorrectly applying the law, and Negusie was still given relief under deferral of removal. However, a deeper look into the

actions of the BIA after the Court's remand are necessary for a more critical conclusion. Despite the remand order, it would take the BIA another nine years to interpret the effect of duress when persecuting and the eligibility for asylum. Even then, the BIA refused to grant Negusie access to asylum and dismissed his appeal, arguing that he did not meet their standards for duress. While the BIA's conclusion did allow for specific appeals of duress, the requirements were incredibly high:

> Must establish by a preponderance of the evidence that (1) he acted under an imminent threat of death or serious bodily injury to himself or others; (2) he reasonably believed that the threatened harm would be carried out unless he acted or refrained from acting; (3) he had no reasonable opportunity to escape or otherwise frustrate the threat; (4) he did not place himself in a situation in which he knew or reasonably should have known that he would likely be forced to act or refrain from acting; and (5) he knew or reasonably should have known that the harm he inflicted was not greater than the threatened harm to himself or others.

This conclusion establishes practical justice as the supplement to formal justice. The Court and BIA both embrace a formal and abstract definition of justice in accepting claims of duress, but the function of the justice is contingent upon its inability to achieve practice justice, as the bar becomes set so high it is impossible to avail oneself of the exception. Not only was the eligibility for the duress exemption almost impossible to meet, but the opinion itself still isolated that the BIA could *deny* claims even for those who *met* these requirements: "even if an applicant is able to meet these standards, a grant of relief is by no means ensured." It is here that we witness the vagaries of criminal law,

where a process of reprieve has been created yet access to its protection almost impossible to guarantee. A facsimile of benevolence to grant the law legitimacy, all the while providing codified avenues to refusal to abide by its principle of freedom.

Esquivel-Quintana v. Sessions

The Rule of Lenity and Chevron's exclusivity came to bear for the second time in *Esquivel-Quintana v. Sessions*, where the Court refused to determine which took priority since they decided to refuse application of Chevron. The Court explained that, "We have no need to resolve whether the rule of lenity or Chevron receives priority in this case because the statute, read in context, unambiguously forecloses the Board's interpretation. Therefore, neither the rule of lenity nor Chevron applies."

The first mention of Lenity in an immigration case was in *Negusie*, where the Court similarly avoided determining whether Lenity and Chevron contradicted one another, arguing that Lenity "*may* be persuasive in determining whether a particular agency interpretation is reasonable, but they do not demonstrate that the statute is unambiguous." Since *Negusie* had conceded that the BIA could interpret the statute narrowly or broadly, the Court argued they only needed to determine if the statute itself was ambiguous, in turn avoiding the need to decide the relative juridical weight of Lenity compared to Chevron. While the Court's decision to refuse Lenity may seem to have little material difference in the case, since they rhetorically situate that the case outcomes for the immigrant would be the same, this conclusion does not hold much weight when considering what the precedential ramifications for the immigrants in those cases could have for future cases. While in *Esquivel-Quintana v. Sessions,* the Court decided that

competing standards for consent meant that the immigrant was not guilty of a statutory rape felony thus not subject to deportation (as the individual participating in sexual acts with Esquivel was of the federal government's unambiguous identified age of consent, and the BIA had raised the age of consent without federal ceding of authority to do so), choosing to vacate the BIA's decision at Step One of Chevron, instead of applying the Rule of Lenity as a Step Zero check ensures that canons of leniency for the immigrant are never codified as precedent in criminal cases. Beyond the question of precedent, the addition of Lenity in the *Negusie* case may have had a very material change. Instead of remanding the case to determine the incorrect citation of caselaw, asylum may actually have been granted. However, in many ways the inability to determine with validity the what-ifs in this counter-factual exercise proves the exact danger of the supplementary function that doctrines like Chevron and the power that exercise of symbolic interpretation of the Court holds to restructure logics of the present.

Not only does the refusal to decide cases on Lenity ensure lack of precedent in favor of immigrants in future cases, I would argue that justifications such as this serve to calculate and produce difference. The other (immigrant) is symbolically precluded from access to a truly fair court process when the symbols of their access (Rule of Lenity) are consistently denied where applicable in favor of symbolic and material constructions of their exclusion (deference to agencies). From a different perspective, the ability for Chevron, and more broadly deference to agencies as a whole, to exist and have meaning – the functional power of the Rule of Lenity in these cases must be disassociated from any meaning. Lenity remains a sign (of justice, potential, hope), but absent real

signification beyond its inapplicability. In short, Lenity may continually be evoked, but never for materially beneficial (the immigrant, that is) functions, as it never comes into play.

Pereira v. Sessions

The tendency for the Court to err against agencies in order to preserve the smooth functioning of the criminal legal complex is a consistent one, seen even in the most recent Chevron case involving immigration matters – Pereira v. Sessions. While this case concluded in favor of the immigrant, the question arises as to exactly why. I would point to the case matters at hand. The Bureau of Immigration Affairs had provided a "notice to appear" document that failed "to specify either the time or place of the removal proceedings." The Court determined that the statute requiring notice to appear documents to specify the time and place for removal proceedings very clearly identified that an inclusion of time and place is then a necessary one for said document to trigger a "stop" of time on nonpermanent resident's continuous physical presence in the United States.[21]

It seems very obvious that if a statute clearly says a document must have a time and date listed, that an agency would not be provided deference for an interpretation of the statute that deemed time and dates to be unnecessary for the document. So, while this case may seem at first to be a huge "win" for immigrant legal rights, I would argue that it was quite necessary for the Court to refuse deference. Any other conclusion would have ruined the legitimacy of the Court to be an assumed neutral arbiter, thus placing the entire

[21] According to statute, nonpermanent residents subject to removal proceedings who have accrued 10 years of continuous physical presence in the United States may be eligible for cancellation of removal. However, the "stop-time rule" ends continuous physical presence when the nonpermanent resident is provided with a notice to appear. See Pereira v. Sessions HN1.

legal enterprise at risk. In order to function as a sovereign entity, each facet of sovereignty must have the perception of legitimacy.

While this decision seemed to be a blow to the executive branch, it was quite the opposite. For every case where executive agencies are denied deference, each case where deference is awarded is given respective coherence and legitimacy. Therefore, while the immigrant has won today, they have done so in order for the Court to provide for the legitimate loss of future immigrants who submit themselves to the Court. To quite simplistically analogize Derrida's notion of supplementation, it is only in finding the exception can we understand the rule. In a sense, in order for the Court to effectively operate violently in most contexts, there must be instances where it does not. In this case, despite all contrary examples, the existence of a single victory for an immigrant within the court of law, no matter how big or small, attaches symbolic hope onto a Court that more often than not fails the immigrant.

Further, even cases like *Pereira* should be cast with high suspicion if symbolized as devastating blows to the criminal immigration victories, or typified as "massive wins for the immigrant." *Pereira* highlights the parameters in which the criminal justice system can receive demands for change of form, but not function or intensity, in that the victories under the law that immigrants achieve are simply minor repairs but never major overhauls. The agency may now be required to abide by harsher understandings of notice to appear documents, but this requirement does nothing to halt the mechanisms of deportation or the ability for the Bureau of Immigration Affairs to send notice to appear documents in the first place.

Finally, heralding these victories for some immigrants within the Court fails to account for the point that having formal opportunities for justice does not provide functional access to justice for those who are dispossessed. In order for immigrants like Pereira to receive "justice" in these cases, they are often required to submit themselves to the Court on the hope for reprieve – knowing that failure of their case means automatic deportation.

Crime and Chevron in the Courts

Reno v Koray

When deference to administrative interpretation enters the realm of interpretation of criminal statutes, the ability for harsher punishment to be levied on defendants often rises. As seen in Reno v. Koray, the Court reversed a Court of Appeals decision in favor of a harsh reading of the phrase "official detention" – determining that being held in confinement at a halfway house with no ability to leave unsupervised did not qualify as being officially detained. Despite agreeing that there could be a more broad interpretation of the law granting the respondent the ability to apply his time at the halfway house while on bail to his sentence, the Court's majority decided in favor of the Bureau of Prisons decision to deny application of that time. While the function of his time at the halfway house mirrored the time spent in federal custody, the Court determined it was not "official" custody. This line of reasoning echoes my analysis of the supplementation of abstract justice and practical justice, from *Cardoza-Fonseca* and *Negusie,* in that there is a willful distinction made between abstract claims regarding official detention requiring a real prison and the practical function of detention being the inability to leave.

Below I have included the full dissent of Justice Stevens to isolate the rather carceral-centric ideology purported by the majority in the Reno v Koray case. Stevens argues that he believes the majority went out of their way to be inconsistent in order to extend time of imprisonment for the respondent in this case:

Pursuant to an order entered by a federal judicial officer, respondent was "confined to premises of [Volunteers of America (VOA)]," a private halfway house. The order of confinement--euphemistically styled a "release" order--provided that respondent "shall not be authorized to leave for any reason unless accompanied by Special Agent Dennis Bass." Brief for Respondent 3. While at VOA, respondent "had to account for his presence five times a day, he was subject to random breath and urine tests, his access to visitors was limited in both time and manner, and there was a paucity of vocational, educational, and recreational services compared to a prison facility." Koray v. Sizer, 21 F.3d 558, 566 (CA3 1994). Except for one off-site medical exam, respondent remained at VOA 24 hours a day for 150 days. In my opinion, respondent's confinement was unquestionably both "official" and "detention" within the meaning of 18 U.S.C. § 3585(b).

*Both the text and the purpose of § 3585(b) clearly contemplate that a person who is locked up [****29] for 24 hours a day, seven days a week, pursuant to a court order, is in "official detention." Such a person is surely in custody, and that custody is no less "official" for being ordered by a court rather than the Attorney General. Indeed, even the majority acknowledges the force of this plain meaning [**2030] argument. Ante, at 61-62. * Moreover, the manifest purpose of § 3585(b) is to give a convicted person credit for*

*all time spent in official [*67] custody as a result of the offense that gave rise to his conviction. When that confinement is in a facility that has all the restraints of a typical prison, it should not matter whether that facility is operated by a State, a county, or a private custodian pursuant to a contract with the government.*

*[****30] Purporting to establish the contrary [***61] conclusion, the Court labors to prove the rather obvious proposition that all persons in the custody of the Attorney General pursuant to a detention order issued under 18 U.S.C. § 3142 (1988 ed. and Supp. V), as well as all persons confined in an "official detention facility" under § 3585(a), are also in "official detention" within the meaning of § 3585(b). However, proof that confinement under § 3142 or § 3585(a) constitutes official detention certainly is not proof that no other form of confinement can constitute official detention. The majority thus fails to demonstrate that respondent should not receive sentencing credit for his court-ordered full-time confinement in a jail-type facility.*

*Moreover, the Court's restrictive interpretation creates an anomalous result. Under the Court's view that only a person "committed to the custody of the Attorney General" can be in "official detention," § 3585(b) does not authorize any credit for time spent in state custody, "no matter how restrictive the conditions." Ante, at 60, 63-64, n. 5. This conclusion is so plainly at war with common sense that even the Attorney [****31] General rejects it. See Brief for United States 11 ("The Bureau grants credit for time spent in state custody"); see also Reply Brief for United States 7-8.*

The majority attempts to escape its self-created anomaly by suggesting that it "need not and does not rule" on the propriety of giving credit for confinement under state

*law. Ante, at 64, n. 5. But that contention simply collapses the majority's house of cards. For either the "text" of the Bail Reform Act limits "official detention" to custody of the Attorney General, in which case the majority adopts an interpretation that even the Attorney General rejects, or the [*68] "text" does not limit the meaning of official detention, and then there is absolutely no reason for concluding that court-ordered 24-hour-a-day confinement is not official detention. The majority cannot have it both ways.*

*Given the anomalous implications of the Court's decision, one may fairly question how the majority justifies its result. It is surely not the plain language of the statute, because the majority's reading requires that a judicially mandated, 24-hour-a-day confinement in a jail-type facility is neither "official" (because it is ordered by a judge [****32] and not the Attorney General) nor "detention" (because the judicial order is labeled "release"). Nor does the majority rely on the nature of the facility itself, because the majority concedes that if the Attorney General rather than the court had confined respondent in the exact same facility, respondent's confinement would have been "official detention" under the statute. The majority purports to rely on some sort of Chevron deference, ante, at 61, but it is indeed an odd sort of deference given that (as I have noted above) the majority adopts an interpretation that the Bureau of Prisons itself has rejected.*

*The majority suggests at one point that it relies on the history of the interpretation of the word "custody," arguing that Congress did not intend to change the settled meaning of "custody" that existed prior to the Bail Reform Act. However, not one of the cases cited by the majority, ante,at 59, [***62] stands for the proposition that custody*

*does not include confinement in a jail-type facility. Instead, all of those cases involved situations in which the defendant was at large. See Polakoff v. United States, 489 F.2d 727, 730 [**2031] (CA5 1974) (defendant [****33] faced "travel and social restrictions and was required to report weekly to a probation officer"); United States v. Robles, 563 F.2d 1308, 1309 (CA9 1977) (defendant required to "obey all laws, remain within the jurisdiction unless court permission was granted to travel, obey all court orders, and keep his attorney posted as to his address and employment"); Ortega v. United States, 510 F.2d 412, 413 [*69] (CA10 1975) ("released on personal recognizance"); United States v. Peterson, 165 U.S. App. D.C. 368, 507 F.2d 1191, 1192 (CADC 1974) (defendant "at large on conditional release"). Moreover, at least one Court of Appeals (albeit after the passage of the Bail Reform Act) interpreted the word "custody" under § 3568 as including "enforced residence under conditions approaching those of incarceration." Brown v. Rison, 895 F.2d 533, 536 (CA9 1990). Thus, though I agree with the majority that Congress intended to incorporate the understanding of "custody" that existed under § 3568, I fail to see how that intention supports the majority's result.*

*Simply accepting the plain meaning [****34] of the statutory text would avoid the anomalies created by the Court's opinion, would effectuate the intent of Congress, and would provide fair treatment for defendants who will otherwise spend more time in custody than Congress has deemed necessary or appropriate. For these reasons, I agree with the persuasive opinion of the Court of Appeals and would affirm its judgment.*

While the majority performed as a post-structuralist in *Reno*, highlighting the ambiguity and slippage of signs, demanding a response to what "official detention" meant, and arguing that the meaning changes depending on context, Stevens spent most of his dissent taking this position to task. Stevens took on the positivist mantle, and encouraged a plain reading, refusing to articulate sign ambiguity.

The important note that I would make here is the failure of any of these opinions to consider the Rule of Lenity in determining interpretation of "official custody." Considering the nature of the defendant's detention while at the halfway house, which Justice Stevens unpacks above, erring against the defendant was a choice to functionally require the defendant to be detained for an additional 150 days in quite similar conditions as he had already served at the halfway house. It is necessary, in this case, to identify the individuals who suffer when agencies are given leeway to determine how much detention is "official enough" to warrant counting – as well as understand the realms of the criminal justice system that are symbolically coded within conclusions like this as being "not-official detention," along with the consequences for this new characterization of "not-official detention." To be more clear, every day under the hold of the penal system for an immigrant or person of color is a risk. Every moment where one's agency is deprived for the purposes of reaching a "proper" number of days of containment within "proper" penal conditions" places the individual being subject to this incarceration into a position of precarity, where the likelihood of violence continues unabated. Not only that, but being able to distinguish the half-way house from the holding cell serves as a

dangerous linguistic function. An attempt to redact the violence of the halfway house when juxtaposed to that of the jail cell, when in reality they are both prisons.

The ambiguity of detention proffered in *Reno* crafts an absence of meaning that requires a symbolic fulfillment, a supplement to detention outside the arenas of "officialness" while legitimizing the function of detention – official and otherwise. In some ways, I would argue that this crafts a liminal space where the mandatory pre-trial halfway house becomes an uncontested and relied upon place of carcerality within the criminal justice system, an absence that the criminal justice system requires to exist as a sign of carcerality in the first place.

Neal v United States

Yet another case where Lenity was ignored can be witnessed in *Neal v. United States*, where interestingly enough the Court refused to apply deference to the United States Sentencing Commission in favor of abiding by principles of stare decisis regarding a previous case (*Chapman v. United States*) concerning whether the weight of blotting paper should be included when calculating LSD weights. In *Chapman*, the Court determined that the paper and the drug could not be divorced, thus the weight must be the combined total of the blotting paper and the drug. After *Chapman*, the United States Sentencing Commission recognized that this weight system placed a disparate consequence on LSD offense charges and created an alternative weighing scheme that multiplied dose amounts by .4 milligrams. The petitioner in *Neal v. United States* argued that the new weighing guideline placed her under the original ten-year mandatory minimum of her sentence and filed a motion to modify the sentence.

Citing stare decisis, the Court refused to modify their original precedent regarding LSD weights, arguing that the decision to modify the law was now in Congress' hands. I find this an interesting conclusion, considering their rhetorical justification for deploying stare decisis mirrors the normal justification for deference (seeming to infer that the United States Sentencing Commission should have received deference for the lighter weight standard instead). The Court explained, "Congress, not this Court, has the responsibility for revising its statutes. Were we to alter our statutory interpretations from case to case, Congress would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair." Yet, this appeal to Congressional statutory changes through lawmaking was the exact reason Chevron was instituted, as agencies were identified as needing to operate within inevitable congressional ambiguity. The appeal for Congressional involvement at Step One to deny Chevron application seems weak at best when the Sentencing Commission has presumably been provided the authority with which to determine sentencing interpretation. Instead, the Court denied deference since the duty for reframing the law after the Sentencing Commission's reinterpretation of weight guidelines rested in Congress. Congressional inaction became enough reason to deny deference, despite the fact that the Sentencing Commission had been provided the authority to regulate sentence laws for drug crimes. I would argue this ruling contradicted the commonly cited justifications for Chevron, agency expertise, in favor of forcing Congress to act where they had failed. Rather than stating that the statute was vague and deference to interpretation of it due, the Court relied on stare decisis as a justification for placing interpretation back into Congress' hands.

Further rhetoric within the *Neal* opinion could be identified to suggest a certain bias in the deployment of stare decisis, as several instances highlight the Court's relative disapproval of the drug offense at hand. For example, while the Court identifies the disparity their weight standard from *Chapman* places on LSD offenders, they also point out that the amount of doses the Neal was arrested for selling "seems rather high."

Despite changing standards of weighing for drug offenses concerning LSD, the court chose to avoid contradicting a former case ruling. *Neal v. United States* represents the first case in this study that I have found that deployed stare decisis to avoid applying Chevron deference. I would argue the criminal nature of this case is a large reason for that anomaly. Just as Lenity seems to be absent from each criminal case where its application would have encouraged a different verdict, case outcomes suggest a decisively criminalizing telos in the holdings of the Supreme Court.

United States v Labonte

United States v Labonte represents the third case brought to the Supreme Court regarding interpretation of a criminal statute that this project analyzed. Similar to the outcomes of *Reno* and *Neal*, the majority's opinion decided in favor of harsher interpretation of sentencing law, forgoing deference to the Sentencing Commissions interpretation. Why is it that when administrative interpretation meets criminal interpretation that the law suddenly becomes decisive? In Labonte, the majority argued that a sentencing law for "career criminals" required interpreting Congress' directive to the Sentencing Commission of ensuring sentences "'at or near the maximum term authorized for categories of' adult offenders who commit their third felony drug offense

or violent crime" as including enhanced mandatory minimums. While the Commission adopted an amendment to their sentencing guidelines that interpreted this statute in a softer manner, forgoing enhanced mandatory minimums in some cases; the Court found this interpretation did not deserve deference, arguing that the phrase "at or near the maximum term authorized for categories of" was unambiguous. I would argue that this finding presents a symbolic pattern. When an agency's interpretation strengthens the coercive power of the state, the Court will find ambiguity in the statute and use Chevron to give agencies deference. On the other hand, when an agency's interpretation weakens the coercive state, the Court will identify statutes as clear to deny agencies deference.

Further, I argue the majority's decision here represents an ideological reliance on *supposed* clarity of the law to ensure excessive criminality of those found in violation. For example, in referencing the respondents' isolation of the Commission's reasonableness surrounding their interpretation, the majority opinion simply concluded, "we are unmoved." The choice to conclude with the subjective nature of their affective response to reasonableness suggests that there was not much ability to sway the majority away from the desire for enhanced minimums, this the potential for legal ambiguity did not matter to an objectively unmotivated court.

When confronted with the definitional ambiguity of the phrase "at or near" (never defined in this court opinion), the majority admitted a "certain degree of flexibility" in the statute, yet argued that this did not matter since it was a question of what statutory maximum the sentence must be close. In coming to this conclusion, yet failing to define "at or near," there is a huge gap I would argue is filled with an ideology of criminality.

Because the Court desires clarity in order to deny deference, they become semiotic positivists, seeing the "true meaning" in statutory language. I would argue no clarity is ever necessary in reality for clarity to be cited for deference denial, so long as attaching meaning to empty text serves an intended purpose. While the Commission's interpretation of mandatory sentence (without enhanced sentencing) concluded as 20 years, the enhanced sentence was 30 years. Without defining "at or near," a more lenient Court could presumably have defined 20 years of imprisonment to be near 30 years – particularly if this court had chosen to apply the Rule of Lenity to this interpretation. In the dissenting opinion, Justices Breyer, Stevens and Ginsburg conclude that the statute was ambiguous and the Commission's definition deserved deference:

> The question that divides this Court is not about the wisdom of this implementing interpretation. It is whether the "career offender" statute's words "maximum term authorized" are open to the Commission's interpretation or whether they unambiguously forbid it. In my view, the words, whether read by themselves, read within the context of sentencing law, or read against the historic background of sentencing reform, do not unambiguously forbid the Guideline. Rather, their ambiguity indicates that Congress simply has not "addressed the question."

These contradicting conclusions by the majority and dissenting opinion of *Labonte* point to the dangerous position created when the determining of legal ambiguity rests in the hands of individuals with their own particular biases regarding crime and the "justified" punishment for said behavior.

United States v O'Hagan

While Justice Scalia was part of the majority decision in *Reno v. Koray*, which concluded in disfavor of the respondent in a case regarding interpretation of a criminal statute, he ironically cites the dissenting opinion of Justice Stevens to support the Rule of Lenity in determining statutory interpretation in *United States v. O'Hagan*, a white-collar crime case. Scalia's dissent on the basis of the Rule of Lenity is also mysteriously unaccounted for in his agreement with the majority in the *Neal* case, the second drug-related crime case brought to the court during the Scalia era. The willingness to cite the Rule of Lenity seems to coincide with the type of crime committed, suggesting a categorization of criminals – the deserving of leniency and the undeserving. While white collar criminals find some amount of recognition for forgiveness and alleviation of criminal penalties in dissenting opinions, rhetoric surrounding drug offenders seems to place them as "bottom barrel" criminals who deserve to have the "book thrown at them." The construction of the good criminal deviant in these spaces occupies a level of power, prestige, and economic status. As Scalia explains in *O'Hagan*, applying the Rule of Lenity to a criminal statute regarding securities fraud requires interpretation of the statute that is the narrowest understanding of guilt, allowing those who are ambiguously guilty to claim innocence. Yet, when it comes to drug sentencing laws, whatever the most expansive understanding of criminal penalty is seems to be the objectively acceptable consequence, as Lenity is not an option.

Olmstead v L.C. by Zimring

A case that gave me significant hope while reading the outcome during my research of Chevron was the *Olmstead v. L.C. by Zimring* case, because on the surface the decision seems to benefit incarcerated individuals who should have been eligible for community living under the Americans with Disabilities Act. However, upon further reflection of the rhetoric used for this decision, I find two issues with the conclusion of benefit prescribed within the opinion. First, the Court still identified that "the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual 'meets the essential eligibility requirements' for habilitation in a community-based program." Thus, the decision of this case may have determined that eligible individuals should be given access to alternative incarceration arrangements but makes no move to limit the power of the State to raise the barrier for entry in terms of what is a reasonable assessment for meeting eligibility requirements.

Secondly, the identification of progress as minor reforms to the carceral state does nothing to dismantle the institution of carcerality itself. In identifying that the Americans with Disabilities Act should be deferred to regarding questions of accessibility for criminalized folks with disabilities, accessibility has been sutured to a prison system that so often codes the disabled as deviant in the first place. Before identifying that imprisonment policies require shifts in access for individuals of differing abilities, a more critical approach should identify what imprisonment of deviance is symbolically supported by "accessible imprisonment" rhetoric.

The Impossibility of Justice

Throughout his scholarship, Derrida theorizes of a concept called "the metaphysics of presence," his criticism of Western philosophy's obsession with immediate access to meaning. Much of this concept informs his focus on differance, paying heed to that which is absent instead of present. Connected to this discussion of metaphysics, Derrida argues that deconstruction takes place within the affirmation of that which is to come, or the impossible (Goosen, 2010). Not to confuse the impossible from that which is impossible, "*the* impossible" is instead the unthought, unreached, potential outside of temporal imagination. While the impossible may be impossible, identifying it within the position of negation ultimately creates its possibility. Derrida explains the impossible through his work discussing the radical notions of the gift, hospitality, forgiveness, and in turn, justice. For Derrida, the impossible functions as a desiring thought – for concepts that are yet to come:

> What do I mean by this? When, for example, I try to think what a pure gift or a pure deed of unconditional forgiveness ought to be, everything tells me that the purity of such a gift—which naturally should not be returned, acknowledged or even consciously given (I tried to formulate some conditions for such a pure gift)—that a pure gift, as such, appears impossible. And the same goes for pure and unconditional forgiveness, pure unconditional hospitality, and so on. Because such a pure, unconditional gift, hospitality, forgiveness—the list is endless—cannot be known as such, it defies not only knowledge, but also phenomenology. It cannot appear as such. (Goosen, 2010, p. 247)

The process of thinking over the impossibility of the pure gift, or pure justice, is intrinsically a desiring and motivating one. When encountered with the impossible, we are made very aware of how divorced the present is from that radical potential. While some may identify this deconstruction as nihilist, Derrida argues that the impossible, and thinking about the impossible, does not require an attachment to the negative of impossibility. Rather, deconstruction's focus on the impossibility of concepts like the pure gift, absolute justice, and complete forgiveness may disrupt the temporal hold that we have to the present. Recognition of a future that is both guaranteed and impossible to predict comes with it the affirmation of justice to come. While that justice is almost unimaginable, the ability to think through why it is unimaginable is a "necessity" (Goosen, 2010).

For example, finding pure justice in a system like ours that decides matters of life and death using national security logics predicated off the expulsion of the Other (see *Aguirre*) may seem to be to be impossible. Yet, drawing on the method of deconstruction, we can identify the symbolic logics which attempt make the imagination of pure justice impossible. This act situates the deconstructionist as an oracle of justice to come.

Derrida (2002) identifies justice as "an experience of the impossible" (p. 244). In his interview with Goosen (2010) he goes onto explain that the affirmation of the impossible places the thinker in a position of both desiring the conditions of unconditional hospitality (or justice if we are connecting these two phenomena) while understanding one's inability to access it within the present. Or rather, "I affirm the impossible, that is, I desire this pure hospitality, even when I cannot afford it. Even when

I cannot experience it as such, I say ‘‘yes’’ to the possibility of the impossible” (Goosen, 2010, p. 249) Using examples like *Olmstead,* I affirm the impossible of a world without carcerality, a world of pure freedom and justice. I desire this pure justice, even when I acknowledge its’ impossible affordance within the present. Those demands will always be countered with calculative logics of consequence and conditional offers of reprieve (reforms) within the justice system itself.

While both Foucault and Derrida identify their scholarship of a critique of liberal justifications for the state and the present, I would argue that it is through a process of deconstruction that we can find an answer to the common criticism made of Foucault, which is the failure to provide an alternative within his critique of biopolitics. Using Derrida’s notion of affirmation of the impossible, I would argue that thinking through the monstrosities of the law requires an embracement of the failure of the project. Affirming this failure for our encounters with the present (which exists only insofar as pure justice, pure freedom, pure democracy, etc. do not) to shift the metaphysical hold that the present has on our imagination. This facet of deconstruction is intimately connected to Derrida’s reading of Freud’s death drive. Derrida argues that the affirmation of death and its inevitability within the past, present and future is a necessary relationship towards failure and the impossibility for anything outside of death to exist within the hold of phenomenology (Goosen, 2010). He analogizes this to mourning, in that the work of mourning is always a failing project, yet one that should be affirmed as it is in recognizing the impossibility to ever succeed at mourning that we recognize any alternative would be to stop loving or referring to the other. Mourning the untold and

unaccounted consequence for immigrants who lose their deportation hearings can never end, because those deaths exist as both a past, present, and future manifestation – particularly considering the inability to identify what happened to those immigrants once they were deported.

How does one grapple with the impossibility of justice when tracing the history of legal failures for the other? When the system seems rigged against the immigrant in deportation proceedings, and the Court denigrates any potential of reprieve for those accused as crimes as threatening the fabric of the criminal justice system? If the ability to understand the existence of justice requires the inaccessibility of justice for others, can it be defined as pure justice? In a sense, I would identify this work as a failing project, but possibly an ethical one. Deconstructing the ties that calculative logic has within the legal system to encourage those who engage it to accept its failures while advocating for its benefits is a necessary one, albeit an impossible endeavor. The process comes replete with responses of what to do next, what is the alternative, etc. Considering this project, I would argue the response to those should be a refusal to succumb to metaphysical demands for presence. Refusal to identify an ethical system of governance, as that presumes governments have the capacity to act ethically in the first place; refusal to provide conscriptions for future work to be done, as that attempts to ground the future in a position of prediction that divorces it from the monstrosity the future will always represent.

Deconstruction inherently entails memory work, identifying and tracing that which we would are asked to forget to potentially motivate and inspire an affirmation of

the impossible. It is in this process that we can potentially understand just how incomprehensible a *just* Court system truly is, because the ability to construct a just court requires its supplement, the unjust court. For us to provide rhetorical coherence to a world within Chevron, we must understand the justifications that exist for Chevron in the first place; and in so doing, re-center those logics within the present. Thus, deconstruction is impossible, as Derrida so often argues (Goosen, 2010). Yet, this does not mean it is lacking of value.

LIMITATIONS

Bragdon v Abbott

I have chosen to forgo investigating one particular court case, because I believe analysis of this requires a future article on my part applying previous work that I performed for my master's thesis. In *Bragdon v. Abbott*, the Court held that HIV infection that has not yet progressed to the "symptomatic phase" should be considered a disability under the Americans with Disabilities Act of 1990 and remanded "a full exploration of issues" surrounding whether performing dental work on those infected with HIV could be posed as a "direct threat to the health and safety of others." Considering the extensive history surrounding anti-queer legislation and actions by industries during and after the time of this ruling, I feel folding in my analysis of the *Bragdon* decision into this study's Chevron frame does a disservice to the application of queer theory and HIV that an evaluation of this particular case deserves.

King v. Burwell and City of Arlington v. FCC

There are some cases that have changed the balance of the Chevron framework, such as the *City of Arlington* and *King v. Burwell* cases, which shaped the time, place, and manner that Chevron may be applied. While I find these cases relevant to an analysis of the way that the Chevron doctrine operates throughout the years of its application, I

did not include them in my investigation of rhetorical themes, as I do not believe they shed light onto the specific themes I have investigated in this project.

CONCLUSION

When I entered into this dissertation project, I truly did not know what I wanted to write, let alone argue when it came to the operations of the Supreme Court. This research began largely out of surprise that most criticisms I found of the Chevron doctrine during my research as a debate coach on a related topic were written from a conservative viewpoint. While it is definitely understandable that opponents of big government would be highly suspicious of a legal standard that allows agencies to claim a large amount of freedom in their daily administration, I had hoped that some critical theorists would have light to shed on the issue, considering the deep history of critical theory and work on administrative violence more generally.

However, after this lengthy research project, I believe the limited analysis of Chevron falls in line with many of the conclusions investigated within this dissertation. The power of the Court, and by extension agencies and other facets of bureaucracy, is to operate within a shadow crafted by relative ignorance of the public. This shadow works best when tethered to myths of legal legitimacy and a branch of government that is above reproach.

For many, watching the Kavanaugh confirmation hearing may have been met with what could only be defined as shock and awe. Shock that an appointment process reserved for the most prestigious life-long position in the United States had shifted to

maneuvers of politics over ethics, and partisanship above respectability. And awe akin to the reaction one has at a massive car pileup on the highway – a feeling of sheer horror combined with an intense need to watch the unfolding events. However, I would argue that examples like the Kavanaugh confirmation should not be viewed with surprise by any person investigating recent events on the Supreme Court. Instead, the vote should be understood as mirroring a process of deferral written into both political norms of engagement and United States legal code. The politicization and bureaucratization of the western legal arena, and in this case the American legal enterprise, can be seen by simply skimming a legal brief.

In this dissertation, I have investigated three major themes in my analysis of the Chevron Doctrine, and the Supreme Court more generally. First, the Chevron Doctrine highlights a broader texture within the institutionalized power of the Court that merges its ideological and repressive functions, making it impossible to distinguish the Supreme Court as an ISA or RSA. In this sense, the power of interpretation within the Court ensures an objectification of its subjects through a hailing to legal sovereignty – with Chevron functioning as the ideological tool of proper interpretation. Within this context, the Court is granted the authority to choose whichever theory of language it needs to arrive at the "proper" (system enhancing) result, and its subjects are left with little choice but to accept the results as they were achieved through the proper and respectable channels. In a sense, the doctrine allows a veneer of respectability to a Court that operates with extreme impunity.

Recalling the overarching concept of bureaucratization by Weber, I would point to the relative inhuman nature of the Court to prove Weber's prediction that expanding bureaucracy ensures a social ceding of power to inhuman forces of institutionalization that place the human in a rather guaranteed state of precarity. When the legal arena operates through incorporating itself as a bureaucratic force, those held subject to its force are left with little power to untether themselves from its grasp.

Despite its contradictions, the ability for the Court to distinguish itself as reasonably operating to uphold the law ensures an institution with license to expand the hold of sovereignty without challenge. This leads me to harken back to my second theme investigated in this work, in short, that the smooth functioning of the administrative state is all but ensured when subjective notions like *reasonability* can be violently defined through simple choices of which type of reading to apply to statutes. The Supreme Court operates as a divine power, determining in each case what ideas, actions, or even people can be made to live or allowed to die. The attachments that the Court, and even its individual actors, have to ensuring the continual flow of sovereign power leaves little hope for progress within an institution that was created to uphold the institution itself.

Tethering this conclusion from Chapter 6 to the earlier discussion of administrative violence in the literature review, reasonability and other functions of case reading/precedent that the Court can call upon to make decisions is the lacuna of administrative procedure and violence. There is always a lack present in the juridical arena. While the word "lack" insinuates a failing, I would argue lacuna in the law is quite the opposite of failure (for the institution, that is), but rather a tool that provides

legitimating force to subjectivity within legal decisions. Administrative procedure provides the Court the ability to operate in biopolitical manners, but providing blank spots the Court is ever capable and eager to fill with whatever reasoning necessary to ensure its ultimate smooth-functioning as an entity of institutional violence.

Yet in the same vein, as described in the final chapter, the Court often functions mythologically – giving the people continual hope that progress can be made when our criticisms of power flow to the proper channels, and our voices speak truth to power to an elite group of people trusted to remain neutral. One may end the reading of my fifth and sixth chapters believing that means I have very little hope for future progress. Indeed, that I may be another critical theory nihilist asking each reader to throw away any notion of a better world to come. However, I believe the final chapter and theme of this dissertation presents quite the opposite scenario. To restate, in many ways I do believe that thinking through the monstrosities of the law does require one to accept a certain failure, but that failure is an acceptance of the present's inability to shift realities outside of our current understanding and imagination of what is possible.

The hopeful liberal would beg the critical theorist to work within the realm of the material, to be a consequentialist in a sense. Accepting that not all progress will be perfect, but progress forward is better than none at all. I would say accepting that reality damns us all to a world of injustice. None of us know what true justice is, as we have never seen it. Perhaps it is time to accept the failure of this world to work for a new one.

APPENDIX 1: CASES

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