TEXTUALISM'S IMMIGRATION PROBLEM: STABILIZING INTERPRETIVE RULES ON NONCITIZENS' RIGHTS AND REMEDIES

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I. INTRODUCTION

Statutory interpretation has an immigration problem. The problem is not with textualism, the dominant methodology that focuses on text and structure over amorphous inquiries into legislative intent.[1] Rather, the problem is how the Supreme Court has *applied* textualist methodology in immigration cases, leading to unstable and unpredictable results. This trend has accelerated over time; during the past two Terms, more than eighty percent of the Court's non-unanimous statutory immigration decisions misread the Immigration and Nationality Act ("INA").[2] That tendency cuts across ideological lines: to a virtually

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1. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 17-20 (2012); NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 128-44 (2019); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16-28 (1997); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112-16, 155-56 (2010); Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 82 (2017); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2122-24, 2127-28 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 9-20 (2001); *see also* Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, 271-74, 279-90 (2020) (suggesting range of approaches under textualist umbrella). Purposivists who focus on the purpose of the statute and are more willing than textualists to consult legislative history critique textualists as engaging in mechanical, sometimes result-oriented interpretation. *See* VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY 34-53 (2016); Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 165-67 (2018) (book review); Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 79-89 (2018). Another school of thought, dynamic statutory interpretation, is closer to purposivism than to textualism, but takes purposivism further, arguing that courts should consider how statutory purposes may evolve over time in the face of changing social and political trends. *See* WILLIAM N. ESKRIDGE, INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 23-27 (2016).

2. *See* Nasrallah v. Barr, 140 S. Ct. 1683, 1690-91 (2020); Johnson v. Guzman Chavez, 141 S. Ct. 2271, 2280 (2021); Barton v. Barr, 140 S. Ct. 1442, 1446-47 (2020); Niz-Chavez v. Garland,

equal degree, both divided decisions favoring immigrants *and* decisions for the government misinterpret the INA's language and structure.[3]

Consider how divided statutory immigration cases in the past two Terms have mangled ordinary meaning. In *Barton v. Barr*,[4] the Court interpreted a provision that barred eligibility for certain relief from deportation—"removal" under the INA—for a lawful permanent resident ("LPR") who has been convicted of an "offense . . . that renders the alien inadmissible."[5] The *Barton* Court, in an opinion by Justice Kavanaugh, applied this bar to an LPR, who cannot be found to be "inadmissible" unless he departs the United States and then seeks to return.[6] The Court's justification for moving beyond ordinary "parlance"—which Justice Kavanaugh conceded would have favored the noncitizen—did not rebut the case for sticking with common meaning.[7]

Confusion in recent divided statutory immigration decisions can also adversely affect the government's interest in a workable system of adjudication. In a case from this Term, *Niz-Chavez v. Garland*,[8] the Court, in an opinion by Justice Gorsuch, held that the "written notice" that might trigger the bar to relief discussed above had to come in a single document.[9] In dissent, Justice Kavanaugh observed that the INA does not expressly require single-step notice; the government had used a simple two-step procedure that did not prejudice the noncitizen's rights; and the primary support for the majority's view was the placement of a single quotation mark—an issue not briefed by the parties or *amici*.[10]

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141 S. Ct. 1474, 1480 (2021); Pereida v. Wilkinson, 141 S. Ct. 754, 758-59 (2021). The sole exception to this mini-reign of error is *Guerrero-Lasprilla v. Barr*, which correctly interpreted the phrase "question of law" in a provision limiting judicial review. 140 S. Ct. 1062, 1068-69 (2020). Unanimous decisions, in which questions tend to be more straightforward, have been sounder in outcome and approach. *See, e.g.*, Sanchez v. Mayorkas, 141 S. Ct. 1809, 1812-14 (2021) (interpreting requirement that noncitizens be "inspected and admitted" to be eligible for lawful permanent residence). My sample here excludes one important decision, which focused largely on administrative law. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1912-15 (2020) (holding that Department of Homeland Security had failed to make appropriate findings regarding rescission of the Deferred Action for Childhood Arrivals ("DACA") program and had thus violated the Administrative Procedure Act).

3. For example, in the cases cited above, both *Nasrallah*, which expanded judicial review of questions of fact under the Convention Against Torture ("CAT") raised by noncitizens who had committed offenses that rendered them removable, and *Guzman Chavez*, which upheld the mandatory detention of noncitizens with prior removal orders, relied on a stylized conception of finality in agency adjudication. *See supra* note 2 and accompanying text; *see also infra* text accompanying notes 422-80.

4. 140 S. Ct. at 1442.

5. *Id.* at 1447, 1451; 8 U.S.C. § 1229b(d)(1)(B).

6. *See Barton*, 140 S. Ct. at 1458-60 (Sotomayor, J. dissenting). The one narrow exception regards LPRs who return to the United States after travel abroad. *See* 8 U.S.C. § 1101(a)(13)(C).

7. *See Barton*, 140 S. Ct. at 1451.

8. 141 S. Ct. 1474 (2021).

9. *Id.* at 1483, 1486; 8 U.S.C. § 1229b(d)(1)(A).

10. *Niz-Chavez*, 141 S. Ct. at 1487-91 (Kavanaugh, J., dissenting).

There's more: in another case from the Term just completed, the Court interpreted a provision that barred release on bond of a detained noncitizen when a removal order was "administratively final."[11] According to Justice Alito, who wrote for the Court, the phrase "administratively final" fit the noncitizen's case, even though an immigration judge ("IJ") in the U.S. Department of Justice had not yet determined—as the INA requires—whether the noncitizen would risk persecution or torture in his country of origin if removed.[12] Here, too, the decision had a book-end disfavoring the government. In *Nasrallah v. Barr*,[13] the Court, in an opinion by Justice Kavanaugh, read judicial review of adverse factual findings on a Convention Against Torture ("CAT") claim as not entailing review of a "final order of removal."[14] The Court adopted this rationale even though the legislation implementing the CAT expressly limited its use to precisely this context.[15]

This Article diagnoses these flaws in the inconsistency that a leading social scientist and his distinguished co-authors call "noise."[16] In their provocative recent book, authors Kahneman, Sibony, and Sunstein define noise as broadly inconsistent results among decisionmakers, both individual and collective.[17] Experts and professionals, including judges, physicians, economic forecasters, and forensic analysts, all reflect high levels of noise—variances of fifty percent or more in assessing identical or similar cases.[18] For example, prior to the drafting and implementation of sentencing guidelines, studies of federal judges showed dizzying swings among individual judges assessing hypothetical cases about two key questions: (1) whether a prison term was appropriate at all for a given defendant, and (2) the duration of the sentence.[19] Similar results occurred for other experts and professionals.[20]

Two major factors hindered individual experts' ability to reduce noise in decision-making. First, experts often lodged too much faith in

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11. Johnson v. Guzman Chavez, 141 S. Ct. 2271, 2283-85 (2021).
12. *Id.*
13. 140 S. Ct. at 1683.
14. *Id.* at 1691-92.
15. *Id*. at 1691.
16. *See* DANIEL KAHNEMAN ET AL., NOISE: A FLAW IN HUMAN JUDGMENT 4-9 (2021). Unstable voting coalitions among the Justices—particularly Justices Gorsuch and Kavanaugh and Chief Justice Roberts—have also contributed to the unpredictability in the Court's decisions. *Cf.* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 813-22 (1982) (discussing how voting theory shows that in multi-member bodies such as appellate courts, "inconsistency [over time] is inevitable").
17. KAHNEMAN ET AL., *supra* note 16, at 6-7, 15-17, 252-53, 276-78.
18. *Id.* at 15-17, 252-53, 276-78.
19. *Id.* at 15-17.
20. *See, e.g.*, *id.* at 276-78 (discussing wide swings in experienced doctors' diagnosis of tuberculosis, skin cancer, and other medical conditions).

first impressions.[21] Once they received an initial data point, experts anchored the rest of their calculations around that one factor.[22] Moreover, experts were overconfident—they lacked insight into the power of first impressions and therefore failed to develop processes for counteracting that impact.[23] Finally, as we shall see, another source of literature posits inconsistency over time in expert-group decisions meeting certain conditions, such as the existence of more than two possible outcomes or approaches to each case.[24] All of these factors are present in the Supreme Court's divided statutory interpretation in immigration decisions.

Both current theories of statutory interpretation recognize that noise is likely in judicial decisions.[25] Consider purposivism, which posits that courts should consider the purpose of statutes, as well as legislative history, such as committee reports discussing pending legislation.[26] Purposivists claim that their methodology best approximates how members of Congress understand and vote on possible statutes.[27] But purposivists' critics—called textualists—argue that purpose is a variable concept and legislative history can reflect different preferences of small groups of legislators, making it less reliable than the text of a statute.[28] The result for textualists is an invitation to judicial lawmaking.[29] As the name suggests, textualists assign primacy to the actual language that Congress used in a law, informed by rules or "canons" that can be linguistic, such as the guideline that a court should not interpret statutory language as superfluous since Congress means to achieve something in the world with its words, or substantive canons, like the canon favoring judicial review or disfavoring retroactive application.[30]

Purposivists push back, arguing that textualists' rules often conflict and that textualists offer no clear and uniform method for resolving those conflicts.[31] Moreover, statutory interpretation theorists have noted that textualism includes at least two approaches—one of which purports to look solely at text and structure, while the other, modified version also

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21. *See id.* at 247-53.

22. *Id.* at 172; *see id.* at 249-53 (showing an example of confirmation bias regarding fingerprints).

23. *Id.* at 138, 141, 144.

24. Easterbrook, *supra* note 16, at 813-27.

25. *See supra* text accompanying notes 18-20; *see also infra* text accompanying notes 28-32.

26. SCALIA & GARNER, *supra* note 1, at 18.

27. *See* Krishnakumar & Nourse, *supra* note 1, at 172-74.

28. *See* SCALIA, *supra* note 1, at 36.

29. *See* SCALIA & GARNER, *supra* note 1, at 18-19 (warning about "manipulability" of purposivism).

30. *See id.* at 56-58.

31. *See* Krishnakumar & Nourse, *supra* note 1, at 174-75; Mendelson, *supra* note 1, at 107-08; Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 395-96 (1950).

looks to other indicia of legislative intent.[32] Noise is inevitable in the interplay between those varied methods, particularly on a multi-member court in which each member embraces a range of substantive and methodological commitments whose ranking shifts in particular cases. In other words, credible opposing views attribute noise to any reasonably available interpretive methodology used by courts.

This Article suggests a fresh model: textual stewardship. To reduce overconfidence, textual stewardship sequences statutory construction.[33] The application of linguistic canons occurs in a comparative, probabilistic assessment to resolve conflicts.[34] Textual stewardship first considers ordinary meaning.[35] If that meaning is reasonably clear, a sequential approach would execute a full stop.[36] It would then require heightened evidence that Congress contemplated another, more specialized definition.[37]

At this second stage, textual stewardship would consolidate textualism's semantic and structural canons into two categories: textual economy and structural congruence.[38] Textual economy inquires whether a proposed reading of a statute will produce surplusage or interpolate extra language that Congress did not include.[39] In such situations, textual economy will balance the number and significance of each reading's results.[40]

Structural congruence entails a similar inspection of possible alternative readings.[41] The touchstone is review of analogous provisions elsewhere in the statute.[42] Sound judgment at this stage requires guarding against inapposite structural analogies. Careful analysis of each parallel provision's features is key.

In making sense of general statutory language, textual stewardship will examine legislative history.[43] But courts should not allow Congress

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32. *See* Grove, *supra* note 1, at 281-90 (discussing branches of textualism on view in Bostock v. Clayton County, 140 S. Ct. 1731 (2020)).

33. *See infra* Part V.

34. *See* SCALIA & GARNER, *supra* note 1, at 174-79; Krishnakumar & Nourse, *supra* note 1, at 168-80 (discussing an "ordering problem" with canons of statutory interpretation); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1125-26 (2017) (expressing wariness about utility of canon against superfluity).

35. *See infra* Part V.A.

36. *See infra* Part V.A.

37. *See infra* Part V.A.

38. *See infra* Part V.A.

39. *See infra* Part V.A.

40. *See infra* Part V.A.

41. *See infra* Part V.A.

42. *See infra* Part V.A.

43. *See infra* text accompanying notes 562-73 (discussing use of legislative history in determining whether a false-representation of citizenship must be material to render the noncitizen inadmissible); *compare* Castro v. Att'y Gen., 671 F.3d 356, 368-70 (3d Cir. 2012) (referring to legislative history to find materiality requirement), *with* Patel v. Att'y Gen., 917 F.3d 1319, 1322-28

to finesse difficult questions by concealing sensitive material in committee reports. In addition, textual stewardship protects reliance interests in noncitizens' plea deals through the rule of lenity and the presumption against retroactivity.[44]

This Article is the first to incorporate the most recent social science on "noise" in professional judgment into analysis of statutory interpretation generally and immigration law in particular.[45] Treating errors in statutory interpretation as products of noise yields important insights. Overconfidence is a source of both error and instability. Overconfident jurists—like the Justices in more or less equal measure during the two most recent Terms—talk textualism, but falter in applying textualist methodology. Rather than review a text methodically, with pauses to ensure that first impressions do not carry the day, the Justices cultivate an initial view of a statutory problem, and then view all other information as supporting that first take. Physicians, forensic analysts, business executives, and political forecasters take a similar approach, which yields both substantive errors and wide swings in judgment. In contrast, combating noise leads to a sequential, probabilistic approach that is particularly helpful with a specialized statute like the INA. This Article suggests a model that clears away the rhetorical underbrush, illuminating a path forward.[46]

This Article is in five Parts. Part II discusses the sources of noise.[47] This Part also analyzes examples, including sentencing judges and other experts.[48] Part III discusses inconsistencies in multi-member tribunals, such as appellate courts.[49] Part IV provides concrete examples of cases

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(11th Cir. 2019) (holding that statute did not require materiality), *aff'd*, 971 F.3d 1258 (11th Cir. 2020) (en banc), *cert. granted sub nom*. Patel v. Garland, 141 S. Ct. 2850 (2021). The Supreme Court heard oral argument in *Patel* in December 2021 and will probably issue a decision by the end of June 2022. *See* Shoba Sivaprasad Wadhia, *Justices Grapple With Question of Federal Court Review in Immigration Cases*, SCOTUSBLOG (Dec. 7, 2021, 8:54 PM), https://www.scotusblog.com/2021/12/justices-grapple-with-question-of-federal-court-review-in-immigration-cases.

44. *See* Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 135-41 (1998); Nancy Morawetz, *Determining the Retroactive Effect of Laws Altering the Consequences of Criminal Convictions*, 30 FORDHAM URB. L.J. 1743, 1750-55 (2003); Daniel Kanstroom, St. Cyr *or Insincere: The Strange Quality of Supreme Court Victory*, 16 GEO. IMMIGR. L.J. 413, 458-62 (2002); *see generally* Barrett, *supra* note 1, at 143-45, 153-55 (suggesting that canons closely related to specific constitutional principles are consistent with the judicial role in statutory interpretation, and that the reliance interests protected by the rule of lenity permit to choose one of two equally plausible readings, when that reading protects reliance interests).

45. For a piece that addresses other aspects of cognitive psychology and draws different normative conclusions, see generally Morrell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 34-55 (2003).

46. *See infra* Part V.

47. *See supra* Part I, II

48. *See supra* Part II.

49. *See infra* Part III.

that do not provide noise and those that do; this Part concludes that the trend-lines point in the wrong direction.[50] The makeup of the current Supreme Court fosters noise and overconfidence in divided statutory immigration cases. Part V presents examples of recent statutory immigration cases.[51] Part VI proposes textual stewardship and applies the new approach to several undecided issues under the INA.[52] These include the INA's definition of a "theft offense" as a ground for removal;[53] statutory limits on judicial review of discretionary decisions;[54] and the role of materiality in admissibility decisions regarding false representations of citizenship.[55]

II. NOISY COURTS: INCONSISTENCY IN EXPERT JUDGMENTS

The two major schools of statutory interpretation—textualism and purposivism—both posit that instability is a pervasive risk of judicial decisions.[56] Each school of thought assumes that acolytes of its approach will reduce that instability.[57] But neither approach grapples completely with features of its own method that give instability—or what social scientists call "noise"—a foothold.[58] Moreover, neither approach fully addresses the vast literature suggesting that expert judgment by both individuals and collective entities, such as multi-member courts, is often noisy: judgments by different experts result in wide swings in outcomes based on identical facts. This Part distills that literature's findings, and suggests some cautionary conclusions for judicial interpretation of statutes.[59] In both typical expert judgments and statutory interpretation,

50. *See infra* Part IV.

51. *See infra* Part V.

52. *See infra* Part VI.

53. 8 U.S.C. § 1101(a)(43)(G); *compare* K.A. v. Att'y Gen., 997 F.3d 99, 108 (3d Cir. 2021) (holding that theft offense can include taking through fraud), *with* Lopez-Aguilar v. Barr, 948 F.3d 1143, 1148-49 (9th Cir. 2020) (holding that theft offense requires physical taking).

54. *See* Patel v. Att'y Gen., 971 F.3d 1258, 1262, 1278 (11th Cir. 2020) (en banc) *cert. granted sub nom.* Patel v. Garland, 141 S. Ct. 2850 (2021) (reviewing facts that contribute to discretionary decisions); *compare* Hernandez-Morales v. Att'y Gen., 977 F.3d 247, 249 (3d Cir. 2020) (terming hardship "quintessential discretionary judgment"), *with* Gonzalez Galvan v. Garland, 6 F.4th 552, 560 (4th Cir. 2021) (regarding hardship as reviewable eligibility component).

55. 8 U.S.C. § 1182(a)(6)(C)(ii)(I); Patel v. Att'y Gen., 917 F.3d 1319, 1327-28 (11th Cir. 2019) (holding that INA did not require proof that false representation was material), *aff'd*, 971 F.3d 1258 (11th Cir. 2020) (en banc), *cert. granted sub nom.* Patel v. Garland, 141 S. Ct. 2850 (2021).

56. *See* Krishnakumar & Nourse, *supra* note 1, at 169 (discussing an "ordering problem" in statutory interpretation).

57. *See id.* at 165, 170.

58. *See* KAHNEMAN ET AL., *supra* note 16, at 4-5 (discussing noise).

59. *See infra* Part II. While one can argue that some of the groups of experts that the literature studies engage in fact-finding, while judges interpret the law, this distinction should not detract from the insights that the literature on expert judgment can provide. First, statutory interpretation has always had elements in common with fact-finding. *See* Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1336 (1990); *see also* GARY LAWSON, EVIDENCE OF THE LAW: PROVING LEGAL

two dangers are most salient: (1) overconfidence in first impressions,[60] and (2) in multi-member bodies, instability caused by shifting member voting coalitions in which, depending on the case, a decisive group of members modify its ranking of three or more core values.[61] I address the latter in the Part immediately following; here, I address point (1).[62]

A. Inconsistency Within and Among Individual Experts' Judgments

While the public views expert judgment as uniform and replicable, expert judgments play out in a landscape dominated by vast deserts of inconsistency, interrupted all too rarely by oases of consistency. Noise's dominance does not discriminate amongst professions and occupations; it includes judges, physicians, business executives, forecasters, and forensic analysts.[63] That inconsistency produces substantial costs to human health, wealth, safety, liberty, and political stability.[64]

In matters that can mean life or death, such as medical diagnosis, "noise" is pervasive. Studies have consistently documented wide swings among experienced physicians regarding assessments of medical conditions and appropriate treatment.[65] For example, in dealing with strep throat, one authoritative study found "significant variability" in diagnosis, testing, and treatment, independent of any variation in patient-related factors that could explain or justify these shifts.[66] Many

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CLAIMS 44, 83-107 (2017) (arguing that administrative law and other modes of interpretation have much in common with fact-finding). Moreover, experts in other fields, such as physicians studying X-rays or forecasters seeking to predict economic or political trends, often perform interpretive tasks. *See* KAHNEMAN ET AL., *supra* note 16, at 6.

60. KAHNEMAN ET AL., *supra* note 16, at 250 (discussing variability in forensic analysis; for example, when fingerprint analysts learned extrinsic information about the subject of a fingerprint match, such as a suspect's alibi or the results of other tests, results often changed).

61. The values that judges juggle can be substantive or methodological. Easterbrook, *supra* note 16, at 814-22; Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149, 171-74 (2001); Adrian Vermeule, *System Effects and the Constitution*, 123 HARV. L. REV. 4, 11-13 (2009); *cf.* Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 421-30 (2016) (discussing judicial cycling between standards and rules).

62. *See infra* Part II.B.

63. KAHNEMAN ET AL., *supra* note 16, at 73-76, 252-53, 259-60, 275-78.

64. *See id.* at 73-75, 140-42, 352-53, 260, 277-78; PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS 76-77 (2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf [hereinafter PCAST REPORT] (discussing a study concerning the criminal justice system's identification of suspects based upon "complex mixtures" of DNA—crime scene samples including two or more persons' genetic material—which reported broad disagreement among a group of experts and between the expert group reviewing the assessment and the analyst who made initial findings).

65. *See* KAHNEMAN ET AL., *supra* note 16, at 275-78.

66. *See* Julie L. Fierro et al., *Variability in the Diagnosis and Treatment of Group A Streptococcal Pharyngitis by Primary Care Pediatricians*, 35 INFECTION CONTROL & HOSP. EPIDEMIOLOGY (SPECIAL ISSUE) S79, S82 (2014); *see also* KAHNEMAN ET AL., *supra* note 16, at

doctors prescribed antibiotics excessively—a public health problem because it encourages the growth of treatment-resistant bacteria—giving these powerful medications to patients who *had not even been tested* for strep throat or who had negative test results.[67] Studies found pronounced variations even among doctors at prestigious institutions, such as New York University, where over one third of dermatologists did not appropriately diagnose skin cancers based on biopsies, leading to "grievous implications for [the] survival of patients."[68] Similar variations occur in diagnosis and treatment of pneumonia, a disease that can lead to severe health complications and even death.[69] Indeed, interpretation of standard diagnostic aids, such as X-ray images, is fraught with intra-analyst variation—variations in reading identical or similar images by the *same analyst*—and inter-analyst variation within groups of clinicians.[70]

Other experts have a similarly poor track-record of errors and noise in judgments.[71] For example, business executives who receive large compensation packages for making accurate predictions show wide variation and a marked propensity for errors.[72] Political forecasters who hold themselves out as predicting crises in public affairs are also prone

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275-78 (reporting on extensive literature finding wide variations in the diagnosis and treatment of common and serious conditions, including heart disease, breast cancer, and tuberculosis).

67. *See* Fierro et al., *supra* note 66, at S82. This violates commonly accepted guidelines for clinical practice. *Id.*

68. KAHNEMAN, ET AL., *supra* note 16, at 278 (citation omitted).

69. *See* David C. Chan et al., *Selection with Variation in Diagnostic Skill: Evidence from Radiologists* 6-7, 11-13, 19-21 (Stanford Inst. for Econ. Pol'y Rsch., Working Paper No. 21-057, 2021), https://web.stanford.edu/~gentzkow/research/radiology.pdf (finding wide variations in diagnoses of pneumonia in very large sample of Veterans' Administration patients; pneumonia diagnosis involves interpretation of X-rays as well as patient symptoms); *Pneumonia*, CLEV. CLINIC, https://my.clevelandclinic.org/health/diseases/4471-pneumonia (last visited Jan. 15, 2022) (stating that physicians may diagnose a patient with pneumonia by ordering and interpreting X-rays or by evaluating a patient's condition via physical examination and further discussing complications caused by pneumonia).

70. *See* P.J. Robinson, *Radiology's Achilles' Heel: Error and Variation in the Interpretation of the Röntgen Image*, 70 BRIT. J. RADIOLOGY 1085, 1087, 1089-91 (1997) (discussing sources of error including, for example, under-reading, incomplete scanning, and failure to recognize abnormalities); Michael A. Bruno et al., *Understanding and Confronting Our Mistakes: The Epidemiology of Error in Radiology and Strategies for Error Reduction*, 35 RADIOGRAPHICS 1668, 1671-72 (2015) (discussing sources of error, including overlooking certain areas and failure to spend sufficient time examining one area of an image that may indicate a clinical abnormality and further discussing a common X-ray reading error described as "satisfaction of search," in which an analyst misses an additional abnormality "because of a failure to continue to search" after spotting an initial abnormality). However, both articles suggest that artificial intelligence and technological advancements may improve diagnoses and reduce the prevalence of errors in image interpretation. *See* Robinson, *supra*, at 1094; Bruno et al., *supra*, at 1673, 1675.

71. *See, e.g.*, Simon Gervais et al., *Overconfidence, Compensation Contracts, and Capital Budgeting*, 66 J. FIN. 1735, 1743-46 (2011).

72. *See id.*; Anand M. Goel & Anjan V. Thakor, *Overconfidence, CEO Selection, and Corporate Governance*, 63 J. FIN. 2737, 2746, 2748-49 (2008) (detailing the same).

to mistakes.[73] Errors that can affect the accuracy of criminal convictions riddle the work of forensic analysts who identify suspects based on fingerprint comparisons, crime scene DNA mixtures, ballistics evidence, or handwriting.[74]

B. Overconfidence and Noise in Expert Judgment

The primary cause of these pervasive errors in professional judgment is overconfidence, typically reflected in hasty decision-making and overreliance on first impressions. As in the "satisfaction of search" that plagues radiologists and forensic analysts, once the analyst has noticed a factor that appears relevant, the analyst becomes overconfident in that factor's explanatory power.[75] The factor triggers an "anchoring effect," shaping further views about the issue.[76] The analyst stops looking for other factors, including those with different implications for the decision at issue.[77]

In the most obvious example, forensic analysts working for law enforcement often have access to external evidence about a suspect, such as witness statements or descriptions by law enforcement officers.[78] Radiologists see initial evidence of an abnormality in an X-ray or other image, and often fail to look for additional abnormalities that may better explain the patient's condition.[79] Overconfidence was also the nemesis

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73. PHILIP E. TETLOCK, EXPERT POLITICAL JUDGMENT 65 (2005) (noting that regardless of formal training or educational credentials, experts' predictive judgments were only marginally superior to laws of chance). In a much-quoted passage, Tetlock phrased this pessimistic description vividly. *See id.* at 51 (summarizing findings as prompting conclusion that in expert predictions, "humanity barely bests the chimp"); Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847, 888-91 (2012) (discussing implications of Tetlock's findings for specialized areas of law; addressing possible solutions, including specialized courts).

74. *See* PCAST REPORT, *supra* note 64, at 87, 90 (discussing longstanding pattern of errors in fingerprint identification); KAHNEMAN ET AL., *supra* note 16, at 248-55 (summarizing extensive literature on problems with forensic analysis); David L. Faigman et al., *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. CHI. L. REV. 417, 438-39 (2014) (cautioning that courts are too ready to accept claims by forensic analysts that their findings accurately identify criminal suspects; suggesting that track record of forensic analysts of fingerprint and other evidence does not warrant such judicial acceptance); Jennifer E. Laurin, *Remapping the Path Forward: Toward a Systemic View of Forensic Science Reform and Oversight*, 91 TEX. L. REV. 1051, 1062-63 (2013) (cautioning and suggesting the same).

75. Bruno et al., *supra* note 70, at 1672.

76. KAHNEMAN ET AL., *supra* note 16, at 170-71.

77. *Id.* at 171-72.

78. *See, e.g.*, PCAST REPORT, *supra* note 64, at 76-89; KAHNEMAN ET AL., *supra* note 16, at 248-55.

79. *See supra* note 70 and accompanying text. Social scientists sometimes refer to overconfidence as confirmation bias. *See* KAHNEMAN ET AL., *supra* note 16, at 169 (framing confirmation bias as propensity to "collect and interpret evidence selectively to favor a judgment that . . . we already believe or wish to be true"); Scott O. Lilienfeld et al., *Giving Debiasing Away: Can Psychological Research on Correcting Cognitive Errors Promote Human Welfare?*, 4 PERSP. ON PSYCHOL. SCI. 390, 391 (2009) (describing confirmation bias as the "tendency to seek out evidence consistent with one's views, and . . . ignore, dismiss, or selectively reinterpret evidence

of business forecasting. Asked to give two numbers indicating a plausible range of possible investment returns, such that a return above or below the range would be an outlier, experienced analysts were wrong almost two-thirds of the time.[80] Analysts displayed confidence that their assessments would match actual results; unfortunately, events in the world belied that confidence.[81] Overreliance on first impressions and isolated data points was also a signature flaw in political forecasting.[82]

C. Judges as Noise-Makers

For those who might claim that judges' capacity for reasoned decisions allows them to buck this trend, the results on the ground provide a harsh rejoinder. Rampant inconsistency is a routine feature of judicial practice,[83] and a central assumption of both leading schools of statutory interpretation: textualism and purposivism.[84] This Subpart

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that contradicts them"); Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CALIF. L. REV. 991, 1033-36 (2018) (discussing impact of cognitive biases on executive and judicial decisions regarding national security). Following Kahneman and his co-authors in *Noise*, I use the term "overconfidence" instead of "confirmation bias" in this Article.

80. *See* KAHNEMAN ET AL., *supra* note 16, at 259-60. In other words, in two-thirds of the cases, the actual return fell above or below the range that the so-called experts deemed to be most probable. *See id.*; *see also id.* at 145 (discussing overconfidence among professionals, and noting that most professionals disdain guidelines and checklists and simply "listen to their gut," especially when facts are "highly uncertain"; when uncertainty prevails, authors conclude, the expert's "gut" is most likely to be wrong); Gervais et al., *supra* note 71, at 1738 (modeling effects of business executives' overconfidence and positing that extreme overconfidence can lead to excessive risk unless firms can adjust compensation to temper this trait); Goel & Thakor, *supra* note 72, at 2748 (highlighting frequency of overconfidence in business judgment); WERNER F. M. DE BONDT & RICHARD H. THALER, FINANCIAL DECISION-MAKING IN MARKETS AND FIRMS: A BEHAVIORAL PERSPECTIVE 6 (1994) (observing that "[p]erhaps the most robust finding in the psychology of judgment is that people are overconfident . . . [w]hen people say that they are 90 percent sure that an event will happen or that a statement is true, they may only be correct 70 percent of the time").

81. KAHNEMAN ET AL., *supra* note 16, at 144-46.

82. *Id.* at 140-41; TETLOCK, *supra* note 73, at 65.

83. *See* KAHNEMAN ET AL., *supra* note 16, at 74-77.

84. *Compare* SCALIA & GARNER, *supra* note 1, at 18-19 (making textualist claim that inconsistency is pervasive risk for courts that fail to use textualist approach), *with* William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 540 (2013) (book review) (arguing on behalf of dynamic statutory construction that opposes textualism and turns on tracing evolution of broad purposes of statutes that textualists' champions Scalia and Garner acknowledged that "'[n]o canon of interpretation is absolute . . . . Each may be overcome by the strength of differing principles that point in other directions'") (citing SCALIA & GARNER, *supra* note 1, at 59); Mendelson, *supra* note 1, at 106-07 (asserting from purposivist perspective that the textualists' linguistic canons such as the rule against superfluity clash with other canons and prompt inconsistent results, at least in the absence of consistent theory for ranking canons when two or more conflict); Krishnakumar & Nourse, *supra* note 1, at 168-80 (writing that from a purposivist perspective, any school of interpretation—including purposivism—that relies even partially on canons to guide interpretation of statutes prompts an "ordering problem" in ranking canons' priority when canons clash).

focuses on empirical data from large-scale studies of judicial decisions in areas such as criminal sentencing.[85]

Sentencing has long been an arena where noise predominates. While some variance might be inevitable in a system in which human beings sentence offenders, the frequent wide swings in sentences on similar or identical facts heralds both inconsistency and error—systemic error must be present when vastly different sentences are meted out by different judges to similarly situated defendants for the same offense.[86] Some judges are far more likely to impose high sentences—for example, fifteen years or more in prison—for a given offense committed by a defendant with certain attributes, including age.[87] In contrast, a substantial cohort of judges impose lower sentences for identical offenses committed by virtually identical defendants.[88]

The high sentence for a specific offense that some enforcement-minded judges impose may be more than *three times* the sentence handed out by judges more centered on reintegrating a similar offender into the community.[89] In other words, for the same offense and a virtually identical defendant, some judges may impose no prison time or a term not to exceed three years, while another sizable group of judges may impose a term of fifteen or more years. The luck of the draw is the decisive factor in a defendant's fate.[90] In a system so driven by luck, there is less room for justice.[91]

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85. *See infra* Part II.C; *see also* KAHNEMAN ET AL., *supra* note 16, at 74-77; Mark W. Bennett et al., *Judging Federal White-Collar Fraud Sentencing: An Empirical Study Revealing the Need for Further Reform*, 102 IOWA L. REV. 939, 946-49 (2017).

86. KAHNEMAN ET AL., *supra* note 16, at 74-77.

87. *See id.*; *see also* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 106-12 (1973) (discussing, based on author's experience as a federal district judge, widespread disparities in sentencing); *cf.* Kenneth Mann et al., *Sentencing the White-Collar Offender*, 17 AM. CRIM. L. REV. 479, 482-85 (1980) (noting that, in the era prior to the enactment of Federal Sentencing Guidelines, judges regularly handed out lower sentences to defendants convicted of fraud, tax evasion, and similar white-collar offenses, reasoning—often with little or no normative or descriptive support—that such defendants were unlikely to reoffend or had already suffered enough through loss of professional reputation or other consequences).

88. KAHNEMAN ET AL., *supra* note 16, at 74-77.

89. *Id.* at 15-16, 74 (explaining that rehabilitation-minded judges impose shorter sentences than judges focused on deterrence and incapacitation).

90. *Id.* at 74 (explaining that the "variability [in sentencing] has nothing to do with justice").

91. The same result holds for other areas of judging. Studies have shown significant variations in juvenile court dispositions that correlate robustly with the performance of the locality's football team: if the team loses, the judge issues rulings that are harsher to the respondents. *Id.* at 17. In asylum adjudication, immigration judges vary markedly in their decisions about similar cases, leading analysts to coin the term, "refugee roulette," to convey the salience of arbitrary differences in results among different judges in the same district and between different districts. *See* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 328, 332 (2007).

D. Noise and Statutory Interpretation: Holy Trinity Puts Immigration Law at the Source

In contending theories of statutory interpretation, each side has long warned that the other's approach generates noise. For textualists, purposivism's penchant for noise manifested itself early in the crucible of immigration law.[92] In the case of *Church of the Holy Trinity v. United States*,[93] an established New York congregation wished to import a pastor from Great Britain.[94] The obstacle was a provision of the U.S. Immigration Code that restricted importation of noncitizens to perform "labor or service," which the statute defined as labor "of any kind."[95] Moreover, the statute included an array of specific exceptions, including singing and acting, as well as lecturers, servants and certain professional services.[96] The statute's mention of labor "of any kind" appeared to indicate a broad prohibition.[97] Moreover, applying the linguistic canon, *expressio unius*, it would seem that the itemized list of exemptions in the statute indicated that Congress had considered possible exceptions, and had decided that items not expressly mentioned were not excepted from the statute's coverage.[98]

That result would have been predictable. Indeed, the Court, in an opinion by Justice Brewer, conceded that Trinity Church's efforts to import a foreign national to serve as a pastor fell "within the letter" of the statutory restriction.[99] Furthermore, it would have tempered any concern that a statute that imposed severe limits on entry of persons of humble birth had an implicit exception for a noncitizen sought by a prosperous group that included persons of power and affluence. However, the Supreme Court held that viewing the statute as covering a pastor for the Holy Trinity Church would yield "absurd results," opining that something may be "within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its

92. *See generally* Church of the Holy Trinity v. United States, 143 U.S. 457 (1892) (providing an example).

93. *Id.* The literature on *Holy Trinity* is vast. For an introduction, see William S. Blatt, *Missing the Mark: An Overlooked Statute Redefines the Debate Over Statutory Interpretation*, 104 NW. U. L. REV. 147, 148-59 (2009); Robert A. Katzmann, *Madison Lecture: Statutes*, 87 N.Y.U. L. REV. 637, 664-66 (2012); Manning, *supra* note 1, at 14-15; see generally Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833 (1998) (analyzing *Church of the Holy Trinity*).

94. *Holy Trinity*, 143 U.S. at 457-58.

95. *Id.* at 458.

96. *Id.* at 458-59.

97. *Id.* at 458. For a caveat on this point, see Cass R. Sunstein, *Textualism and the Duck-Rabbit Problem*, 11 CALIF. L. REV. 463, 472-73 (2020) (suggesting that contemporaneous sources viewed "labor" as restricted to manual labor).

98. *See* Mendelson, *supra* note 1, at 81.

99. *Holy Trinity*, 143 U.S. at 458.

makers."[100] In this sense, the Court ignored the text of the statute and rewrote the statute to suit the Justices' own predilections, in a fashion that invited further displays of noise in the future.

Textualists who limit the absurdity canon rightly point out that a test that turns on whether a result is "absurd" invites subjective judgments.[101] People will vary in their assessment of absurdity, without a clear consensus among the public or in the legislature. The result will be varying interpretations, difficult to square with any single overarching metric. Justice Scalia worried that legislative history was too "manipula[ble]," allowing interpretation to turn not on the language that Congress enacted but on the varying preferences of individual judges.[102] In addition, Congress will lack guidance on what courts will do under the absurdity mantle. Moreover, Congress may fall into bad habits, discounting the need to draft statutory language carefully, since courts stand ready to bail Congress out if it fails to be precise, and courts can be blamed if they fail to do so. In other words, for textualists, the avoidance of noise has a powerful democratic component, prodding the democratically accountable Congress to deliberate on the text of legislation, instead of dishing off that obligation to unaccountable courts.[103] As we shall see, recognizing the potential for noise in purposive interpretation does not necessarily require abandoning all of purposivism's tools, including legislative history. However, it does mean that any use of those tools must occur in a carefully cabined framework in which the statute's text is the touchstone.

Textualism has traditionally come with maxims or linguistic canons that inform the reading of texts.[104] Perhaps the best-known is *expressio unius*, which holds that the legislature's mention of one thing implicitly rules out other items not mentioned.[105] In addition, the canon, *noscitur a sociis* holds that words in a series in statutory text are known by the words around them; the meaning of those neighboring words should inform interpretation of the word or term at issue.[106] The rule of the last antecedent holds that a qualifier after the last term in a statutory series of terms only modifies the last item in the series, not the previous items.[107] The series qualifier canon holds the opposite, finding when dealing with

100. *Id.* at 459.
101. *See* Barrett, *supra* note 1, at 169.
102. *See* SCALIA, *supra* note 1, at 36; Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 363 (2005); Herrmann v. Cencom Cable Assocs., 978 F.2d 978, 982 (7th Cir. 1992) ("Focusing on the text itself also cuts down the amount of judicial discretion, for judges free to bend law to 'intents' that are invented more than they are discovered become the real authors of the rule.").
103. *See* Barrett, *supra* note 1, at 112-17.
104. *Id.* at 111, 157.
105. *See* Jama v. ICE, 543 U.S. 335, 341-42 (2005).
106. Nelson, *supra* note 102, at 383.
107. *See Jama*, 543 U.S. at 342-44.

an integrated series of terms, that a qualifying phrase after the last term of a law actually also applies to all other terms in the series.[108] The canon disfavoring superfluity states that courts should read a statute as if Congress meant every phrase that it included, instead of reading the statute to render a statutory term unnecessary.[109] Tempering the canon against superfluity, courts have also recognized that some redundancy in drafting a statute is inevitable, and even desirable, to stress certain statutory elements.[110] The "whole-Act" canon combines text and structure, assuming that other sections or subsections of a given statute, such as the INA, will provide cues for the meaning of a term or phrase in a specific section or sub-unit of that same statute.[111]

In addition to linguistic canons, courts also apply substantive canons that protect important interests, requiring Congress to clearly state that it wishes to affect those interests through legislation.[112] For example, the rule of lenity interprets ambiguous statutory terms to favor criminal defendants, on the theory that individuals are entitled to

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108. United States v. Bass, 404 U.S. 336, 337-39 (1971); Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1169 (2021); SCALIA & GARNER, *supra* note 1, at 147.

109. *Compare* Barton v. Barr, 140 S. Ct. 1442, 1453 (2020) (asserting that majority's broad reading of provision limiting certain relief from deportation did not trigger canon against superfluity; any possible surplusage resulting from majority's reading was merely incidental redundancy), *with id*. at 1458-62 (Sotomayor, J., dissenting) (asserting that majority's reading rendered an important part of the provision "meaningless" and thus "flout[ed] basic statutory-interpretation principles").

110. Marx v. Gen. Revenue Corp., 568 U.S. 371, 385 (2013) ("The canon against surplusage is not an absolute rule.") (citation omitted); Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 299 n.1 (2006) ("While it is generally presumed that statutes do not contain surplusage, instances of surplusage are not unknown."); Ethan J. Leib & James J. Brudney, *The-Belt-and-Suspenders Canon*, 105 IOWA L. REV. 735, 741-43 (2020) (discussing virtue of redundancy in legislative drafting). Scholars have recently debated the significance of findings that the congressional staffers who actually draft most legislation do not always adhere to the expectations in linguistic canons, including avoidance of surplusage. Professors Abbe Gluck and Lisa Schultz Bressman have published the results of a study of congressional staffers that appears to show a gap between judicial rules—particularly linguistic canons—and the understanding and experience of legislative drafters. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 927-31 (2013). Noted textualists have pushed back, arguing that the careful study of staffers—a valuable undertaking in its own right—should not detract from the importance of clear legislative language. Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2200-04, 2209 (2017) (asserting that the most important stakeholders in statutory interpretation are members of the public subject to statutory commands and that courts should presume, absent clear contrary evidence, that statutory language reflects the "ordinary" meaning of words and phrases); John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1946-47 (2015) (arguing that primary reliance on the text of statutes and wariness about legislative history such as committee reports furthers accountability of the political branches).

111. *See* Johnson v. Guzman Chavez, 141 S. Ct. 2271, 2289 (2021). The whole-code rule holds that terms or phrases from *other* parts of the U.S. Code can shed light on the meaning of a term or phrase in a particular section. *See* Anita Krishnakumar, *Cracking the Whole Code Rule*, 96 N.Y.U. L. REV. 76, 84-87 (2021).

112. Barrett, *supra* note 1, at 143-45, 155; Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 WASH. U. L. REV. 351, 366-68 (2019).

reasonable notice that their conduct can subject them to criminal sanctions such as imprisonment.[113] The presumption against retroactivity has a similar notice rationale, holding that a civil statute is considered to only apply prospectively unless Congress has clearly stated that it will apply to past conduct.[114] These substantive canons protecting reliance interests also apply in immigration law.[115]

E. Textualism, Inclusion, and Immigration Law: Boutilier v. INS

Textualists can point to a striking immigration case from 1967 on the admissibility of gay and lesbian noncitizens in which a textualist analysis would have led to a result that is far more inclusive than the Supreme Court's decision. In *Boutilier v. INS*,[116] the Supreme Court cited legislative history in holding that the amorphous term "psychopathic personality" in the then-applicable version of the INA authorized the exclusion of individuals who had a gay or lesbian sexual orientation or at least had recounted several same-sex experiences.[117] The Court, over the dissents of Justices Douglas, Brennan, and Fortas, acknowledged that the statute did not expressly bar either group.[118]

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113. Hessick & Kennedy, *supra* note 112, at 366-68.

114. *See* Landgraf v. Usi Film Prods., 511 U.S. 244, 270-71 (1994).

115. Vartelas v. Holder, 566 U.S. 257, 264-67 (2012) (applying presumption against retroactive application to shield LPR who had departed from the United States on a brief trip to see family abroad; upon the LPR's return, immigration officials declined to admit him because of changes in the law that attached more substantial immigration consequences to criminal conviction that occurred prior to the law's enactment); INS v. St. Cyr, 533 U.S. 289, 320-23 (2001) (applying presumption against retroactivity to preserve noncitizen's access to certain relief from deportation).

116. 387 U.S. 118 (1967).

117. *Id.* at 118. *Boutilier* is a rich case study on identity, discourse, and social mobilization, as well as statutory interpretation. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 51-55 (1994); Marc Stein, Boutilier *and the U.S. Supreme Court's Sexual Revolution*, 23 L. & HIST. REV. 491, 507-28 (2005). The discussion in the text may provide an unduly stark view of the Court's views in the 1960s. Earlier, the Court had seemingly shown awareness of the potential for unfairness in the "psychopathic personality" exclusion ground, in deciding a case of an LPR with an arrest record for same-sex encounters who then took a brief trip to Mexico. The Court found that the respondent had not made a "departure" from the United States within the meaning of the INA's inadmissibility grounds. Rosenberg v. Fleuti, 347 U.S. 449, 451-52, 463 (1963). As a result, the Court held that the "psychopathic personality" ground for inadmissibility did not apply to the respondent. *Id.* at 453.

118. *Boutilier*, 387 U.S. at 121-22. The Supreme Court has long regarded Congress as possessing plenary power over immigration, despite the paucity of express references to immigration in the Constitution. *Compare* David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 44 (2015) (noting most plausible arguments for judicial deference), *with* Kevin R. Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 61-62 (2015) (contending that recent Supreme Court decisions relying on constitutional values in interpreting immigration statutes signaled easing of deference); *see also* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1842-78 (1993) (noting role of states and low profile of federal regulation of immigration during first century of United States' existence); *cf.* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 262 (1984) (referring to link between the plenary power doctrine and courts'

However, it found that the statutory term covered Boutilier and persons similarly situated.[119] In doing so, the Court cited the 1952 conference committee report on the statute, which explained in precise terms—disturbing from a 2021 perspective—that the statutory language covered persons with a same-sex sexual orientation or history.[120]

While textualism was not an accepted mode of interpretation when *Boutilier* was decided, textualists looking back at this decision have robustly disagreed with the majority's view.[121] For textualists, the ordinary meaning of "psychopathic personality" did not include persons who had a gay or lesbian sexual orientation.[122] Textualists also have maintained that the marked disagreement among medical and other professionals about the meaning of the phrase established that it was not a "term of art"—a term with a specialized meaning that courts should view as controlling.[123] The legislative history's specific reference to persons with a same-sex orientation merely reinforced the textualists' conviction that legislative history is often a dodge that Congress uses to sidestep accountability—a shoddy expedient for showing that "a nod is as good as a wink" and for avoiding the embarrassment, inconvenience, or indelicacy that would flow from Congress saying exactly what it means in the actual text of the statute.[124]

More recently, the textualist Justice Neil Gorsuch echoed this critique in his opinion for the Court in *Bostock v. Clayton County*.[125] In *Bostock*, the Court held that the 1964 federal fair employment law barred discrimination against gay, lesbian, bisexual, and transgender people.[126] It seems virtually certain, as in *Boutilier*, that a majority of legislators in

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deference to the executive branch on foreign affairs, observing that "it ignores reality to hold that every provision concerned with immigration, as applied to every fact situation it might encompass, is so intimately rooted in foreign policy that the usual scope of judicial review would hamper the effective conduct of foreign relations"); Linda Kelly, *Republican Mothers, Bastards' Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 HASTINGS L.J. 557, 573-74 (2000) (critiquing basis of plenary power doctrine and application to gender roles); Matthew J. Lindsay, *Disaggregating "Immigration Law,"* 68 FLA. L. REV. 179, 224-25 (2016) (analyzing discrete aspects of immigration that should elicit varying levels of judicial deference).

119. *Boutilier*, 387 U.S. at 122-23.

120. *Id.*

121. *See* SCALIA & GARNER, *supra* note 1, at 397-98.

122. *Boutilier*, 387 U.S. at 125-35 (Douglas, J., dissenting).

123. *Id.*

124. *Id.* at 120-24 (majority opinion).

125. 140 S. Ct. 1731, 1737 (2020); *see also* Grove, *supra* note 1, at 281-90 (discussing different approaches to textualism through lens of *Bostock*). Some scholars had anticipated this broader view of the language of fair employment laws. *See* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 48-49 (1995) (suggesting that "stricter . . . constructionist" view of definitions of terms such as "sex" would lead to broadening statutes' scope, whatever the political tendencies of strict constructionists).

126. *Bostock*, 140 S. Ct. at 1753-54.

each house of Congress agreed with or at least accepted a view that gave fewer protections to same-sex individuals.[127] Justice Gorsuch's view in *Bostock* advanced a textualist case for eschewing inquiry into subjective legislative intent in that case, just as textualists have urged the abandonment of subjective intent in cases like *Boutilier*.[128] However, as Justice Alito's robust dissent in *Bostock* demonstrated, textualism includes at least two different perspectives: the "strong textualism" of Justice Gorsuch's majority opinion, and the more flexible textualism[129] of Justice Alito's dissent, that traces the boundaries of the deal embodied in the 1964 statute.[130] After *Bostock*, textualists engaged in interpretation to resolve which version of textualism to apply.

Purposivists, who tend in their ideological positions to be political progressives, are caught in an interpretive dilemma in both *Bostock* and *Boutilier*.[131] Purposivism, despite its many virtues, does not provide a convincing justification for disregard of legislative history in either *Boutilier* or *Bostock*. But progressives such as William Eskridge have blanched at embracing a textual approach to counter *Boutilier*.[132] Eskridge critiqued *Boutilier* based on a theory of "dynamic statutory interpretation" that departs from purposivism by explicitly requiring adoption of statutory language to evolving norms, such as the evolving norm barring discrimination against persons with a same-sex orientation.[133] Purposivists more focused on traditional interpretive methods, such as the use of legislative history, are wary of this aspect of Eskridge's approach.[134] Concerned purposivists warn that dynamic statutory interpretation can also present an "ordering" problem in assessing which canons count for vindicating an evolving norm, and which norms have evolved sufficiently to merit the deployment of dynamic interpretation's methodology.[135] Thus, *Boutilier* may not demonstrate purposivism's inadequacy, but it does suggest lingering problems with making legislative history dispositive in explaining an ambiguity in the text, such as Congress's use of the term "psychopathic personality."

Ordering issues for linguistic canons in textualism and *Boutilier*'s challenge for purposivists' attachment to legislative history show that both textualism and purposivism can engender noise and error. While

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127. *Id.* at 1755-56 (Alito, J., dissenting).
128. *Id.* at 1753 (majority opinion); *Boutilier*, 387 U.S. at 120-24.
129. *See* Grove, *supra* note 1, at 281-90.
130. *Bostock*, 140 S. Ct. at 1757 (Alito, J., dissenting).
131. *See* Grove, *supra* note 1, at 274.
132. ESKRIDGE, *supra* note 117, at 48-55, 58, 63, 69.
133. *Id.* at 66-67; *see also* Daniel A. Farber, *Statutory Interpretation and the Idea of Progress*, 94 MICH. L. REV. 1546, 1558 (1996) (book review) (discussing Eskridge's account).
134. *See* Krishnakumar & Nourse, *supra* note 1, at 166-68.
135. *Id.* at 169-73.

changing norms have rendered the majority opinion in *Boutilier* obsolete, purposivism does not provide a clear counter to the majority's reasoning in that case. On the other hand, textualism does not provide a clear "ordering" principle for choosing between linguistic canons in the event of clashes, such as the conflict between *expressio unius* and the canon disfavoring surplusage. Bringing administrative law into the picture does not reduce noise. The *Chevron* doctrine defers to agency decisions when the statute is ambiguous and the agency interpretation is reasonable.[136] However, as then-Judge Brett Kavanaugh pointed out in a review of Judge Robert Katzmann's argument for purposivism, "different judges have wildly different conceptions of whether a particular statute is clear or ambiguous."[137] In sum, as *Holy Trinity* and *Boutilier* show, the risk of noise and error is ubiquitous in statutory interpretation.

III. NOISE IN MULTI-MEMBER BODIES LIKE THE SUPREME COURT

The potential for noise and error in single-judge decisions on statutes increases with multi-member bodies, such as the Supreme Court. Social scientists have long believed that as a matter of both theory and practice, multi-member bodies are prone to voting shifts among their groups of members that create inconsistent and sometimes erroneous results.[138] Shifting coalitions are likely when two conditions are met: (1) there are at least three different ways to decide a case, including, (a) threshold issues of notice and standing; (b) methodological issues such as whether the judge is a textualist or purposivist; and (c) substantive issues, and (2) in different cases over time, one or more members modify the degree of importance they attach to threshold, methodological, and substantive issues, respectively.[139] These issues have plagued the Supreme Court's statutory immigration law cases in recent Terms.

In many cases, the Justices will have at least three different potential doctrinal routes to resolving a case.[140] Having only two routes tends to promote consistency, as Justices dutifully line up on either side

136. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

137. *See* Kavanaugh, *supra* note 1, at 2152.

138. *See* Easterbrook, *supra* note 16, at 813-15, 821-22; *The Cycles of Statutory Interpretation*, *supra* note 61, at 172-73. The mathematical theory behind the "voting paradox" is complex and beyond the scope of this paper. The history of the paradox goes back over two centuries. *See* Eerik Lagerspetz, *Albert Heckscher on Collective Decision-Making*, 159 PUB. CHOICE 327, 327-28 (2014) (discussing lineage of theory, including the Marquis de Condorcet, Charles Dodgeson (A.K.A. Lewis Carroll), and Kenneth Arrow).

139. *See* Easterbrook, *supra* note 16, at 816-27.

140. *Id.* at 826-27 (discussing multi-peaked preferences); Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 107-14 (1986) (discussing path-dependence in appellate courts); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 11-12 (1993) (discussing the same).

of the issue; in contrast, having at least three routes including a threshold issue like standing provides more chances for a "swing Justice" to decide a case and provide the margin for victory, tilting the outcome from one position—pro-government or pro-immigrants—to the other.[141] Second, depending on the case, an individual Justice may ascribe a different priority to each of these issues.[142] A decision in one case may preserve judicial review,[143] while a decision in another case may expand the use of mandatory detention in immigration law, thus, in practice limiting the factual and legal arguments that a noncitizen can make to courts in the first place.[144] If a Justice values judicial review above enforcement in the first scenario, but discounts the impact on judicial review in the second situation, instability and error may emerge. Third, in an appellate system governed by stare decisis, path-dependence will skew decisions: a decision in a case that the Court decided first will influence the result in the second situation, leading to a different outcome than the one that would be obtained if the second case were resolved first. Finally, at least one Justice might act strategically on a threshold issue, such as standing, in order to avoid deciding some or all of the issues on the merits.

To illustrate how noise can afflict multi-member tribunals, return to then-Judge Kavanaugh's point about instability and *Chevron*.[145] In any *Chevron* case, there are at least three possible decisions.[146] As then-Judge Kavanaugh noted, judges on a multi-member court can reach one of two conclusions at *Chevron* Step 1, which considers whether a statute is ambiguous.[147] A judge who finds that a statute is clear stops at that point in her analysis.[148] That judge would hold that the statute clearly bars the agency's reading.[149] However, a judge who finds that the statute is ambiguous has two choices at Step 2.[150] The judge can either find that the agency's reading is reasonable, or find that the agency has not met the reasonableness standard.[151] In other words, one of three outcomes is possible: (1) the statute clearly bars the agency action; (2)

141. *See* Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1100-03 (2015) (describing certain Justices, including Anthony Kennedy, as acting strategically regarding standing issues).

142. *Id.* at 1102-03.

143. Nasrallah v. Barr, 140 S. Ct. 1683, 1694 (2020).

144. Johnson v. Guzman Chavez, 141 S. Ct. 2271, 2291 (2021).

145. Kavanaugh, *supra* note 1, at 2152.

146. *See generally* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). There are even more choices if one counts standing.

147. *Id.* at 842.

148. *Id.*

149. *Id.* at 843.

150. *Id.*

151. *Id.*

the statute is ambiguous and the agency's view is reasonable; or (3) the statute is ambiguous and the agency's view is unreasonable.[152]

Several features of the ambiguity determination drive home the pervasive risk of noise and error in multi-member tribunals' decisions over time. First, each member of a tribunal may rank signals of clarity in a text differently, depending on the case at hand. In his article, then-Judge Kavanaugh candidly acknowledged that judges vary in the degree of certainty they expect before they are prepared to call a statute "clear."[153] Some judges may be sticklers, insisting on compelling evidence that favors one reading and rules out others; in then-Judge Kavanaugh's helpful quantification, these are the "80-20" or even "90-10" jurists.[154] Other jurists may be a bit more flexible, requiring merely a "65-35" level of certainty.[155] Other judges may be even more flexible, viewing "55-45" as a sufficient showing.[156] No authoritative source specifies a particular quantitative level.[157] In addition, as then-Judge Kavanaugh recognized, this precise quantitative frame—"65-35," etc.—masks substantial uncertainty in deciding whether a particular "text in question surmounts that 65-35 [or other] threshold."[158] Then-Judge Kavanaugh acknowledged that, with such a wide variation in degrees of certainty—as much as sixty percent between the toughest stickler and the most flexible of her fellow judges—managing the interpretive task over time is a daunting challenge.[159] Many judges cannot maintain a particular certainty standard over time; despite a judge's best efforts, some wobble is certain to occur.[160] In a multi-member court, these oscillations and the shifting coalitions they spawn will spur further noise.

As an example of how this wobbling may play out, let us briefly consider here an issue from a case in which Justice Kavanaugh wrote for the Court: *Barton v. Barr*.[161] *Barton* narrowed access to a particular protection against removal of LPRs.[162] The chief immigration agency tribunal, the Board of Immigration Appeals ("BIA"), had already taken

152. *Id.* at 842-43.
153. Kavanaugh, *supra* note 1, at 2137.
154. *Id.*
155. *Id.* at 2138. Judge Kavanaugh placed himself in this latter group. *Id.* at 2137-38.
156. *Id.*
157. *See, e.g.*, *id.*
158. *Id.* at 2138.
159. *Id.* (describing sorting out *Chevron* issues as "a difficult task for different judges to conduct neutrally, impartially, and predictably").
160. *See, e.g.*, Barton v. Barr, 140 S. Ct. 1442, 1453 (2020); *id.* at 1461 (Sotomayor, J., dissenting) (demonstrating the different views of Supreme Court Justices as to statutory interpretation).
161. *Id.* at 1442 (majority opinion).
162. *Id.* at 1454.

this position.[163] The disagreement between the majority and Justice Sotomayor's dissent turned in part on the application of two opposing textualist canons.[164] Justice Kavanaugh asserted that a phrase governing access to relief was merely redundancy of a kind that is "common in statutory drafting."[165] Suppose that the Court had instead invoked the canon against superfluity to give that phrase its full meaning, rather than regarding it as incidental redundancy that was "meaningless" and thus irrelevant to the statutory scheme.[166] In that event, the petitioner in *Barton* and others similarly situated would have had access to relief from removal. Neither textualism nor purposivism provide a clear and consistent answer on whether a court should invest a phrase like the one at issue in *Barton* with meaning or treat it as redundant.

Chevron might resolve such difficulties, but that depends on whether there is any clear and consistent definition of "ambiguity" at *Chevron*'s Step 1.[167] If Justice Sotomayor was a "65-35" judge who viewed the statute as ambiguous, she could then have determined that the BIA's view was reasonable. On a differently configured Court, Justice Sotomayor's vote might have been essential for a government win. On the other hand, on that same hypothetical Court, the government would have lost if Justice Sotomayor was an "80-20" judge who did not find the statute ambiguous. The potential for noise is pervasive.[168]

The noise triggered by ambiguity determinations grows even louder if one realizes that courts cannot hermetically seal off their view of ambiguity under *Chevron*'s Step 1 from their view of the reasonableness of the agency's reading under *Chevron*'s Step 2. Then-Judge Kavanaugh's candor again highlights the scope of the problem. Alluding to the philosopher John Rawls's famous device for ensuring impartial determinations about the distribution of rights and goods in a republic, Judge Kavanaugh observed that courts do not make the ambiguity determination "behind a veil of ignorance."[169] Instead, as Judge Kavanaugh wisely warned, "policy preferences can seep into ambiguity

163. *Id.* at 1446.

164. *See id.* at 1453; *id.* at 1641 (Sotomayor, J., dissenting).

165. *Id.* at 1453 (majority opinion) (asserting that the phrase in 8 U.S.C. § 1229b(d)(1)(b) "renders the alien . . . removable . . . under 8 U.S.C. § 1227(a)(2)" is mere incidental redundancy that should not affect the Court's view) (modifying quotation).

166. *Id.* at 1457-58 (Sotomayor, J., dissenting).

167. *See generally* Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 DUKE L.J. 1197 (2021) (arguing that *Chevron* deference is inappropriate regarding BIA decisions, although more appropriate for rulemaking).

168. In *Barton*, Justice Kavanaugh viewed the answer as clear, and thus did not have to address ambiguity under *Chevron*. *Barton*, 140 S. Ct. at 1448-50. However, since Justice Kavanaugh only reached this result by finding that the statute unambiguously *favored* the government's position in the case, *Barton* is still a useful case study in the noise that ambiguity determinations can generate.

169. *See* Kavanaugh, *supra* note 1, at 2139.

determinations in subconscious ways."[170] A judge's view of whether a statute is ambiguous may be infected by the judge's view that the agency action at issue is wholly unreasonable. That determination should only be made at *Chevron*'s Step 2. However, a judge influenced in the manner that Judge Kavanaugh described could skip analysis at Step 2 entirely, by disposing of the case at Step 1.

Moreover, as other commentators have suggested, the ambiguity determination can also encourage strategic voting.[171] Some judges may manipulate the *Chevron* ambiguity determination to invalidate agency action at that stage, rather than undertake the more difficult task of showing that an agency action is unreasonable under *Chevron* Step 2. The possible incidence of strategic voting by one or more members of an appellate tribunal further enhances the risk of error and noise.

IV. THE SUPREME COURT'S RECENT STATUTORY IMMIGRATION CASES: UNITY SIGNALS SUCCESS, WHILE DIVISION FLAGS FLAWED READINGS OF THE STATUTE

The Supreme Court's report card from the last two Terms on statutory immigration cases has been bifurcated: its record in unanimous decisions has been excellent, while its record in divided cases bespeaks a need for improvement. Despite the omnipresent risk of error and noise, a unanimous Court has decoded the complexities of the INA.[172] Unfortunately, in cases that highlight the terse drafting of the INA—particularly the 1996 Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA")[173]—the Court has often been divided.[174] By the neutral metric described in this and the following Parts, five out of six divided decisions were incorrect: in win-loss terms, the Court's

170. *Id.*

171. *See* Fallon, *supra* note 141, at 1100, 1102-03; Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 811-12, 819-20, 824, 827-28 (2010).

172. Unanimous cases include: Sanchez v. Mayorkas, 141 S. Ct. 1809, 1811-13 (2021) (interpreting requirement that noncitizens be "inspected and admitted"); United States v. Palomar-Santiago, 141 S. Ct. 1615, 1619, 1622 (2021) (interpreting the exhaustion requirement for a collateral challenge to a prior removal order in a current prosecution for unlawful re-entry); Garland v. Ming Dai, 141 S. Ct. 1669, 1674-78 (2021) (holding that an absence of an express adverse finding on a noncitizen's credibility by IJ does not require an appellate court to treat all of a noncitizen's factual allegations as credible and true).

173. Pub. L. No. 104-208, div. C, 110 Stat. 3009-546.

174. *See, e.g.*, Nasrallah v. Barr, 140 S. Ct. 1683, 1687-88 (2020); Johnson v. Guzman Chavez, 141 S. Ct. 2271, 2280, 2292 (2021); Barton v. Barr, 140 S. Ct. 1442, 1067, 1073 (2020); Niz-Chavez v. Garland, 141 S. Ct. 1474, 1480-81, 1486 (2020); Pereida v. Wilkinson, 141 S. Ct. 754, 767 (2021). My sample excludes one major decision that focused on administrative law. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915-16 (2020) (holding that Department of Homeland Security's rescission of the DACA program violated the Administrative Procedure Act).

record has been 1-5. Applying the neutral metric advanced in this Article, the identity of the victorious party in a case—government or noncitizen—was not an accurate signal of success: the incorrect decisions included three in which the government prevailed and two in which victory belonged to the noncitizen. This is a small number, but it signals increasing error and noise. If one goes back to the 2017 Term, the record is better in divided cases, with three more right,[175] for an overall 4-5 record during that period.[176] That would not be a good record in team sports; moreover, the trend line is heading in the wrong direction.

A. A Unanimous Case With a Telltale Flaw: Sanchez v. Mayorkas

With unanimous cases included, the Court's overall record improves. Consider *Sanchez v. Mayorkas*,[177] in which the unanimous Court, in an opinion by Justice Kagan, held that the lawful entry requirement in the INA disqualified many noncitizens with Temporary Protected Status ("TPS")[178] from adjusting their uncertain status to the statute's "gold standard": lawful permanent residence.[179] *Sanchez* embodied Justice Kagan's comment in a 2015 lecture on Justice Scalia that, "We're all textualists now."[180] However, it also included a miscue in structural analysis of the statute that typifies the Court's recent problems in divided cases.[181]

Under the INA, any applicant for adjustment of status to lawful permanent residence must show that she is "admissible"[182] and that she

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175. Jennings v. Rodriguez, 138 S. Ct. 830, 852 (2018); Pereira v. Sessions, 138 S. Ct. 2105, 2120, 2121 (2018); Nielsen v. Preap, 139 S. Ct. 954, 976 (2019).

176. This longer look back excludes another important decision that also raised constitutional questions about the interaction of presidential power with the Establishment Clause. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2415, 2423 (2018) (upholding President Trump's ban on admission of nationals of several—mostly Muslim-majority—countries). The Court was also incorrect on the statutory question in that decision, although the constitutional issues predominated, making the case less useful for our sample. *See* Peter Margulies, *The Travel Ban Decision, Administrative Law, and Judicial Method: Taking Statutory Context Seriously*, 33 GEO. IMMIGR. L.J. 159, 166-67 (2019). The split between the incorrectly decided *Hawaii* and the correctly decided *Regents* (the DACA case) would peg the Court's total record at 5-6. Suppose one gave Chief Justice Roberts, who authored *Hawaii* and *Regents*, the benefit of the doubt—after all, this is the "Roberts Court." The record with *Hawaii* shifted to the win column would be 6-5. That is a winning record, but it is just one win over the laws of chance, and—since *Hawaii* dates from the 2017 Term—the momentum is still in the wrong direction.

177. 141 S. Ct. at 1809.

178. *Id.* at 1812-13; 8 U.S.C. § 1254a.

179. *Sanchez*, 141 S. Ct. at 1812-13.

180. Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statute*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg.

181. *See infra* text accompanying notes 193-209.

182. 8 U.S.C. § 1255(a). This entails determining if the applicant triggers any of the INA's grounds of inadmissibility based on past immigration violations, public health and welfare, law

has been "inspected and admitted or paroled" in the United States, as opposed to entering surreptitiously.[183] Justice Kagan explained that this latter requirement requires "lawful entry of the alien into the United States after inspection and authorization by an immigration officer."[184] As Justice Kagan recognized, the noncitizen here surreptitiously entered the United States.[185] He therefore did not fulfill the procedural requirement of the adjustment provision entailing "lawful entry"[186] and could not adjust to LPR status.[187]

While Justice Kagan's textual analysis was straightforward and dispositive, her analysis of the statute's structure included a miscue. Justice Kagan asserted that the adjustment-of-status provision, 8 U.S.C. § 1255, required lawful entry not only in § 1255(a) but also in § 1255(k).[188] According to Justice Kagan, the latter provision required that an applicant for adjustment who had worked without authorization had to be present in the United States "pursuant to a lawful admission."[189] However, Justice Kagan misapprehended the scope of this provision, which actually only addresses the small subset of TPS recipients seeking employment-based visas.[190]

A large sub-group of family visa applicants, who are immediate relatives of U.S. citizens, are not subject to this restriction on unauthorized work.[191] While the petitioners in *Sanchez* were applicants for employment visas, the vast majority of TPS recipients qualify for

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enforcement, and national security. *See* 8 U.S.C. § 1182 (specifying grounds for inadmissibility, including communicable diseases such as tuberculosis; dependence on public assistance (the "public charge" provision)); commission of crimes; national security and foreign policy concerns such as terrorism; and grounds involving immigration control such as previous removals from the United States and periods of unlawful presence); *see also* § 1182(f) (granting the President power to suspend the entry of any noncitizen or group of noncitizens whose entry the President determines would be "detrimental to the interests of the United States"); Trump v. Hawaii, 138 S. Ct. 2392, 2405, 2414-15 (2018) (upholding presidential power under § 1182(f) to bar travel to the United States by nationals of several countries, most with majority-Muslim populations, including Iran, Libya, Syria, and Yemen); *cf.* Margulies, *supra* note 176, at 199-201 (critiquing the statutory basis for President Trump's travel ban).

183. 8 U.S.C. § 1255(a); *Sanchez*, 141 S. Ct. at 1813.

184. *Sanchez*, 141 S. Ct. at 1811 (citing 8 U.S.C. § 1101(a)(13)(A)).

185. *Id.* at 1812.

186. *Id.*

187. *Id.* at 1813-14.

188. *Id.* (asserting that due to this provision, § 1255 "imposes an admission requirement twice over").

189. *Id.*; *see also* 8 U.S.C. § 1255(k)(1) (requiring that the applicant's presence at the time of her application be "pursuant to a lawful admission"); § 1255(k)(2)(B) (denying eligibility for adjustment to applicant who had worked without authorization for an aggregate period exceeding 180 days).

190. *See* § 1255(k) (cross-referencing 8 U.S.C. § 1153(b), which provides for employment-based visas); § 1255(c) (barring adjustment for employment-based applicants who have worked without authorization).

191. *See* § 1255(c)(2) (expressly exempting immediate relatives of U.S. citizens from bar on adjustment due to unauthorized employment).

family-based visas, due to a relationship with a U.S. citizen or LPR.[192] The language in § 1255(k) that Justice Kagan cites does not affect this group. The provision that Justice Kagan flagged therefore did not have the structural implications for all TPS recipients that Justice Kagan claimed. At the very least, Justice Kagan should have mentioned that § 1255(k) only applied to the small group of employment visa applicants among TPS recipients.

While Justice Kagan's misapprehension on § 1255(k) was not material to the result in *Sanchez* because of the work done by other provisions that the Justice cited correctly, this near-miss underlined the risk of noise and error presented by the INA's complexity. The Court's recent divided decisions in statutory immigration cases amplify the need for constant diligence.

B. Divided Decisions and Unstable Methodology: A Disturbing Trend

If a unanimous Court in *Sanchez* sidestepped a structural miscue,[193] a divided Court in the 2020 decision, *Barton v. Barr*,[194] was not so fortunate. In *Barton*, Justice Kavanaugh wrote for the majority, which narrowed access to cancellation of removal, a vital avenue of relief from removal for LPRs convicted of crimes.[195] *Barton* held that LPRs were subject to grounds of inadmissibility in a provision extending relief to both LPRs and non-LPRs,[196] even though LPRs occupy the most-favored spot in the INA's framework and by definition do not face future inadmissibility determinations.[197] Elevating the role of crime-based inadmissibility grounds that are largely irrelevant to LPRs, the *Barton* Court's holding clashed with ordinary meaning. It also

192. *See* Maryellen Fullerton, *Justices Deny Green Cards to Noncitizens Granted Temporary Protected Status*, SCOTUSBLOG (June 7, 2021, 10:49 AM), https://www.scotusblog.com/2021/06/justices-deny-green-cards-to-noncitizens-granted-temporary-protected-status.

193. *Sanchez*, 141 S. Ct. at 1813 (asserting, mistakenly, that 8 U.S.C. § 1255(k) shows that § 1255 "imposes an admission requirement twice over"); *see supra* notes 188-90 and accompanying text.

194. 140 S. Ct. 1442 (2020). *Barton* was a 5-4 decision along liberal-conservative lines—a rarity in the cases addressed in this Article. *Id.* at 1445.

195. *Id.* at 1449-50.

196. 8 U.S.C. § 1229b(d)(1) (stopping the clock on noncitizens accruing continuous-residence time in United States that governs eligibility for relief from removal, upon commission of crime that "renders the alien inadmissible . . . or removable").

197. *Barton*, 140 S. Ct. at 1455, 1457-58 (Sotomayor, J., dissenting) (noting that inadmissibility grounds should be viewed as irrelevant to an LPR who remains in the United States—as opposed to an LPR who departs and then seeks to return—because an LPR in the United States "has already been admitted"; is free from official scrutiny based on the admissibility grounds; and therefore only needs to avoid committing an act such as a criminal offense that "renders [the LPR] . . . removable from the United States").

flouted the canon against superfluity by rendering "meaningless" a vital part of the relief provision.[198]

The overconfidence that breeds noise and error in expert judgment distorted *Barton*'s methodology, as well as the methodology in two other recent cases on cancellation of removal: *Niz-Chavez v. Garland*[199] and *Pereida v. Wilkinson*.[200] While Justice Kavanaugh in *Barton* failed to heed the warning about interpretive noise in his earlier review essay,[201] he wrote an insightful dissent in *Niz-Chavez v. Garland*[202]—another case on accruing time for relief from removal—detailing that decision's arbitrary expansion of notice requirements.[203] In *Niz-Chavez*, the textual analysis of Justice Gorsuch, who wrote for the Court, relied heavily on the placement of a single quotation mark in the statute—a seemingly random drafting detail that had not been raised by the parties, *amici*, or the court below.[204] Unfortunately, Justice Kavanaugh also joined in the majority opinion by Justice Gorsuch in *Pereida v. Wilkinson*,[205] another cancellation of removal case, in which the Court departed from its longtime approach to analyzing the immigration consequences of criminal offenses.[206]

Serious methodological flaws marred each of these decisions. Each decision pivoted too quickly from ordinary meaning, failed to properly parse statutory text, and failed to comprehensively analyze statutory structure. Two of the decisions—*Niz-Chavez* and *Pereida*—encouraged random results, divorced from the merits and unbriefed by the parties or *amici*. Each of these decisions upended the reasonable expectations of at least one of the parties. Both *Niz-Chavez* and *Pereida* inhibited the efficiency of immigration courts, which the Court has long viewed as a value integral to the INA's framework.

Moreover, while textualism cautions about facile imputations of legislative purpose,[207] each decision relied excessively on a framing device to anchor an explanation of the statute.[208] In *Barton*, for example,

198. *Id.* at 1458.
199. 141 S. Ct. 1474 (2021).
200. 141 S. Ct. 754 (2021).
201. *See* Kavanaugh, *supra* note 1, at 2152; *supra* text accompanying notes 168-70.
202. 141 S. Ct. at 1474.
203. *Id.* at 1488-93 (Kavanaugh, J., dissenting) (detailing the arbitrary expansion of the notice requirement).
204. *Id.* at 1490 (noting that the majority's concentration on quotation-mark location was a "novel basis" for decision).
205. 141 S. Ct. at 754.
206. *Id.* at 764-67 (finding that "aliens seeking to cancel a lawful removal order must prove that they have not been convicted of a disqualifying crime").
207. *See* SCALIA & GARNER, *supra* note 1, at 18-19.
208. *Cf.* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1304-05 (2020) (asserting that textualist Justices used linguistic canons to help delineated overarching conception of

Justice Kavanaugh described the relevant paragraph of the cancellation of removal provision as a "recidivist sentencing" measure, despite the absence of support in the text or legislative history for that theory.[209] These framing devices served to reinforce faulty first impressions and compound the problem of interpretive overconfidence. They functioned much like purposivists' formulations of legislative purpose, unmoored from whatever constraints legislative history imposes.

1. *Barton*'s Unwarranted Expansion of Inadmissibility Grounds to LPRs

In fairness to the Court, while *Sanchez* dealt with relatively straightforward provisions of the INA on adjustment of status, the noisy decisions discussed here deal with a far more knotty portion of the statute: the provisions governing relief for noncitizens called "cancellation of removal."[210] As the Court recognized in 2001 in *INS v. St. Cyr*,[211] noncitizens concerned about the devastating impact of removal on their families develop reliance interests on the availability of this important relief.[212]

a. The Statutory Backdrop: Removability and Cancellation of Removal

The longtime remedies that Congress shaped into today's cancellation of removal in IIRIRA are bifurcated: one avenue of relief applies to non-LPRs, while the other applies to LPRs.[213] For non-LPRs, the most common basis for removal is the lack of any legal status.[214] Moreover, as a matter of immigration gatekeeping, any foreign national, including those who present themselves at a port of entry for an initial arrival, is subject to the grounds of inadmissibility, which include not merely the absence of a visa but also the presence of a criminal record, communicable disease, evidence of dependence on government assistance, or national security or foreign policy concern.[215]

The gatekeeping function of the inadmissibility grounds extends further. Apart from LPRs, a foreign national already in the United States

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legislative purpose, which textualist Justices then used to assess plausibility of competing readings of statute).

209. Barton v. Barr, 140 S. Ct. 1442, 1449, 1451, 1453-454 (2020).

210. 8 U.S.C. § 1229b.

211. 533 U.S. 289 (2001).

212. *Id.* at 315.

213. *Compare* 8 U.S.C. § 1229b(b) (applying to non-LPRs), *with* § 1229b(a) (applying to LPRs).

214. *See* 8 U.S.C. § 1227(a)(1)(C)(i) (establishing lack of legal status as a basis for removal).

215. 8 U.S.C. § 1182.

remains subject to the grounds for inadmissibility if that noncitizen seeks any form of legal status.[216] For example, as noted above in discussing *Sanchez*, any foreign national, including one who has entered unlawfully and subsequently applies for TPS, is subject to an admissibility determination.[217] So are all noncitizens who apply for adjustment to LPR status.[218]

For LPRs, triggers for removal are quite different. In virtually all cases, LPR removability flows from commission of certain criminal offenses.[219] By definition, the removable non-LPR's core concern—lack of a visa—is not a problem for LPRs, who have immigrant visas. In general, once a noncitizen adjusts to LPR status, the INA's gatekeeping is complete.[220] For LPRs who are not convicted of a criminal offense, issues with inadmissibility are purely hypothetical, unless the LPR departs the United States and then seeks to return. At the point of return, the INA's gatekeeping function kicks in again.[221] The INA has special provisions that subject returning LPRs to certain inadmissibility grounds, including those based on a criminal record.[222] Apart from that instance, inadmissibility grounds were entirely irrelevant to LPRs, at least until *Barton v. Barr* made inadmissibility grounds relevant to LPR cancellation of relief.[223]

To temper the harshness of removal, the INA has long made relief from removal available, bifurcating that relief for LPRs and non-LPRs and treating the former group far more favorably. Compared to non-LPRs, who often lack a legal status, LPRs stand to lose a great deal more through removal, including loss of the ability to remain legally in the United States, work with authorization, sponsor family members for immigration, and acquire U.S. citizenship, with all of its attributes, including the right to vote.

For decades prior to the passage of IIRIRA in 1996, officials had provided relief from removal to LPRs under then-section 212(c) of the INA.[224] By its terms, section 212(c) applied only to noncitizens seeking to enter the United States.[225] However, long agency practice,

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216. 8 U.S.C. § 1255(a).

217. 8 U.S.C. § 1254a(c)(1)(A)(iii); Sanchez v. Mayorkas, 141 S. Ct. 1809, 1813 (2021).

218. 8 U.S.C. § 1255(a).

219. 8 U.S.C. § 1227(a)(2).

220. *But see* 8 U.S.C. § 1429 (establishing that gatekeeping resumes if the LPR eventually seeks to naturalize).

221. *See* 8 U.S.C. § 1101(a)(13)(C)(ii) (establishing that admissibility again becomes applicable if an LPR departs the United States).

222. 8 U.S.C. § 1182.

223. 140 S. Ct. 1442, 1453-54 (2020).

224. Judulang v. Holder, 565 U.S. 42, 47 (2011); Francis v. INS, 532 F.2d 268, 270-71 (2d Cir. 1976); Brief of Amici Curiae Immigration Law Professors in Support of Petitioner at 14, Barton v. Barr, 140 S. Ct. 1442 (2020) (No. 18-725).

225. *See Judulang*, 565 U.S. at 46.

acknowledged in judicial decisions, applied section 212(c) to both prospective entrants and longtime residents.[226] Immigration officials made 212(c) relief readily available; under that remedy, an LPR would generally be allowed to retain her LPR status after commission of a crime, except for certain especially serious offenses.[227]

In contrast, non-LPRs had to satisfy the far more demanding test of suspension of deportation under then-section 244(a) of the INA.[228] Suspension of deportation required a showing of "extreme hardship" if the noncitizen were deported to her country of origin.[229] This form of relief also had an onerous time requirement: the noncitizen had to have accrued seven years of continuous physical presence in the United States to show a stake in remaining in the country.[230]

In 1996, Congress maintained more favorable status for LPRs, but also combined the provisions for relief into one provision: 18 U.S.C. § 1229b (§ 240A of the INA).[231] While the new forms of relief, both now called "cancellation of removal," were each more restrictive than the earlier forms that applied to LPRs and non-LPRs, respectively, Congress still extended more favorable treatment to LPRs.[232] For example, LPRs could still apply for relief as a substantive matter, unless they had committed what the 1996 Act called an "aggravated felony," including "crimes of violence."[233] In terms of time, LPRs had to show that they had maintained continuous residence for seven years after admission in any status—immigrant or nonimmigrant—and that they had been LPRs for five years or more.[234] In contrast, non-LPRs now had to show "exceptional and extremely unusual hardship" to a spouse, parent, or child who is a U.S. citizen or LPR, "good moral character," and an absence of convictions for criminal offenses, including a category of offenses with an antiquated label, but substantial current impact: "crimes involving moral turpitude" ("CIMTs").[235]

Congress, in 1996, also added a new provision to cancellation of removal called the stop-time rule, which restricted the accrual of time in

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226. *Id.* at 47.
227. *Id.* at 48.
228. INS v. Jong Ha Wang, 450 U.S. 139, 140 n.1 (1981).
229. *Id.*
230. *Id.* at 140.
231. 8 U.S.C. § 1229b.
232. *Id.*
233. 8 U.S.C. § 1229b(a)(3) (listing "aggravated felony" disqualification); *see also* 8 U.S.C. § 1101(a)(43)(F) (including "crime of violence" in list of aggravated felonies, with a cross-reference to 18 U.S.C. § 16).
234. 8 U.S.C. § 1229b(a)(1)–(2).
235. *Id.* § 1229b(b)(1); *see also* 8 U.S.C. § 1182(a)(2)(A)(i)(I) (listing commission and admission of or conviction for crime involving moral turpitude as ground for inadmissibility); 8 U.S.C. § 1227(a)(2)(A)(i)(I) (listing crimes involving moral turpitude ("CIMTs") as basis for removal).

the United States for both LPR and non-LPR relief.[236] The stop-time rule is included in one key paragraph of the cancellation of removal provision, containing both procedural and substantive triggers that stop the clock for acquiring the requisite period of time in either "continuous residence"—for LPR relief—or "continuous physical presence"—for non-LPR relief.[237] I will address the procedural aspect of the stop-time rule, concerning notice to noncitizens of removal proceedings, later in this Part, in discussing *Niz-Chavez v. Garland*.[238] Here, the focus is on the substantive aspects of the rule, which the Court misconstrued in *Barton v. Barr*.[239]

b. *Barton*'s Misapprehension of Text, Structure, and Statutory History

Justice Kavanaugh's opinion for the Court in *Barton* misconstrued the stop-time rule's text, structure, and statutory history. While the text of the stop-time rule lends some support for Justice Kavanaugh's view, a careful look at the relevant cues leads to a different conclusion. Particularly on statutory structure, Justice Kavanaugh went astray, citing purported links with other portions of the INA that dissolve upon closer inspection.[240]

i. Text, Ordinary Meaning, and the Canon Against Superfluity

In *Barton*, the Supreme Court had to decide an important question about the stop-time rule: whether a 1996 conviction for aggravated assault would stop an LPR's accrual of continuous residence needed for cancellation of removal.[241] That 1996 conviction was concededly a CIMT under the inadmissibility grounds.[242] But it was not the basis (and

236. 8 U.S.C. § 1229b(d)(1).

237. *Id.*

238. 141 S. Ct. 1474 (2021); *see infra* Part IV.B.3.

239. 140 S. Ct. 1442 (2020); *see infra* Part IV.B.1.b.

240. *See Barton*, 140 S. Ct. at 1452 (comparing LPRs, who hold an immigrant visa, with non-immigrant TPS recipients and special agricultural workers).

241. *Id.* at 1447.

242. Jordan v. De George, 341 U.S. 223, 226 (1951). Courts have defined moral turpitude as denoting an offense that is especially base, vile, or depraved. *Id.* at 226-32 (holding in a case involving attempt to defraud the United States of tax revenue owed from the sale of liquor that the term was not void for vagueness). In particular, courts have looked to the state of mind that the offense requires and the gravity of harm that could result from the conduct that the statute prohibits. *See* Leal v. Holder, 771 F.3d 1140, 1146-47 (9th Cir. 2014). Offenses such as fraud involving the intent to deceive are almost always CIMTs. *Jordan*, 341 U.S. at 227-29, 232. CIMTs also include offenses that require specific intent to harm another person. *Leal*, 771 F.3d at 1146-47. As the state of mind that an offense requires declines to recklessness, courts generally require a greater level of actual or potential harm that is grave, imminent in time, and reasonably possible in probability. *Id.* The Supreme Court recently held that a statute used in both criminal and immigration law that

under the INA *could not* be the basis) for the LPR's removal.[243] The Court nonetheless held that such a nonqualifying conviction could trigger the stop-time rule.[244]

According to the stop-time rule's substantive subparagraph (B), a period of either continuous physical presence or continuous residence ends when the alien has

> [C]ommitted "an offense referred to in section 1182(a)(2) [listing inadmissibility grounds based on criminal conduct] . . . that *renders the alien inadmissible* to the United States under section 1182(a)(2) . . . *or removable* from the United States under 8 U.S.C. § 1227(a)(2) [listing removal grounds based on convictions for crimes]."[245]

At first blush, Justice Kavanaugh's opinion for the Court in *Barton* relied on a colorable reading of the text. Justice Kavanaugh viewed as dispositive the statutory language that appears to halt the accrual of time for an LPR's continuous residence when the alien has "committed an offense referred to in section 1182(a)(2) . . . that renders the alien inadmissible" to the United States under that section of the INA.[246]

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defined a "crime of violence" as an offense that "involves conduct that presents a serious potential risk of physical injury to another" was void for vagueness, spurring renewed speculation about whether the Court would revisit the issue of vagueness with CIMTs. *See* Sessions v. DiMaya, 138 S. Ct. 1204, 1210, 1212 (2018).

243. *Barton*, 140 S. Ct. at 1457-58 (Sotomayor, J., dissenting). The petitioner in *Barton* could not have been removed for the aggravated assault conviction because it occurred in 1996, more than five years after he was initially admitted to the United States on a visitor's visa, along with his mother. *Id.* At the time of his admission, Barton was approximately 12 years old. *See* Brief of Petitioner at 7-9, Barton v. Barr, 140 S. Ct. 1442 (2020) (No. 18-725). To be a removable offense, a CIMT must be committed within five years of the noncitizen's admission. *See* 8 U.S.C. § 1227(a)(2)(A)(i)(I). In Barton's case, the offenses of removal were a firearm offense and two drug offenses. *Barton*, 140 S. Ct. at 1445.

244. *Barton*, 140 S. Ct. at 1448, 1454. The majority's outcome and rationale were not outliers among the tribunals that considered the issue. For example, the Second Circuit took a similar view. *See* Heredia v. Sessions, 865 F.3d 60, 68, 71 (2d Cir. 2017) (finding for the government, based on what the court viewed as the "plain language of the statute"). So did three other Circuits and the Board of Immigration Appeals ("BIA"), the administrative tribunal within the Department of Justice's Executive Office for Immigration Review. *See In re* Jurado-Delgado, 24 I. & N. Dec. 29, 31 (B.I.A. 2006); *see also Barton*, 140 S. Ct. at 1448-50 (describing prior decisions on this issue). The Ninth Circuit's disagreement with that view prompted the grant of *certiorari* in *Barton*. *Id.* at 1448.

245. *Barton*, 140 S. Ct. at 1448 (citing and modifying quotation of 8 U.S.C. § 1229b(d)(1)(B)) (emphasis added).

246. *Barton*, 140 S. Ct. at 1449-50 (alteration in original) (citing and modifying quotation of 8 U.S.C. § 1229b(d)(1)(B) (asserting that the stop-time rule should be read to provide that, "[i]f during the initial 7-year period of residence, a lawful permanent resident committed certain . . . offenses referred to in § 1182(a)(2) [and was subsequently convicted of those offenses], then the noncitizen . . . is not eligible for cancellation of removal"). While this Article agrees with Justice Sotomayor's dissent that the majority opinion did not probe its first impressions with sufficient vigor, the majority provides evidence that Justice Kavanaugh sought to clear away impediments to impartial judging. For example, Justice Kavanaugh used the term, "noncitizen," eschewing the term, "alien," that many U.S. immigrants view as reflecting stereotypes. *Id.* at 1446 n.2. In addition, Justice Kavanaugh showed empathy—not hostility or indifference—in assessing

Moreover, the elements of aggravated assault include intent to inflict substantial bodily harm on another person, which clearly qualifies as a CIMT under the INA.[247] It is also clear that the inadmissibility grounds in section 1182 refer expressly to CIMTs.[248] Finally, there was no dispute that Barton committed those crimes during his first seven years of residence in the United States.[249] For Justice Kavanaugh, the four other Justices in the *Barton* majority, and the majority of circuit courts that had considered the issue, the inference from the stop-time rule's text was just that "straightforward."[250]

However, as Justice Sotomayor's insightful dissent demonstrated, a more comprehensive application of text, structure, and statutory history would yield a different answer. That more comprehensive approach indicates that Congress sought in the stop-time rule to preserve the longtime bifurcation of LPR and non-LPR relief.[251] Historically, the bifurcated approach extended more favorable treatment to LPRs because of what even Justice Kavanaugh conceded was the "wrenching" impact of loss of LPR status.[252]

The place to start is the text. On careful examination, the stop-time rule's second reference to inadmissibility grounds does not fit a current LPR, such as the petitioner in *Barton*. The rule alludes to an offense that "*renders the alien inadmissible* to the United States under section 1182(a)(2)."[253] That language does not fit LPRs, for whom the inadmissibility grounds' gatekeeping function was largely irrelevant prior to *Barton*. In contrast with the TPS recipient in *Sanchez*, an LPR by definition has *already* been both "admitted" and found "admissible" under section 1255. While, as *Sanchez* noted, admissibility's gatekeeping function applies to a *non*immigrant such as a tourist or student, who must be found admissible to become an LPR, gatekeeping is complete for an LPR when officials opened the gate as part of the adjustment-of-status process.[254]

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the petitioner's predicament. *See id*. at 1454 ("Removal of a lawful permanent resident from the United States is a wrenching process, especially in light of the consequences for family members . . . . Removal is particularly difficult when it involves someone, such as Barton, who has spent most of his life in the United States.").

247. Lovano v. Lynch, 846 F.3d 815, 817 (6th Cir. 2017).

248. *Barton*, 140 S. Ct. at 1450 (citing 8 U.S.C. § 1182(a)(2)(A)(i)).

249. *Id.*

250. *Id.*

251. *Id.* at 1455 (Sotomayor, J., dissenting).

252. *Id.* at 1454 (majority opinion).

253. 8 U.S.C. § 1229b(d)(1)(B) (emphasis added).

254. Sanchez v. Mayorkas, 141 S. Ct. 1809, 1814-15 (2021); *see Barton*, 140 S. Ct. at 1458 (Sotomayor, J., dissenting) ("A noncitizen who has already been admitted, and is not seeking readmission, cannot be charged with any ground of inadmissibility and thus cannot be deemed inadmissible.").

Prior to *Barton*, the irrelevance of inadmissibility to LPRs had only one exception: LPRs who depart the United States and then seek to return.[255] The paucity of exceptions and carefully crafted limits to the one clear pre-*Barton* exception reinforced the general rule: inadmissibility was largely irrelevant to LPRs. In all other pre-*Barton* instances, a current LPR's admissibility was purely hypothetical. Losing LPR status did not hinge on admissibility, but only on whether the noncitizen had triggered the precise grounds for *removal*—such as convictions for criminal offenses—mentioned later in the same sentence of the stop-time rule.[256] That is not an exotic argument that contorts the INA's text; rather, as Justice Sotomayor observed in her dissent, it is "basic immigration law."[257]

The linguistic canon against superfluity also weighs against the majority's reading.[258] Generally, a court interpreting a statute should presume that each term or phrase in the provision is there for a reason.[259] Congress does not practice wordsmithing for its own sake. If Congress included language in a statute, the language should generally serve a purpose in the statutory scheme. That presumption is even more compelling for one express item, factor, or cross-reference in a statutory list. Stray adjectives or articles may be present for emphasis.[260] It seems

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255. Even in this instance, the INA classifies the LPR as seeking a new admission only in limited situations. For example, an LPR has to have embarked on a protracted visit abroad of more than 180 days. 8 U.S.C. § 1101(a)(13)(C)(ii). In addition, the INA would treat the LPR as seeking a new admission if she had "engaged in illegal activity" during her trip abroad, 8 U.S.C. § 1101(a)(13)(C)(iii), or had previously committed an offense listed in 8 U.S.C. § 1182(a)(2). *See* 8 U.S.C. § 1101(a)(13)(C)(v); *see also* Vartelas v. Holder, 566 U.S. 257, 261, 275 (2012) (holding that 8 U.S.C. § 1101(a)(13)(C)(v) did not apply to offenses committed prior to enactment of this provision as part of IIRIRA); *see generally* Rosenberg v. Fleuti, 374 U.S. 449, 461 (1963) (holding that if an LPR engaged in an "innocent, casual, and brief" visit abroad, the return from that visit would not constitute a new admission.) Congress built on and modified the *Fleuti* standard in 8 U.S.C. § 1101(a)(13)(C).

256. 8 U.S.C. § 1229b(d)(1)(B) (referring to an offense that "renders the alien . . . *removable* from the United States under section 1227(a)(2)") (emphasis added).

257. *Barton*, 140 S. Ct. at 1457-58 (Sotomayor, J., dissenting).

258. *Id*. at 1458 (citing Corley v. United States, 556 U.S. 303, 314 (2009)).

259. *See* SCALIA & GARNER, *supra* note 1, at 174-79.

260. *See* Gluck & Bressman, *supra* note 110, at 934; Krishnakumar & Nourse, *supra* note 1, at 187 (discussing Gluck and Bressman's study). Leib and Brudney distinguish between two types of redundancy that courts should recognize. Leib & Brudney, *supra* note 110, at 741-43. One type is textual redundancy stemming from caution, which in a regulatory statute can entail listing overlapping words or concepts in a prophylactic way to convey that Congress is not implicitly excluding any or is recognizing well-established (albeit sometimes unnecessarily wordy) legal expressions. *Id.* (citing familiar multi-part legal phrases with overlapping meanings such as "cease and desist"); *see also* SCALIA & GARNER, *supra* note 1, at 179 (discussing routine legislative use of legal "synonyms or near-synonyms" such as "transfer, assign, convey, [or] alienate," expressly listed so that the subjects of the law cannot later argue that an assignment of property is appropriate, if the legislature has barred a transfer or conveyance of such property). Leib and Brudney also mention a legislature's *substantive* choice to require redundancy. *See* Leib & Brudney, *supra* note 110, at 743. For example, a legislature might expressly require that a manufacturer of items that can be hazardous, such as automotive vehicles, install two different kinds of sensors or warning

unlikely that Congress inadvertently included statutory tests that were irrelevant to the legislative framework. But the *Barton* Court consigned an important substantive element of the stop-time rule to irrelevance in just that way.

Consider the removability component of the stop-time rule, which halts the continuous residency clock "when the alien has committed an offense . . . that renders the alien . . . removable . . . under section 1227(a)(2)."[261] Under the majority's reading, the removability component is "meaningless."[262] In the majority's interpretation, the paragraph's proximate reference to "an offense . . . that renders the alien inadmissible" completely swallows up the removability criterion.[263] By definition, any "offense referred to" under § 1182's list of inadmissibility grounds also renders the alien "inadmissible" under that section, at least if the noncitizen has been convicted of the offense.[264] So there will *never* be an occasion, on the majority's reading, to consider when an offense "renders the alien . . . removable" under § 1227's list of grounds for removal. Sidelining one of three substantive clauses in the paragraph distorts the provision's meaning and import.[265]

In sum, based on the text of the stop-time rule and Congress's longtime policy choice to extend favorable treatment to LPRs, the Court should have treated the rule's admissibility and removability components as distinct requirements applying to two separate groups. That reading would have recognized the awkwardness of applying the provision's "renders . . . inadmissible" language to LPRs and would have avoided the surplusage spawned by sidelining the stop-time rule's "renders . . . removable" language. A better reading would have applied the admissibility component only to non-LPRs, who still face admissibility tests in a range of contexts. The removability component would apply to LPRs, for whom admissibility is largely irrelevant. But the majority, satisfied with its initial take on the statute, substituted faith in first impressions for a sustained examination of the statute's text.

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systems. *See id.* at 744-46. There, the legislature has made a safety judgment that one warning system may fail, so that requiring two provides greater protection for the public. Courts should *not* treat the express mention of one of the warning systems in the pair as a mere textual redundancy or figure of speech, such as "cease and desist." Instead, an agency issues a rule requiring both systems, but a manufacturer challenges the rule on the basis that the two systems overlap, a court should invoke the canon against superfluity, holding that Congress has required both warning systems for a substantive reason integral to the safety scheme in the legislation.

261. 8 U.S.C. § 1229b(d)(1)(B).

262. *Barton*, 140 S. Ct. at 1458 (Sotomayor, J., dissenting).

263. *Id.* at 1449-50 (majority opinion).

264. *Id.* at 1450.

265. *Id.* at 1461-62 (Sotomayor, J., dissenting) (explaining that majority was "excising . . . an entire clause").

ii. *Barton*'s Flawed Structural Arguments

To rebut this sensible reading, Justice Kavanaugh turned to structural features of the INA.[266] However, Justice Kavanaugh's structural analysis compared unlike cases that highlighted the flaws in his position. Justice Kavanaugh also relied on an unduly loose definition of immigration "status."

The majority in *Barton* asserted that Congress would not have blinked at subjecting LPRs to inadmissibility grounds outside of the "departure-and-return" setting—the only context where Congress expressly authorized application of inadmissibility grounds to LPRs.[267] To make this argument, Justice Kavanaugh cited several other examples from elsewhere in the INA in which certain noncitizens were subject to admissibility inquiries.[268] This comparison mixes apples and oranges.

To illustrate the structural mismatch between LPRs and the *Barton* majority's examples of noncitizens subject to inadmissibility, consider one group of noncitizens cited by Justice Kavanaugh and addressed by the Court during the 2020 Term in *Sanchez*: recipients of TPS.[269] The differences between these two groups are substantial, as *Sanchez* showed. LPRs are legal *permanent* residents who can generally remain in the United States unless they are convicted of criminal offenses that render them removable.[270] In contrast, TPS recipients are nonimmigrants, not immigrants.[271] They have a temporary, provisional status that executive branch officials can revoke when they conclude that the humanitarian rationale for a specific grant of TPS has run its course.[272] Upon revocation of TPS status, the government can remove

266. *Id.* at 1450-51 (majority opinion).
267. *See id.* at 1446, 1449; *see also id.* at 1458-59 (Sotomayor, J., dissenting).
268. *Id.* at 1451-52 (majority opinion).
269. *Id.* at 1452; Sanchez v. Mayorkas, 141 S. Ct. 1809, 1811 (2021).
270. *See Barton*, 140 S. Ct. at 1448.
271. *Sanchez*, 141 S. Ct. at 1813.
272. 8 U.S.C. § 1254a(b)(3)(B) (providing for termination of TPS designation when responsible official determines that a foreign country "no longer continues to meet the conditions for designation"). Courts have held that termination of a given TPS designation is subject to review under the Administrative Procedure Act. *See* Peter Margulies, *Rescinding Inclusion in the Administrative State: Adjudicating DACA, the Census, and the Military's Transgender Policy*, 71 FLA. L. REV. 1429, 1474-77 (2019). Indeed, citing administrative law, the Supreme Court has reviewed and invalidated the Trump administration's attempt to rescind the DACA program, which provided an immigration "benefit," not a status *per se*, since only Congress can establish an immigration status, and Congress had not expressly authorized DACA. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1905, 1910-12 (2020); *see also id.* at 1920 (Thomas, J., dissenting); Peter Margulies, *The DACA Case: Agencies' "Square Corners" and Reliance Interests in Immigration Law*, 2019–2020 CATO SUP. CT. REV. 127, 131, 146-48, 151-53 (2020). However, all of these decisions accepted that the executive branch had the power to terminate or rescind the programs at issue. *See, e.g.*, *Regents*, 140 S. Ct. at 1905 (majority opinion). In contrast, the executive branch cannot summarily revoke LPR status for any given individual or group. *See* Hiroshi Motomura, *The President's Discretion, Immigration Enforcement, and the Rule of Law*, AM. IMMIGR. COUNCIL (Aug. 26, 2014),

them, unless they currently have a clear path to some other legal status, meet all of the admissibility criteria, and initially made a lawful entry into the United States.[273]

Moreover, as Justice Sotomayor's dissent made clear, Congress expressly subjected TPS recipients and other nonimmigrants to admissibility requirements.[274] In contrast, LPRs have *already* been subject to admissibility requirements as part of the process of adjustment to LPR status.[275] Apart from the very limited departure-and-return scenario, pre-*Barton* no provision of the INA subjected LPRs to a repeat of any part of the admissibility process.[276] In sum, far from being the structural cognate of LPR status that the *Barton* majority claimed, the temporary and contingent nature of TPS makes it an infelicitous analogy that does not support the majority's argument.[277]

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https://www.americanimmigrationcouncil.org/research/president%E2%80%99s-discretion-immigration-enforcement-and-rule-law.

273. *Sanchez*, 141 S. Ct. at 1813-14 (discussing whether a TPS recipient who entered unlawfully was eligible for adjustment to LPR status, flagging the "disqualifying effect of an unlawful entry"; because of that unlawful entry, the TPS recipient could not fulfill the procedural requirement that she be "inspected and admitted" to the United States); *see supra* text accompanying notes 216-17 (discussing *Sanchez*).

274. 8 U.S.C. § 1254a(c)(1)(A)(iii); *Barton*, 140 S. Ct. at 1458-59 (Sotomayor, J., dissenting).

275. *Barton*, 140 S. Ct. at 1455.

276. *Id.* at 1458-59. Justice Kavanaugh further confused the issue by referring to inadmissibility as a "status" under the INA. *Id.* at 1452 (majority opinion). Inadmissibility is not a status in and of itself. Forms of status are bases for noncitizens to lawfully enter or remain in the United States. *See* Texas v. United States, 809 F.3d 134, 184 (5th Cir. 2015), *aff'd by an equally divided Court sub nom.* United States v. Texas 136 U.S. 2271 (2016) (noting that administrative benefits such as deferred action, which typically grant a reprieve from removal and eligibility for a work permit to certain noncitizens who would otherwise be removable, have served as "bridges" to a formal, legal status and provide for the lawful presence of noncitizens who "have never had a legal status and may never receive one"). Admissibility is a threshold criterion for most grants of status. TPS is a status under the INA; to obtain TPS, an applicant must be admissible or receive a waiver of any relevant grounds for inadmissibility. *See* 8 U.S.C. § 1254a(c)(1)(A)(iii), (2)(A). Lawful permanent residence is also a status, requiring a showing of admissibility as well as some basis for adjustment, such as a qualifying family or employment relationship. *Chapter 2 - Lawful Permanent Resident Admission for Naturalization*, USCIS, https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-2 (Mar. 23, 2022). However, while nonimmigrants and other noncitizens can "suffer certain immigration consequences" due to inadmissibility, including denial of adjustment, *Barton*, 140 S. Ct. at 1452, in no other context besides the contingent "depart-and-return" setting does the INA inflict adverse effects on LPRs due to inadmissibility. *Id.* at 1458-59 (Sotomayor, J., dissenting). Justice Kavanaugh's incomplete view of the INA's structure and his misapprehension of the meaning of "status" under the statute thus helped drive his inapposite comparison of LPRs with nonimmigrants such as TPS recipients.

277. *Barton*, 140 S. Ct. at 1458-59. The petitioner described the statutory requirement that TPS applicants show they are admissible as a process of "constructive admission" that Congress did not impose on LPRs, who have already shown that they are admissible. *Id*. at 1452 (majority opinion). Justice Kavanaugh referred to the phrase, "constructive admission," as a "ginned-up label." *Id.* This characterization was unfortunate. Admittedly, the phrase, "constructive admission," is awkward and insufficiently concrete. It shares that quality with other uses of the adjective "constructive" that have nonetheless worked their way into the legal lexicon, such as "constructive eviction" or "constructive discharge." That said, the phrase "constructive admission" reinforced that TPS recipients and other nonimmigrants seeking immigrant status are subject to both admissibility and lawful entry requirements, as *Sanchez* recently held, while LPRs typically are not (except for the departure and

Furthermore, as Justice Sotomayor's dissent explained, Justice Kavanaugh's effort to rationalize the surplusage and structural mismatch in the majority's interpretation smacked of the worst excesses of purposivism.[278] Justice Kavanaugh repeatedly described the stop-time rule as a "recidivist statute" that imposes consequences for repeated criminal activity.[279] However, as Justice Sotomayor noted, Justice Kavanaugh offered no support for this conclusion, either in the statute's text or in its legislative history.[280]

In this sense, the overconfidence displayed by Justice Kavanaugh in *Barton* embodies the worst of both worlds. Purposivists, whatever their sins, would scour legislative history before opining about statutory purpose.[281] In *Barton*, the only support for Justice Kavanaugh's "recidivist statute" theory was a strained extrapolation from legislative text.[282] That approach echoes the unduly casual ascription of purpose to Congress that textualists rightly condemn. It also lacks even the modest check that the search for legislative history provides in purposivist methodology. The lack of constraint provides fertile ground for error and noise.

2. *Pereida v. Wilkinson*: A Sudden Shift Disrupts Reliance Interests in Non-LPR Relief

If *Barton* was troubling because it breached the INA's longtime separation between LPR and non-LPR relief, another decision involving cancellation of removal, *Pereida v. Wilkinson*,[283] reflected similar overconfidence. *Pereida* involved the eligibility requirements for non-LPR cancellation of removal, which include a variant of the language that the *Barton* Court interpreted regarding LPR relief: to be eligible for non-LPR removal, a noncitizen must, *inter alia*, show that she "has not been convicted of an offense under section 1182(a)(2) [or]

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return exception). *Sanchez*, 141 S. Ct. at 1813-14. Articulating this distinction educated some members of the Court. *See Barton*, 140 S. Ct. at 1458-59 (Sotomayor, J., dissenting) (taking issue with the majority's "ginned-up" characterization of "constructive admission"). If the *Barton* majority had been less overconfident and more willing to grapple with the vulnerabilities in its position, that education could have been even more comprehensive. Referring to such education efforts as "ginned-up" merely highlights that the Court believes first impressions are an adequate substitute for a thorough understanding of the INA's inner workings.

278. *Barton*, 140 S. Ct. at 1461-62.

279. *Id.* at 1449, 1451, 1453 (majority opinion) (asserting that the stop-time rule "functions like a traditional recidivist sentencing statute").

280. *Id.* at 1460 (Sotomayor, J., dissenting). Congress knows how to prescribe adverse treatment for recidivism in the INA. *See, e.g.*, 8 U.S.C. § 1182(a)(2)(B) (rendering inadmissible any noncitizen who has "[m]ultiple criminal convictions," defined as a conviction of "[two] or more offenses").

281. *See* Krishnakumar & Nourse, *supra* note 1 at 169.

282. *Barton*, 140 S. Ct. at 1449-50 (majority opinion).

283. 141 S. Ct. 754 (2021).

1227(a)(2)[, the respective admissibility and removability grounds for criminal conduct]."[284] The relevant INA sections include offenses with an antique label that masks their ongoing relevance: "crime[s] involving moral turpitude."[285] *Pereida*'s holding is unexceptionable on its face but more troubling once one understands the statutory scheme: an applicant for non-LPR cancellation must show that her *particular conduct* did not entail a CIMT.[286]

Pereida is disruptive because in non-LPR relief, it sidelined the well-established categorical approach to defining offenses. The categorical approach defines an offense through its statutory elements, without the noise generated by the facts of particular defendants' acts.[287] To justify this shift, *Pereida*, a 6-3 decision in which Justice Gorsuch wrote for the Court, took an unduly broad view of the statutory language that shifts the burden of proof to the noncitizen on relief from removal.[288] With minimal briefing on the effects of such a move, Justice Gorsuch opened the door for IJs to consider every kind of evidence on the specific acts that prompted the noncitizen's conviction—a conviction that usually stems from a plea bargain.[289] *Pereida* thus ushered in random, inefficient litigation about past conduct and eroded noncitizens' reliance interests.

a. The Categorical Approach's Protection of Reliance Interests and Efficient Adjudication

The categorical approach has a "long pedigree."[290] It instills predictability in the criminal plea negotiation process and efficiency in subsequent immigration adjudication. To accomplish these goals, the categorical approach considers the elements of the offense, not the particular facts of the defendant's conduct.[291] That assessment of elements is a *legal* question, not a factual one.[292] As an example, take the

284. *Id.* at 758-59; 8 U.S.C. § 1229b(b)(1)(C).

285. 8 U.S.C. § 1182(a)(2)(A)(i)(I); 8 U.S.C. § 1227(a)(2)(A)(i)(I).

286. *Pereida*, 141 S. Ct. at 762-63.

287. *See* Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1567-68 (2017).

288. 8 U.S.C. § 1229a(c)(4)(A)(i) (providing that the noncitizen seeking relief has the burden of proof to show that she "satisfies the applicable eligibility requirements"); *Pereida*, 141 S. Ct. at 760-61 (discussing this provision).

289. *Pereida*, 141 S. Ct. at 775-76 (Breyer, J., dissenting).

290. *Id.* at 771; Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1720 (2011).

291. *See* United States *ex rel.* Mylius v. Uhl, 203 F. 152, 153-54 (S.D.N.Y. 1913); *see also* Das, *supra* note 290, at 1689-97.

292. *See* Descamps v. United States, 570 U.S. 254, 263 (2013). Some commentators have criticized the categorical approach because its focus on elements, not actual conduct, leads to dissimilar results for defendants who have engaged in comparable conduct. *See* Sheldon A. Evans, *Categorical Nonuniformity*, 120 COLUM. L. REV. 1771, 1792-94 (2020) (criticizing categorical approach for failing to require similar results for defendants whose conduct is virtually identical).

INA's provision that a noncitizen who has been convicted of a CIMT is removable.[293] While the musty phrase "moral turpitude" is not crystal clear, courts for over a century have read it as referring to the intent to harm another physically or through deception.[294] A CIMT would include a conviction for an offense that has as its necessary elements passing bad checks with the intent of deceiving another person for material gain.[295] Under the categorical approach, classifying an offense as a CIMT requires a finding that "the least of th[e] acts"[296] prohibited by the statute would entail either (1) intentional physical harm or deception causing financial harm, or (2) depraved indifference to creation of a condition that could cause grave and imminent harm.[297] If it is reasonably foreseeable that a prosecution under the provision could target conduct that failed to fit either of these tests, then the offense is *not* a CIMT under the categorical approach. Again, the elements of the offense are key; a court "must focus solely on the elements of the statute at issue and should generally refrain from consideration of the facts underlying the conviction."[298]

The categorical approach's spotlight on the elements of the offense removes noise and vindicates reliance interests. The noncitizen criminal defendant concerned about immigration consequences of a plea need not dwell on the minutiae of her case. Instead, the noncitizen defendant need only assess the elements of the underlying offense.[299] Since an IJ will only consider the latter issue in a subsequent removal proceeding, the constraints imposed by the categorical approach promote reasoned choices by noncitizen criminal defendants and protect expectations forged by those choices.

Moreover, the categorical approach markedly improves the efficiency and fairness of immigration courts.[300] In a removal proceeding in which immigration officials cited the noncitizen's offense of

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293. 8 U.S.C. § 1227(a)(2)(A)(i)(I).

294. *See* Altayar v. Barr, 947 F.3d 544, 552-54 (9th Cir. 2020). A conviction for aggravated assault, which under the relevant state statute entails "[i]ntentionally placing another person in reasonable apprehension of imminent physical injury while "us[ing] a deadly weapon or dangerous instrument," constitutes a CIMT. *Id.* at 547 (alteration in original) (citing 8 U.S.C. § 1227(a)(2)(A)(i)).

295. *See* Lovano v. Lynch, 846 F.3d 815, 817 (6th Cir. 2017).

296. Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1568 (2017) (alteration in original) (quoting Johnson v. United States, 559 U.S. 133, 137 (2010)).

297. Leal v. Holder, 771 F.3d 1140, 1146-47 (9th Cir. 2014).

298. *Lovano*, 846 F.3d at 818.

299. *Cf.* Padilla v. Kentucky, 559 U.S. 356, 366-68, 374 (2010) (discussing role of criminal defense lawyers in counseling noncitizen defendants on immigration consequences of plea bargain and holding that failure to provide such advice was ineffective assistance of counsel depriving the defendant of a fair trial in violation of the Sixth Amendment).

300. Pereida v. Wilkinson, 141 S. Ct. 754, 771 (2021) (Breyer, J., dissenting) (noting that, "[i]mmigration judges . . . have limited time and limited access to information about prior convictions").

conviction, the categorical approach yields a streamlined inquiry. The IJ need only determine whether, given its elements, as a matter of law the offense at issue triggers a removal ground.[301] Generally, the IJ need not consult any additional sources of information, whether that information or sources of data be further documentation about the particular offense, affidavits, or testimony by the noncitizen or other parties.[302] A turn toward detailed factfinding would inundate immigration courts, which already have a devastating backlog of 1.4 million cases.[303]

The need for further factfinding would introduce randomness and bias into the system. A noncitizen's fate might hang on a particular prosecutor's courtroom routine: noncitizens whose conduct was minor would benefit if a prosecutor put more information on the record in court and stored it properly. A noncitizen whose conduct was identical would be adversely affected by a prosecutor whose routine was more informal or evanescent.[304] A noncitizen who was represented by counsel in immigration court might be in a better position to locate witnesses if more elaborate proof was required by the IJ. Unfortunately, many noncitizens are "unrepresented, detained, or not fluent English speakers [who] . . . may not have the resources" to gather such materials.[305]

b. *Pereida* and the Modified Categorical Approach

A variant of the categorical approach, called the modified categorical approach, was at issue in *Pereida*.[306] The modified categorical approach applies in certain cases of statutory ambiguity, where the legislature has made the drafting choice within a section of the criminal code to include subsections that each appear to state a separate offense. Some of those offenses might have the elements of a CIMT, and some might not.[307] For example, in *Pereida*, the state statute included at least two subsections that involved deception for financial gain, while one subsection included a ringer: acting as a professional without a license.[308] In this situation, precedent permits the IJ to consider a narrow range of documents to discern the particular subsection that was the subject of the noncitizen's plea.[309] Those materials include the record of

301. *Id.* at 768-69.
302. *Id.* at 769-70.
303. *See* Tarini Parti & Michelle Hackman, *Biden Administration Proposes Asylum Overhaul to Reduce Backlog, Speed Deportations*, WALL ST. J. (Aug. 18, 2021, 1:31 PM), https://www.wsj.com/articles/biden-administration-proposes-asylum-overhaul-to-reduce-backlog-speed-deportations-11629307861.
304. *Pereida*, 141 S. Ct. at 776 (Breyer, J., dissenting).
305. *Id.*
306. *Id.* at 763 (majority opinion).
307. *Id.* at 762-63.
308. *Id.* at 759.
309. *Id.* at 763.

conviction: a transcript of the sworn plea colloquy between the noncitizen and the judge.[310]

In consulting sources such as the record of conviction under the modified categorical approach, a decisionmaker such as an IJ is not delving into the facts. Rather, the decisionmaker is resolving a question of law, as is always the case under the categorical approach.[311] If those materials are silent, then as a matter of law the court treats the entire statute as categorically not constituting a CIMT.[312] In *Pereida*, since the record was silent, precedent would have required the IJ to find that the entire section did not include CIMTs.[313]

c. *Pereida*'s Category Mistake on "Burden of Proof" and the Modified Categorical Approach

Responding to this argument from precedent, the majority misapprehended the scope and meaning of the INA's provision on applications for relief from removal. Justice Gorsuch observed that under the INA, the noncitizen seeking relief has the burden of proof to show that she "satisfies the applicable eligibility requirements."[314] According to Justice Gorsuch, the modified categorical approach therefore did not operate the way it usually did.[315] Instead of a court finding no CIMT as a matter of law due to the plea colloquy's unavailability or silence, the court should require the noncitizen to produce affirmative evidence that he pleaded guilty to a non-CIMT subsection of the statute. Justice Breyer, writing in dissent, noted that under the Court's precedents, the burden of proof theory was incompatible with the treatment of the categorical approach as posing a question of law.[316] It also vitiated reliance interests and discounted the

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310. *Id.*; *see* Mellouli v. Lynch, 135 S. Ct. 1980, 1986 n.4 (2015) (reinforcing that a court or IJ in using the modified categorical approach examines sources such as the plea colloquy between the judge and the defendant purely to determine as a matter of law whether the decisionmaker can treat a particular statutory section as divisible with respect to that defendant, but warning a court or IJ applying the modified categorical approach that "[o]ff limits to the adjudicator . . . is any inquiry into the particular facts of the case").

311. *Pereida*, 141 S. Ct. at 772-73 (Breyer, J., dissenting); *see also* Descamps v. United States, 570 U.S. 254, 263 (2013) (explaining that the modified categorical approach "merely helps implement the categorical approach . . . . The modified categorical approach thus acts not as an exception, but instead as a tool . . . . It retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime").

312. *Pereida*, 141 S. Ct. at 765-66 (majority opinion).

313. *Id.* at 772 (Breyer, J., dissenting).

314. 8 U.S.C. § 1229a(c)(4)(A)(i); *Pereida*, 141 S. Ct. at 760-61 (majority opinion) (discussing this provision).

315. *Pereida*, 141 S. Ct. at 763.

316. *Id.* at 773, 775 (Breyer, J., dissenting) (arguing that status of offense of conviction under both categorical and modified categorical approach was a "question solely of law"). Justice Breyer was joined by Justice Sotomayor and Justice Kagan. *Id.* at 767. Justice Barrett took no part in the

statutory commitment to avoiding arbitrary and inefficient litigation in immigration court.

Justice Gorsuch did not adequately acknowledge the "long pedigree" of the "question of law" approach and the reliance interests that a shift to a "proof of facts" approach would undermine. Based on the long pedigree of the categorical approach, non-LPR defendants who might consider a plea deal against the backdrop of non-LPR cancellation of removal might well have assumed that an unavailable or silent plea colloquy would work in their favor. In effect, the majority opinion played "gotcha" with those expectations.[317]

Justice Gorsuch was not content with upsetting these expectations; he also blamed the noncitizen for conforming to them.[318] At the hearing on his application for non-LPR cancellation, Pereida had declined to provide details about his own conduct that may have prompted his prosecution.[319] While Justice Gorsuch highlighted Pereida's refusal to testify at the removal hearing about his conviction,[320] the modified categorical approach in fact *precludes* such testimony and most other extrinsic evidence, because of the reliance and efficiency concerns discussed above.[321] Justice Gorsuch treated the submission of such evidence as integral to the noncitizen's discharge of his burden of proof, even though no party or *amicus curiae* had briefed whether an expanded menu of extrinsic evidence was permissible.[322]

There was also a substantial gap between the structural features that the majority opinion cited and the meaning that the majority ascribed to them. Consider the requirement that an applicant for admission show

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case. *Id.* at 754; *see also* Mellouli v. Lynch, 135 S. Ct. 1980, 1986-87 (2015) (discussing pedigree of categorical approach).

317. *Pereida*, 141 S. Ct. at 775 (Breyer, J., dissenting) (observing that the categorical approach "enables aliens 'to anticipate the immigration consequences of guilty pleas'") (quoting *Mellouli*, 135 S. Ct. at 1987). In contrast, Justice Breyer observed, the majority may "deprive some defendants of the benefits of their negotiated plea deals." *Id.* (quoting Descamps v. U.S., 570 U.S. 254, 271 (2013)).

318. *Id.* at 763 (majority opinion).

319. *Id.* at 760-61. The charging instrument, which as a matter of law is not dispositive under the modified categorical approach, accused Pereida of using a fraudulent social security card to obtain employment. *Id.* If the charges were true, Pereida's tendering of the fake social security card presumably occurred when the employer asked about Pereida's immigration status in order to comply with provisions of the INA requiring that the employer decline to hire a person who could not demonstrate that she had a work permit or other document that authorized her employment. *Id.*; *see* 8 U.S.C. § 1324a(b)(1)(C).

320. *Pereida*, 141 S. Ct. at 760 (recounting that at his removal hearing, Pereida "declined to offer any competing evidence of his own"); *id.* at 763 (observing that at his removal hearing, Pereida "refused to produce any evidence about his crime of conviction"); *id.* at 766 (remarking that Pereida "simply declined to insist on clarity in his state court records or supply further evidence"); *id.* at 767 (noting that Pereida "acknowledges none of this," referring to Pereida's supposed ability to provide the IJ with extensive evidence of the facts that may have led to his conviction).

321. *Id.* at 774 (Breyer, J., dissenting).

322. *See id.* at 775; *see also id.* at 760-61 (majority opinion).

"clearly and beyond doubt" that she is "entitled to be admitted and is not inadmissible."[323] Courts for *over a century* have interpreted this and similar provisions as being consistent with the categorical approach and the "question of law" model that the categorical approach adopts.[324]

Moreover, Justice Gorsuch's opinion also failed to fully acknowledge how the use of the categorical approach and the modified categorical approach improve the efficiency of immigration courts.[325] Justice Gorsuch unduly minimized the role of these concerns in sound interpretation of the INA provision at issue in the case.[326] Far from being a foray into "freewheeling judicial policymaking," as Justice Gorsuch claimed,[327] the Court has long viewed a reasonable regard for efficient immigration adjudication as implicit in the statutory scheme.[328]

Justice Gorsuch's dismissal of fairness was similarly unpersuasive.[329] Justice Gorsuch was correct that courts should not deploy some free-floating conception of fairness to eradicate harsh results that are hard-wired into the statutory scheme. However, fairness can also encompass a reduction in random outcomes. It is reasonable to infer that Congress sought to encourage sound adjudication, whether it be on the merits or on threshold issues such as eligibility. Yet for many noncitizens, the result in *Pereida* means reckoning with randomness, including foreign nationals unable to locate witnesses, retain counsel, or obtain documentation about charges that may never have been compiled in written form.[330] In the criminal justice system, arguably *Pereida* encouraged future vigilance by defense counsel, even as it undermined reliance interests in prior deals. But in immigration court, the challenge of obtaining counsel will combine with *Pereida*'s holding to make the immigration system even more arbitrary.

3. Overconfidence and Rigid Notice Requirements

The scourge of overconfidence also occurs in cases where the noncitizen prevails. Consider how overconfidence played out in another

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323. *Id.* at 761 (quoting 8 U.S.C. § 1229a(c)(2)(A)).

324. *See, e.g.*, United States *ex rel.* Mylius v. Uhl, 203 F. 152, 153-54 (S.D.N.Y. 1913).

325. *Pereida*, 141 S. Ct. at 775 (Breyer, J., dissenting).

326. *See id.* at 766 (majority opinion) (asserting that the Court was not free to choose "whatever outcome seems to us most congenial, efficient, or fair").

327. *Id.* at 766-67.

328. *See* Moncrieffe v. Holder, 569 U.S. 184, 200-01 (2013) (warning that "*post hoc* investigation into the facts of predicate offenses . . . [has been] long deemed undesirable" and that the categorical approach "serves 'practical' purposes"; for example, "[i]t promotes judicial and administrative efficiency by precluding the relitigation of past convictions in minitrials conducted long after the fact").

329. *Pereida*, 141 S. Ct. at 766.

330. *Moncrieffe*, 569 U.S. at 201 (citing Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 5-10 (2008)).

decision on non-LPR cancellation of removal in which Justice Gorsuch wrote for the Court: *Niz-Chavez v. Garland*.[331] There, the focus was on the procedural portion of the stop-time rule, which stops the clock when a noncitizen has received a "notice to appear."[332] In *Niz-Chavez*, the Court held that, at least for purposes of the stop-time rule, the "written notice" required by the rule had to be issued in *one document* that included both the charges against the noncitizen and the time and place of the initial hearing in the case.[333] If the government failed to include all such information in one document, the notice provided would not trigger the stop-time rule, and the noncitizen would continue to accrue time toward the ten years of continuous physical presence mandated under non-LPR cancellation.[334]

While *Niz-Chavez* at first blush seems like a reasonable reading of the statute, that initial impression is deceptive. More careful study reveals that it shares five attributes of the majority decision in *Pereida*: attachment to one view of statutory text without due consideration of alternatives; inattention to apt structural parallels; extended discussion of points without briefing; inattention to efficiency in immigration adjudication; and randomness in outcomes.

a. Statutory Background on Written Notice in Removal Proceedings and the Facts in *Niz-Chavez v. Garland*

As with the substantive portions of the stop-time rule that *Barton v. Barr* addressed,[335] the procedural portion of the stop-time rule aims to limit the accrual of time that makes noncitizens eligible for cancellation of removal.[336] While the substantive portion of the rule stops the clock when noncitizens commit certain criminal offenses, the procedural portion stops the clock when the government provides the noncitizen with appropriate notice of the start of removal proceedings.[337] The statute describes that notice as "a notice to appear."[338] Through a statutory cross-reference, the stop-time rule defines "notice to appear" as

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331. 141 S. Ct. 1474 (2021).

332. *Id.* at 1486; 8 U.S.C. § 1229b(d)(1)(A).

333. *Niz-Chavez*, 141 S. Ct. at 1486. The decision was 6-3; Justice Kavanaugh dissented in an opinion that Chief Justice Roberts and Justice Alito joined. *Id.* at 1478, 1486-47.

334. *See id.* at 1480-81.

335. *See supra* text accompanying notes 241-50.

336. Guaman-Yuqui v. Lynch, 786 F.3d 235, 239 (2d Cir. 2015) (per curiam) (describing "clear Congressional intention to discourage aliens from obstructing their immigration proceedings once notified that the government has initiated charges against them").

337. 8 U.S.C. § 1229b(d)(1)(A).

338. *Id.* Although the notice provision applies to the overall operation of the stop-time rule, in practice it is most relevant regarding non-LPR cancellation, since accrual of time for LPR relief will typically be cut short at an earlier point by commission of an offense mentioned in § 1229b(d)(1)(B). *Id.* § 1229b(d)(1)(B).

"written notice."[339] Such notice must include several facts, including charging data such as the "nature of the proceedings"[340] and the "acts or conduct" that triggered the proceeding,[341] and scheduling data: the "time and place" of the hearing.[342]

In *Niz-Chavez*, the government had followed a two-step process: first, Immigration and Customs Enforcement ("ICE"), part of the Department of Homeland Security ("DHS"), provided charging data.[343] Second, the immigration court, part of the Executive Office for Immigration Review of the Department of Justice, sent scheduling data two months later.[344] This was *not* a case where a year or more separated the noncitizen's receipt of charging information from her receipt of scheduling data.[345] The noncitizen duly appeared with his lawyer at the scheduled hearing, which was an initial "master calendar" hearing to set up the course of the proceedings.[346] In other words, there was no prejudice to the noncitizen; the IJ did not issue an *in absentia* removal order, since the noncitizen had attended the calendar hearing.[347] Several years later, the noncitizen had a merits hearing and asserted eligibility for non-LPR cancellation.[348]

If the date of the scheduling notice or even the date of the master calendar that the noncitizen attended with counsel stopped the accrual of time needed to establish continuous physical presence, the result would have been routine. The noncitizen would have been several years shy of the necessary ten years and would have been ineligible for non-LPR cancellation of removal.[349] However, the *Niz-Chavez* Court held that the scheduling notice did not trigger the stop-time rule because the scheduling notice omitted the charging information sent in the earlier notice.[350] Under *Niz-Chavez*, the government must send all information

339. *See id.* § 1229b(d)(1)(A) (referring to 8 U.S.C. § 1229(a)(1)).
340. 8 U.S.C. § 1229(a)(1)(A).
341. *Id.* § 1229(a)(1)(C).
342. *Id.* § 1229(a)(1)(G)(i).
343. *Niz-Chavez*, 141 S. Ct. at 1487 (Kavanaugh, J., dissenting).
344. *Id.*
345. *See id.*
346. *Id.*
347. *In absentia* removal orders are a substantial problem in immigration court. *See* Ingrid Eagly & Steven Shafer, *Measuring* In Absentia *Removal in Immigration Court*, 168 U. PA. L. REV. 817, 834 (2020). The high number of *in absentia* removal orders—a mean of over 15,000 annually—stems from a range of causes. *Id.* Noncitizens' failure to update address information—a statutory requirement—plays a role. *See, e.g.*, Popa v. Holder, 571 F.3d 890, 895 (9th Cir. 2009). In other cases, bureaucratic errors are at fault. *See* Eagly & Shafer, *supra*, at 850-52; *see also* Pereira v. Sessions, 138 S. Ct. 2105, 2112-14 (2018) (detailing bureaucratic problems in a case where a noncitizen did not receive full charging and scheduling information until after the elapsing of the ten-year period and holding that since only charging information was provided prior to the end of the ten-year period, the noncitizen was eligible for non-LPR relief).
348. *Niz-Chavez*, 141 S. Ct. at 1488 (Kavanaugh, J., dissenting).
349. *Id.* at 1487.
350. *Id.* at 1487-88.

in a single notice form.[351] Since the notice in Niz-Chavez's case was insufficient, Niz-Chavez was able to satisfy the time requirement for non-LPR cancellation.[352]

The difficulty with providing one-step notice stems from two issues: (1) ICE lassitude, which is remediable; and (2) complexity, lack of shared data, and extremely high volume in interagency communication between ICE and the immigration court, which is a much more intractable problem. The Supreme Court noted the first problem in *Pereira v. Sessions*,[353] in which the Court held, in an opinion by Justice Sotomayor, that a noncitizen's accrual of time continued despite the stop-time rule if the government provided charging information within the requisite ten-year period, but failed to provide scheduling information during this time.[354] In that case, ICE had sent charging information to a noncitizen, but delayed for a year sending that information to the immigration court.[355] The *Pereira* Court rightly regarded this slipshod approach to notice as inconsistent with the statutory scheme.[356]

While ICE has not fully remedied its problems, it has moved toward a more systematic approach. However, extremely high volume and antiquated filing systems vex communication with an independent agency: the immigration court. In the high-volume environment of immigration cases, ICE and the immigration court lack comprehensive access to the other agency's vast database.[357] ICE does not have ready access to the immigration court's docketing data.[358] Moreover, the immigration court's docket is voluminous and its backlog is long.[359] Typically, the immigration court schedules merits hearings at least three years after master calendar hearings.[360] Therefore, it may "not [be] feasible" for the immigration court to immediately schedule a hearing when ICE sends out a notice to appear.[361] A two-step process is the most efficient approach for the immigration adjudication system, much like the approach used in *Niz-Chavez*: first, ICE sends out charging information and, second, within a reasonable time—for example, sixty

351. *Id.* at 1486 (majority opinion).
352. *Id.*
353. 138 S. Ct. 2105 (2018).
354. *Id.* at 2110. Justice Alito dissented. *See id.* at 2121 (Alito, J., dissenting).
355. *Id.* at 2112 (majority opinion). In another notice snafu, once the immigration court received the charging information from ICE, it sent out a scheduling notice to the wrong address. *Id.*
356. *Id.* at 2115-16.
357. *See* Popa v. Holder, 571 F.3d 890, 896 (9th Cir. 2009).
358. *See id.*
359. Parti & Hackman, *supra* note 303.
360. *See Popa*, 571 F.3d at 896 (discussing the ability of the immigration court to exercise discretion in the scheduling of hearings after the issuance of a notice to appear).
361. *Id.*; *see* Patrick J. Glen & Alanna R. Kennedy, *The Strange and Unexpected Afterlife of* Pereira v. Sessions, 34 GEO. IMMIGR. L.J. 1, 22 (2019).

days—the immigration court sends out scheduling information.[362] The two-step approach provides accurate information to the noncitizen and accommodates the difficulties of high-volume communication between ICE and the immigration court.

Justice Gorsuch's opinion in *Niz-Chavez* failed to acknowledge the complex interactions between ICE and the immigration court and the difficulties posed by high volume and separate databases. Forsaking nuance, Justice Gorsuch recounted a stilted narrative of bureaucratic indifference, treating ICE and the immigration court as one entity called "the government."[363] That stylized view obscured the inefficiency and randomness that the *Niz-Chavez* majority set in motion. Randomness and noise echo through Justice Gorsuch's analysis of the procedural stop-time rule's text, to which we now turn.

b. *Niz-Chavez* and Statutory Text: The Surprising Power of Punctuation

Justice Gorsuch failed to recognize the ordinary meaning of the phrase "written notice" in the statutory definition that the stop-time rule cross-referenced.[364] The phrase "a 'notice to appear'" was the defined term.[365] But to understand that term, a court must consult the statutory definition.[366] The phrase "written notice" does not refer solely to a single document. Indeed, the phrase "written notice" conspicuously omits the indefinite article, "a." Here, the familiar textualist canon, *expressio unius*, has a role to play.[367] Congress imposed several requirements regarding the manner in which the government had to provide notice.[368] Notice had to be written, served personally or by mail, and provide a

362. *See* Niz-Chavez v. Garland, 141 S. Ct. 1474, 1487 (Kavanaugh, J., dissenting) (discussing procedure in *Niz-Chavez*, which led to the noncitizen's timely appearance). It would be useful to supplement a reasonable two-step notice procedure with more funds for legal representation of immigrants. *See* Eagly & Shafer, *supra* note 347, at 859, 861-62 (noting importance of legal representation for informing noncitizens of pending court dates and preparing clients appropriately). Although the Supreme Court held in *Niz-Chavez* that the procedural prong of the stop-time rule for relief from removal required one-step notice to stop accrual of time, courts have held that the use of a two-step procedure does not affect the jurisdiction of the immigration court over removal proceedings generally. *See* Banegas Gomez v. Barr, 922 F.3d 101, 111 (2d Cir. 2019).

363. *See generally Niz-Chavez*, 141 S. Ct. at 1478, 1491, 1498 (referring to the agency and immigration court collectively as "the Government").

364. 8 U.S.C. § 1229(a)(1); *cf. Niz-Chavez*, 141 S. Ct. at 1491 (commenting that "judges interpreting statutes should follow ordinary meaning, not literal meaning").

365. 8 U.S.C. § 1229(a)(1). *See* Brief for the Respondent at 3, Niz-Chavez v. Barr, 141 S. Ct. 1474 (2021) (No. 19-863).

366. *Niz-Chavez*, 141 S. Ct. at 1489.

367. *See* Sanchez v. Mayorkas, 141 S. Ct. 1809, 1814-15 (applying maxim). The full name for this maxim is *Expressio unius est exclusio alterius* ("expressing one thing excludes all others"). *See* SCALIA & GARNER, *supra* note 1, at 107-11 (describing *expressio unius* as the "negative-implication" canon).

368. *See* 8 U.S.C. § 1229(a)(1).

range of information, including charging and scheduling data; an advisory that the noncitizen had a right to counsel; and a mandate that the noncitizen provide the government with a current address and phone number.[369] Congress could have added to this list that the written notice envisioned had to be a single document. But Congress failed to do so, suggesting that the statutory framework did not call for this feature.[370]

Even if an aggressive statutory interpreter sought to parse the phrase "a 'notice to appear,'" that phrase would not ordinarily connote a single document. According to the Dictionary Act, the term "a" in a statute can refer to one thing or to a group.[371] In his insightful dissent, Justice Kavanaugh noted that in "ordinary parlance . . . the word 'a' is not a one-size-fits-all word."[372] Justice Kavanaugh provided examples from ordinary speech of items that a speaker conveyed in the singular, although each item could refer to a series.[373] For example, Justice Kavanaugh mentioned that an author sending a *manuscript* to a publisher could send the manuscript seriatim, one chapter at a time.[374] As Justice Kavanaugh mentioned, "Context is critical to determine the proper meaning of 'a' in a particular phrase."[375] But the majority had little to say about context in this sense.

The absence of context and ascent of randomness in *Niz-Chavez* is most clear at the core of the majority's interpretive approach: its stress on the placement of a *single quotation mark* in the cross-referenced statutory definition of "notice of appearance."[376] In the provision that the stop-time rule cross-referenced, Congress had required "written notice" of charging and scheduling information.[377] This provision added that in that definitional section, "written notice [was] . . . referred to as *a 'notice to appear.'*"[378] Punctuation is key: Congress placed the indefinite article, "a," *outside* the first quotation mark enclosing the phrase, "notice to appear."[379] According to Justice Gorsuch, placing the "a" outside the quotation marks surrounding "notice to appear" indicated that Congress wished to also use "a" to modify the definitional term, "written notice."[380] For Justice Gorsuch, the placement of "a" outside the single

369. *Id.*
370. *Niz-Chavez*, 141 S. Ct. at 1490 (Kavanaugh, J., dissenting).
371. *See* 1 U.S.C. § 1; *see also* Brief for the Respondent at 17, Niz-Chavez v. Barr, 141 S. Ct. 1474 (2021) (No. 19-863).
372. *Niz-Chavez*, 141 S. Ct. at 1491.
373. *Id.* at 1491-92.
374. *Id.* at 1492.
375. *Id.* at 1491.
376. *Id.* at 1480 (majority opinion).
377. 8 U.S.C. § 1229(a)(1).
378. *Id.* (emphasis added).
379. *Niz-Chavez*, 141 S. Ct. at 1480.
380. *Id.*

quotation mark meant that Congress had defined a "notice to appear" in the stop-time rule as "*a* written notice"—that is, a *single* "written notice" containing both charging and scheduling information.[381]

Justice Gorsuch conceded that in his analysis, "a lot turns on a small word" and the surrounding punctuation.[382] But his concession does not reduce the random results that such an approach engenders. Warning against such arbitrary moves, Scalia and Garner observed that "words are given meaning by their context."[383] The placement of a single quotation mark cannot obscure three points: (1) the indefinite article, "a," in or out of quotation marks, is not dispositive of meaning;[384] (2) even if the "a" were dispositive, Congress could have readily added another "a" before the term, "written notice," but failed to do so;[385] and (3) Supreme Court precedent expressly warns against attributing undue weight to the "deployment of quotation marks."[386]

Adding to the risk of error and noise, the *Niz-Chavez* majority's reliance on quotation-mark placement did not build on analyses by the parties, *amici*, or courts below.[387] Other players in the litigation process may miss key interpretive insights. But a new interpretive move unheralded by previous players may risk inconsistency, with little benefit for interpretive practice. The *Niz-Chavez* majority did not adequately reckon with these risks.

c. Misreading Structural Signals

Moreover, Justice Gorsuch's opinion misread or ignored important structural cues that suggested problems with its approach. Justice Gorsuch made much of a paragraph in the INA section containing guidance on "[n]otice to appear," in which Congress required that the government send "a written notice" to the noncitizen regarding any change in a previously scheduled hearing date or location.[388] But Justice Gorsuch's reference to the scheduling-change paragraph in the statute proves too much.

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381. *Id.* at 1481-83.

382. *Id.* at 1480.

383. SCALIA & GARNER, *supra* note 1, at 56.

384. *Niz-Chavez*, 141 S. Ct. at 1491 (Kavanaugh, J., dissenting).

385. *Id.* at 1490.

386. *Id.* (quoting U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 455 (1993)). The earlier case that Justice Kavanaugh cited warned that "a purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning." *Id.* (quoting *U.S. Nat'l Bank of Or.*, 508 U.S. at 454).

387. *Niz-Chavez*, 141 S. Ct. at 1490 (noting that the majority's focus on quotation-mark location is a "novel basis" for decision "not raised by Niz-Chavez, not advanced by any *amicus* brief, and not adopted by any lower courts").

388. *Id.* at 1483-84 (majority opinion) (citing 8 U.S.C. § 1229(a)(2)(A)).

For starters, Congress expressly included the indefinite article, "a," in this paragraph, although it omitted it in the paragraph on initial notice.[389] Second, it seems logical to require that officials notify the noncitizen of new scheduling information when they inform the noncitizen that old scheduling information on which the noncitizen had relied is no longer applicable. Third, and most revealing of the gap between the majority's narrative about the case and the complex bureaucratic reality, the immigration court—which stores docketing data—can readily provide new scheduling information, just as it can provide an initial hearing time and place. The sticking point in *Niz-Chavez* did not concern the immigration court; rather, it was about the difficulty of coordination in high-volume adjudication between the court and ICE and how that affected the ability of these agencies to collaborate in producing a single form containing *both* charging and scheduling information.[390]

In addition, as Justice Kavanaugh noted in his dissent, the majority's view clashed with another structural cue on notice: the INA's treatment in a neighboring provision of the interaction between "written notice" and a noncitizen's failure to appear.[391] That provision, which contemplates entry of an *in absentia* removal order if a noncitizen fails to show, simply refers to "written notice."[392] It thus lacks the indicia—weak though the indefinite article "a" and its accompanying quotation mark might be—that the majority flagged in requiring a single notice for purposes of the stop-time rule. As Justice Kavanaugh pointed out, it seems incongruous that Congress would require a single notice for stop-time purposes, while allowing a two-step process to suffice for the far more common issue of *in absentia* removals.[393]

d. Arbitrary Outcomes

The majority opinion in *Niz-Chavez* also set the stage for arbitrariness in outcomes. Those outcomes will not correlate with either the merits of particular cases or the prejudice to their interests that noncitizens experience in removal proceedings. After *Niz-Chavez*, a noncitizen applying for non-LPR relief can meet an important criterion of eligibility due to the government's sending of two notices over two months, instead of a single notice.[394] That favorable outcome can occur even if the noncitizen, like Niz-Chavez, was years away from meeting

389. *See* 8 U.S.C. § 1229(a)(2)(A).
390. *Niz-Chavez*, 141 S. Ct. at 1492-93 (Kavanaugh, J., dissenting).
391. *See id.* at 1491.
392. *Id.*
393. *See id.* at 1491-93.
394. *Id.* at 1486 (majority opinion).

the eligibility requirement when officials sent both charging and scheduling information and the noncitizen suffered no prejudice due to two-step notice.[395] In contrast, another noncitizen can be denied eligibility for non-LPR relief even though she received her notice when she was within days of establishing eligibility.

Niz-Chavez endorses such arbitrary results. Of course, any legal rule can create arbitrary results at the margins. But, because *Niz-Chavez* does not require a showing of prejudice by the noncitizen, arbitrariness of this kind is not merely at the margins—it is baked into the core of the holding. Such arbitrary results disserve Congress's effort to create a logical system of immigration adjudication.[396]

e. Poor Textualist Practice or Purposivism by Any Other Name?

Like both *Barton* and *Pereida*, the Court's decision in *Niz-Chavez* seemed driven by the kind of guiding narrative that purposivists propose when they argue based on legislative intent. In *Barton*, the guiding narrative was the Court's unsupported characterization of the substantive prong of the stop-time rule as a "recidivist sentencing statute."[397] *Pereida*'s story focused on an inapposite view of the burden of proof and stigmatized the noncitizen as an unwilling witness on the circumstances of his conviction, even though both the categorical and modified categorical approaches expressly barred the noncitizen's testimony about

395. *Id.* at 1487 (Kavanaugh, J., dissenting) (noting that Niz-Chavez "(i) received all the statutorily required information about his removal proceedings, including the time and place of the removal hearing; (ii) was not prejudiced in any way by receiving notice in two documents rather than one; and (iii) in fact appeared with counsel at his scheduled removal hearing").

396. The Court's decision will likely be of scant future help to noncitizens. ICE and the immigration court may respond by sending "placeholder" notices that will result in adjournments when the noncitizen appears. *Id.* at 1496. The adjournment will simply add another hearing date for the noncitizen to attend, to avoid receiving an *in absentia* removal order. That additional burden does not benefit noncitizens. Although Justice Gorsuch also cited to the statutory history of the notice provision, he exaggerated the import of the modest change that Congress made in 1996. Before IIRIRA required a "notice to appear" to start removal proceedings, Congress required a similar document called an "order to show cause." *Id.* at 1484 (majority opinion). Officials provided charging information in the order to show cause and could provide scheduling information in that document "or otherwise." *Id.* In this respect, there is more continuity than change between IIRIRA and earlier provisions. Pre-IIRIRA, the INA referred to the order to show cause as "written notice," just as the post-IIRIRA defined a "notice to appear" using that term. *Id.* at 1494 (Kavanaugh, J., dissenting) (citing 8 U.S.C. § 1252b(a)(1) (1994)). It is arguable that in omitting the "or otherwise" language in IIRIRA, Congress was trying to lend a measure of formality and predictability to a notice process that had been too haphazard. But the 1996 change to the requirement of "written notice" does not expressly bar the two-step notice that officials provided to Niz-Chavez. *Id.* Moreover, diligent application of a reasonable two-step process does not prejudice noncitizens—as Niz-Chavez's own case showed—and seems entirely consistent with IIRIRA's guidance.

397. Barton v. Barr, 140 S. Ct. 1442, 1449 (2020).

these matters.[398] The majority opinion in *Niz-Chavez* lambasted the excesses of bureaucracy.[399] It also described the two distinct agencies involved in providing notice—ICE and the immigration court—as one monolithic entity: the "government."[400] These guiding narratives generate more heat than light. Just as purposivists pursue the chimera of legislative intent, the Court's decisions elevate an overconfident narrative above the diligent inquiry into ordinary meaning, text, and structure that sound interpretation requires.

V. TEXTUAL STEWARDSHIP AS A REMEDY FOR OVERCONFIDENT INTERPRETATION

To combat error and noise, this Article proposes a new approach: textual stewardship.[401] This approach recognizes that the judicial branch is a "faithful agent" of Congress regarding statutory interpretation.[402] In discharging that role, textual stewardship encourages what one psychologist has called "actively open-minded thinking," defined as a cognitive calling to "actively search for information that *contradicts* . . . preexisting hypotheses."[403] Textual stewardship sequences the process of statutory construction to reduce overconfidence and the wide swings it prompts.[404]

A. The Approach Explained

As textual stewardship's first step, the court should consider the ordinary meaning of a term or phrase. This is more difficult than it sounds. Furthermore, a reflective pause at the ordinary meaning stage is vital. Too often in immigration cases, the Court encounters a phrase such as "renders . . . inadmissible,"[405] and acknowledges its meaning

398. Pereida v. Wilkinson, 141 S. Ct. 754, 763 (2021) (commenting that Pereida "refused to produce any evidence about his crime of conviction").

399. *Niz-Chavez*, 141 S. Ct. at 1485 (describing the world as "awash in forms"); *see id.* at 1478 (describing the government's "affinity for forms").

400. *Id.* at 1478.

401. *See infra* Parts V.A–B.

402. *See* Barrett, *supra* note 1, at 112-14.

403. KAHNEMAN ET AL., *supra* note 16, at 234 (emphasis added). I have used the stewardship concept in earlier work to describe the executive branch's discretion to assist U.S. resident noncitizens such as DACA recipients. *See* Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105, 167-71 (2014); Margulies, *supra* note 272, at 139. I have also described judicial review in immigration cases as a process of shared stewardship involving the courts, Congress, and the executive branch. *See* Peter Margulies, *Bans, Borders, and Sovereignty: Judicial Review of Immigration Law in the Trump Administration*, 2018 MICH. ST. L. REV. 1, 25-38 (2018).

404. *See infra* Part V.A.

405. 8 U.S.C. § 1229b(d)(1)(B).

grudgingly.[406] Overconfidence is the culprit: typically, the opinion's author is already fully invested in a contrary first impression that will drive the opinion down error's path.

We can even coin a term for the overconfident judge's maneuver: the ordinary-meaning two-step. Step 1 is a perfunctory nod; Step 2 is a summary dismissal. Justice Kavanaugh's opinion in *Barton v. Barr* provides a handy case study. In *Barton*, Justice Kavanaugh acknowledged that "common parlance" favored the petitioner's reading.[407] However, this acknowledgment was preceded by vigorous discussion of the flaws in the petitioner's interpretation.[408] Completing the ordinary-meaning two-step, Justice Kavanaugh—immediately after his acknowledgment of "common parlance"—cautioned, "[b]ut the [common parlance] argument fails because it disregards the statutory text."[409] Unfortunately, Justice Kavanaugh's second step was also a case study in overconfidence.[410]

A sequential approach would place a full stop after the acknowledgment of plain meaning. The ordinary-meaning two-step will become the stuff of history. Freed to investigate with an open mind, the judge would require heightened evidence that Congress had envisioned another, more specialized meaning.[411]

At this second stage, textual stewardship streamlines textualism's multifarious semantic and structural canons into two categories: textual economy and structural congruence. A court should weigh each application of linguistic canons in a particular case, since those canons—such as the canon disfavoring surplusage in legislative language—can conflict.[412] Textual economy asks whether a proposed interpretation will either render statutory language superfluous or require that a court infer

406. *See, e.g.*, Barton v. Barr, 140 S. Ct. 1442, 1451 (2020) (discussing 8 U.S.C. § 1229b(d)(1)(B)).

407. *Id.*

408. *See id.* at 1450-51 (purporting to identify "Achilles' heel" of petitioner's contentions).

409. *Id.* at 1451.

410. In his textual explanation, Justice Kavanaugh stated that the INA "employs the term 'inadmissibility' as a *status* that can result from" a noncitizen's commission of certain criminal offenses. *Id.* (emphasis added). But in the admittedly arcane vocabulary of the INA, inadmissibility is not a status at all; a status is a term of art denoting a legal basis under the statute for remaining in the United States. *See* Texas v. United States, 809 F.3d 134, 184 (5th Cir. 2015), *aff'd by an equally divided Court sub nom*. United States v. Texas 136 U.S. 2271 (2016). In contrast, inadmissibility is a basis for *denying* a noncitizen a legal status. *See, e.g.*, 8 U.S.C. § 1254a(c)(1)(A)(iii) (requiring that noncitizen be admissible to receive TPS).

411. In a recent case on the Computer Fraud and Abuse Act ("CFAA"), the Court handled the transition from ordinary meaning to statutory term of art in a careful way that echoes the approach this Article recommends. *See* Van Buren v. United States, 141 S. Ct. 1648, 1654-59 (2021) (interpreting the term "authorized access" under the CFAA).

412. *See* SCALIA & GARNER, *supra* note 1, at 174-79; Krishnakumar & Nourse, *supra* note 1, at 168-74 (discussing an "ordering problem" with canons of statutory interpretation); Baude & Sachs, *supra* note 34, at 1125-26 (expressing wariness about utility of canon against superfluity).

extra language that is not actually in the text.[413] Each opposing reading of a statute may create redundancy or hinge on language that is implied, not express. In such situations, textual economy will weigh the frequency and importance to the statutory scheme of each reading's results.[414]

Structural congruence involves a like calculus. It requires comprehensive assessment of structural parallels elsewhere in the INA to the provision at issue. Some analogies fit while others are inapposite. Too often, the overconfident interpreter will settle on the first parallel that suits her first impression of the case, without examining how that parallel lines up with the provision at bar. Structural congruence aims to remedy this tendency.[415] For example, in *Barton v. Barr*,[416] Justice Kavanaugh sought to analogize LPRs, who are typically not subject to inadmissibility grounds, to nonimmigrant special agricultural workers or recipients of TPS, who must show that they are admissible.[417] Neglecting these distinctions caused Justice Kavanaugh to describe petitioner's argument as "ginned-up."[418] Further investigation of the INA's admittedly daunting recesses might have prompted Justice Kavanaugh to reconsider both his structural analogies and his description of the petitioner's position. While opposing canons may still create "ties" in interpretive approaches, the more precise approach advanced here will often resolve those ties and combat overconfidence.

The final two features of textual stewardship depart more distinctly from textualist norms. In interpreting general statutory language, textual stewardship will consult legislative history.[419] But courts should not allow Congress to pawn off its responsibilities on courts by enacting text that manifestly means one thing and smuggling in another definition in a

413. *See supra* text accompanying note 39.

414. *See* VALERIE C. BRANNON, CONG. RSCH. SERV., RL7-5700, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 41 (2018) (stating that "courts frequently investigate how a statute actually works, asking what problem Congress sought to address by enacting the disputed provision, and how Congress went about doing that. As a result, courts have assessed whether the consequences of an asserted interpretation align with the statutory scheme.").

415. *See Barton*, 140 S. Ct. at 1452 (providing an example on how structural congruence aims to remedy the tendency of the overconfident interpreter).

416. *Id.* at 1442.

417. *Id.* at 1452.

418. *Id.*

419. *See infra* text accompanying notes 562-73 (discussing use of legislative history in determining whether a false representation of citizenship must be material to render the noncitizen inadmissible); *see also* Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266, 376-79 (2013) (noting that 1940s courts used legislative history, albeit with substantial caveats and critical perspective); Stuart Minor Benjamin & Kristen M. Renberg, *The Paradoxical Impact of Scalia's Campaign Against Legislative History*, 105 CORNELL L. REV. 1023, 1063, 1073 (2020) (reporting based on study that circuit court judges, whether appointed by a Republican or Democratic president, cited congressional committee reports, and that those appointed by a Republican actually cited committee reports at a higher rate).

committee report, as Congress did in the "psychopathic personality" inadmissibility ground that the Court interpreted in *Boutilier v. INS*.[420] Legislative maneuvers of that sort impair the public's ability to rely on statutory text as the "go-to source" for meaning. In addition, although textual stewardship is sparing in its use of substantive canons, it seeks to honor reliance interests in "crimmigration" cases through the rule of lenity and the presumption against retroactivity.[421]

B. Applying Textual Stewardship to Recent Decisions on Judicial Review and Mandatory Detention

Textual stewardship provides a fresh and critical perspective on developments in two important areas: judicial review and mandatory detention. *Nasrallah v. Barr* is a significant decision expanding judicial review of CAT denials.[422] *Johnson v. Guzman Chavez* is an important decision expanding mandatory detention.[423] Both deal with the definition of finality in orders of removal, with the 2019 Term's *Nasrallah*, in which Justice Kavanaugh wrote for the Court, presaging the 2020 Term's *Guzman Chavez*, in which Justice Alito wrote the majority opinion.[424] In a reflection of the noise that is never far from the surface in the Court's recent divided statutory immigration decisions, *Guzman Chavez*'s expansion of detention impairs the ability of noncitizens to make arguments on the merits—the ability that the Court sought to protect in *Nasrallah*.

1. *Nasrallah v. Barr*: The Strange Case of Undue Judicial Review

In *Nasrallah*, Justice Kavanaugh's analysis foundered at the ordinary meaning stage and then capsized in addressing the text and structure of § 1252 and provisions of the CAT.[425] The core problem for ordinary meaning, text, and structure is the INA's treatment of finality in agency adjudication. Finality actually has a double meaning under the INA and related agency practice: the first meaning addresses whether the

420. 387 U.S. 118, 121-23 (1967).

421. *See Rethinking Retroactive Deportation Laws and the Due Process Clause*, *supra* note 44, at 135-41; *Determining the Retroactive Effect of Laws Altering the Consequences of Criminal Convictions*, *supra* note 44, at 1750-55; Kanstroom, *supra* note 44, at 458-62; *see generally* Barrett, *supra* note 1, at 143-44, 153-55 (suggesting that canons closely related to specific constitutional principles are consistent with the judicial role in statutory interpretation, and that the reliance interests protected by the rule of lenity permit to choose one of two equally plausible readings, when that reading protects reliance interests).

422. 140 S. Ct. 1683, 1688 (2020) (expanding judicial review to encompass not only legal challenges to a CAT order but factual challenges).

423. 141 S. Ct. 2271, 2280 (2021).

424. *See id.* at 2284-85, 2287-88; *Nasrallah*, 141 S. Ct. at 1690-93.

425. *See* 140 S. Ct. at 1691, 1693.

officials have ruled that the noncitizen is inadmissible or removable, and the second addresses whether officials have legal authority to *physically* remove a noncitizen from the United States to another country—usually the noncitizen's country of origin.[426] The statutory term, "final order of removal," actually addresses both these senses of "final" and "removal."[427] That duality can create headaches for courts.

a. The CAT Claimant's Predicament

In *Nasrallah*, both the question of CAT relief and the definition of "final" and "removal" arose because in most cases, the INA limits review of agency decisions on LPRs who have committed criminal offenses that can make those noncitizens removable.[428] Review typically extends to "questions of law" but not to factual issues.[429] Nevertheless, after the Court's decision in *Guerrero-Lasprilla v. Barr*,[430] a CAT claimant would have substantial recourse even without review of factual findings, since *Guerrero-Lasprilla* construed "questions of law" broadly.[431]

b. The Ordinary Meaning of "Final Order of Removal"

The ordinary meaning of "final order of removal" would suggest that an order *denying* CAT relief fits that definition. In everyday conversation, issuance of a "final order of removal" would signal that there is nothing more to do prior to the government's physical transfer of the noncitizen from the United States to her country of origin. The primary meaning of "final" according to *Merriam-Webster* is "not to be altered or undone."[432] *Merriam-Webster* defines "removed" as "to change the location, position, station, or residence of"; for example,

426. *Id.* at 1691; *see Johnson*, 141 S. Ct. at 2281, 2285-86.

427. *Nasrallah*, 140 S. Ct. at 1691.

428. 8 U.S.C. § 1252(a)(2)(C).

429. 8 U.S.C. § 1252(a)(2)(D). In concentrating on *Nasrallah* because of its relationship to *Guzman Chavez*, this Article can only briefly discuss the one *correct* divided statutory immigration decision of the last two terms: Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062 (2020). In *Guerrero-Lasprilla*, a 7-2 case in which Justice Breyer wrote for the Court and Justice Thomas, joined by Justice Alito, dissented, the Court held that mixed questions of law and fact counted as "questions of law" under the INA, allowing judicial review. *Id.* at 1067, 1072-73. Justice Breyer cited the presumption favoring reviewability of agency action. *Id.* at 1069-70. But the text of the statute was probably sufficient on its own, since a key paragraph mentioned the "*application* of . . . statutory provisions" as one item suitable for judicial review. *Id.* at 1070 (alteration in original) (quoting 8 U.S.C. § 1252(b)(9)). That reference to "application" suggests a broad definition of "questions of law" that courts have jurisdiction to review. *See id.* at 1067, 1070.

430. *Id.* at 1062.

431. *Id.* at 1067, 1070.

432. *Final*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/final (last visited Jan. 15, 2022).

"remove soldiers to the front" in a war.[433] The INA uses "removal" in a distinct fashion, connoting a "change [in] . . . location" from one sovereign country—the United States—to another.[434] At some point the removal of a noncitizen entails the physical transfer that *Merriam-Webster* describes. Connecting the two dictionary definitions, ordinary meaning indicates that a "final order of removal" is an order by a court or agency that has the following two attributes: (1) upon issuance of the order, nothing can alter or undo it; and (2) the physical transfer of the noncitizen to another country.

The Court encountered difficulty with ordinary meaning in *Nasrallah*, although it failed to acknowledge that difficulty. Justice Kavanaugh referred to the underlying order issued *prior* to a decision on CAT relief—an order based solely on the noncitizen's underlying conviction for an offense that made him removable.[435] According to the majority, that was the final order of removal for purposes of judicial review.[436] That is true in a narrow, technical way, but it clashes with ordinary meaning and ultimately misreads the statute.

To see why ordinary meaning does not map onto the narrow view of a final order of removal advanced by Justice Kavanaugh in *Nasrallah*, consider again our ordinary definition of "final order of removal" as leaving nothing to be altered or undone before the noncitizen's physical transfer to another country. Both a request for CAT relief and a request for CAT relief's related remedy, withholding of removal, create at least *one more step* that officials need to take prior to physical transfer.[437] Moreover, if officials grant CAT relief, physical transfer will require even more steps, since the United States will have to use its diplomatic capital to persuade another country to accept the noncitizen—a country where the noncitizen will not run a risk of persecution or torture.[438] Indeed, in the overwhelming majority of cases, the noncitizen who receives CAT protection will remain in the United States under legal protection indefinitely.[439] At least as ordinary persons understand

433. *Remove*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/remove (last visited Jan. 15, 2022).

434. *Id.*; Nasrallah v. Barr, 140 S. Ct. 1683, 1687 (2020).

435. *Id.* at 1688.

436. *Id.* at 1691 (asserting that a CAT order "is not itself a final order of removal" and that CAT relief does not vitiate the validity of the underlying order based on the noncitizen's criminal convictions).

437. *Id.* at 1690-91.

438. Jama v. ICE, 543 U.S. 335, 337-38, 352 (2005) (upholding removal to Somalia without consent of Somali government).

439. *Nasrallah*, 140 S. Ct. at 1691 (noting that if officials grant CAT relief, "the noncitizen may not be removed to the designated country of removal, at least until conditions change in that country"); Johnson v. Guzman Chavez, 141 S. Ct. 2271, 2286 (2021) (acknowledging study that found that only 1.6% of noncitizens granted withholding of removal, a form of relief that closely resembles the CAT, were ultimately removed to another country).

language, the need for more steps prior to physical transfer and the virtual certainty that a successful CAT applicant will remain in the United States indefinitely would indicate that the order in such a case has been "undone" or at the very least, "altered." In other words, in ordinary parlance a pre-CAT order is hardly final.

c. No Term of Art: Textual Economy Tracks Ordinary Meaning

While ordinary meaning would recede under the textual stewardship approach if the statute were clear, here the INA's restrictive provisions on judicial review only create additional obstacles for the *Nasrallah* majority's analysis. But, as we shall see, the majority viewed these express obstacles as so much surplusage, barely worthy of the Court's attention.[440]

Those obstacles are significant. In the Foreign Affairs Reform and Restructuring Act ("FARRA"), Congress implemented the CAT with strict limits on judicial review.[441] Under FARRA, courts lack jurisdiction over CAT claims "*except* as part of the review of a final order of removal."[442] That would put the *Nasrallah* majority between a rock and a hard place: in one option, as Justice Thomas explained in his incisive dissent, the CAT claim was part of a final order involving an LPR who was removable on criminal grounds.[443] In that event, courts could review questions of law but not questions of fact.[444] Failing that, as Justice Thomas observed, the denial of CAT relief would not be reviewable *at all*.[445] There are simply no other choices under § 1252.

Justice Kavanaugh's response to this concern was unpersuasive. Rather than address the impact of FARRA's language barring judicial review of CAT claims "except as part of the review of a final order of removal," Justice Kavanaugh cited only part of FARRA's text.[446] His account omitted the "except" language that expressly limits review.[447] Justice Kavanaugh retained only a more anodyne version of FARRA's text, suggesting that a CAT order is subject to review "as part of the review of a final order of removal."[448] With the restrictive "except" language conveniently removed, the remaining text suggests a flexible brand of review that fits the majority's analysis: a court *could* review

440. *See Nasrallah*, 140 U.S. at 1683-98.
441. Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (1998).
442. *Id.* (emphasis added).
443. 140 S. Ct. at 1696 (Thomas, J., dissenting).
444. *Id.*
445. *Id.* at 1697.
446. *Id.* at 1691, 1695 (majority opinion).
447. *Id.*
448. *Id.*

CAT claims in connection with an order of removal, but could also review CAT claims in a legion of other settings that Congress did not bother to mention.[449]

In a stewardship approach, textual economy would push back, reading the text as confirming the ordinary meaning account described earlier. The majority's reading treated FARRA's restrictive "except" language as meaningless.[450] This treatment does not fully acknowledge the restrictive import of the text. Whatever the drafting virtues of occasional redundancy, it seems unlikely that Congress would include restrictive words such as "except" or "only" to limit access to a particular remedy but *actually* mean that this remedy was widely available. Yet, just as the majority in *Barton* relegated to surplusage the "rendered . . . removable" language in the stop-time rule,[451] the majority in *Nasrallah* relegated "except" to the large pile of inconvenient expressions in statutory text that courts are free to disregard.[452] In another demonstration of statutory interpretation as the worst of both worlds, this cavalier approach owes as much to purposivism as it does to textualism. *Nasrallah*'s free way with text merely lacks purposivism's passion for finding support in legislative history.

Stewardship would take a different tack. Having assessed textual economy, stewardship would stick with ordinary meaning. It would, therefore, have found that the courts lacked jurisdiction to review factual determinations in CAT claims by removable LPRs, and would have limited judicial review to the expanding category of legal questions.

2. Mandatory Detention and Textual Stewardship

Showing the ascent of error and noise, *Nasrallah*'s unduly stark distinction between an order of removal, and CAT relief that modifies removal, contributed to an equally misguided 2020 Term decision *for the government* on mandatory detention: *Johnson v. Guzman Chavez*.[453]

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449. *Id.* at 1691 (asserting that FARRA and § 1252 "simply establish that a CAT order *may* be reviewed together with the final order of removal") (emphasis added).

450. *See id.* at 1683-98.

451. *See* Barton v. Barr, 140 S. Ct. 1442, 1453 (2020); 8 U.S.C. § 1229b(d)(1)(B).

452. 140 S. Ct. at 1695 (Thomas, J., dissenting).

453. 141 S. Ct. 2271 (2021). Textual stewardship would reach the same result as the Court in the earlier mandatory detention case, Nielsen v. Preap, 139 S. Ct. 954 (2019). In *Preap*, the Supreme Court construed 8 U.S.C. § 1226(c)(1), which requires immigration detention "when the alien is released" from law enforcement custody based on conviction for a wide array of offenses that render the noncitizen—usually an LPR in such a case—removable. *Preap*, 139 S. Ct. at 960. Justice Alito, writing for the Court, found that the provision's "when . . . released" language did not require that the government *immediately* detain any noncitizen released from criminal custody. *Id.* at 965 (alteration in original). The noncitizen had argued that if the government did not immediately detain a removable LPR covered by this paragraph, the noncitizen would receive a bond hearing where detention would hinge on proof that particular person was a flight risk. *Id.* at 964. This interpretation would have tempered the INA's mandatory detention provision, which on a broader

In this case, Justice Alito construed 8 U.S.C. § 1231(a)(1)(B)(i), citing *Nasrallah* for the proposition that a removal order could be "administratively final" even when a noncitizen with a reinstated removal order still had a CAT or withholding claim pending.[454]

a. Reinstatement and Mandatory Detention

Guzman Chavez concerned withholding-only proceedings, in which a noncitizen has received an order of removal in the past, enters the United States again, and is arrested by immigration authorities.[455] To deter reentry, a provision of the INA requires reinstatement of the previous order of removal.[456] However, to contest removal to a particular country—typically the noncitizen's country of origin—the noncitizen may assert that return to that country would result in either torture or persecution.[457] At issue in *Guzman Chavez* was whether a noncitizen in withholding-only proceedings could seek bond or instead was subject to mandatory detention for ninety days and further confinement for a substantially longer period.[458] The statute would *require* detention and preclude a bond hearing if the reinstated removal order was "administratively final."[459] The Court held that the earlier order was administratively final within the meaning of the statute.[460]

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reading of "when . . . released" would require the detention of many noncitizens who had been convicted of minor crimes but were then released, sometimes with little or no prison time. *Id.* at 969 (alteration in original). The *Preap* majority rejected this argument. *Id.* at 964. In his opinion for the Court, Justice Alito correctly concluded that the text of the provision, the structure of the statute, and the policy driving its enactment meant that detention was mandatory for a noncitizen arrested *at any time after* release from criminal custody, including years later. *Id.* at 964, 966. In essence, Justice Alito noted, Congress drafted this paragraph believing that "an official's crucial duties are better carried out late than never." *Id.* at 967 (citation omitted); *cf. id.* at 973 (Kavanaugh, J., concurring) (observing that "[i]t would be odd . . . if the Act (1) mandated detention of particular noncitizens because the noncitizens posed such a serious risk of danger or flight that they *must* be detained during their removal proceedings, but (2) nonetheless allowed the noncitizens to remain free during their removal proceedings if the Executive Branch failed to *immediately* detain them upon their release from criminal custody."). In cases where such detention was manifestly arbitrary, the courts could entertain individual as-applied constitutional challenges to the statute. *Id.* at 972 (majority opinion). However, outside of that context, while the statute was harsh, its ordinary meaning was clear.

454. *Guzman Chavez*, 141 S. Ct. at 2288.

455. *Id.* at 2283.

456. 8 U.S.C. § 1231(a)(5).

457. *Id.* § 1231(b)(3)(A). While this subparagraph only mentions a showing of persecution, the noncitizen can also seek relief under the CAT. *See* Note following § 1231; 8 C.F.R. §§ 208.16–208.17 (2021); *Guzman Chavez*, 141 S. Ct. at 2282.

458. 141 S. Ct. at 2280, 2291.

459. 8 U.S.C. § 1231(a)(1)(B)(i).

460. *Guzman Chavez*, 141 S. Ct. at 2285.

b. The Ordinary Meaning of Administrative Finality

Under a textual stewardship approach, a court would first determine the ordinary meaning of "administratively final." Here, as Justice Breyer urged in his dissent, under the most "natural" reading, the phrase refers to a case in which "administrative proceedings are over."[461] For a noncitizen in withholding-only mode, administrative proceedings are not completed under the statute and the applicable regulations until the "immigration judge and the BIA finally determine whether the restriction [barring removal to a specific country based on a finding of likely persecution or torture] applies."[462] As described above, the dictionary definition of "final" reinforces this view.[463] A reinstated removal order can, as a matter of ordinary meaning, be "altered" if withholding bars actual removal to the most obvious country, such as the noncitizen's country of origin.[464] Indeed, as a practical matter, such an order can be "undone," since only 1.6% of noncitizens who prevail on withholding are in fact removed.[465] Under a textual stewardship approach, the fit between the definition propounded by the noncitizen and ordinary meaning would prompt a much more rigorous look at whether the opposing meaning urged by the government was a term of art.

Dissenting from an earlier decision in which the Court found that Congress had not abrogated the power of an appellate tribunal to order a stay of removal pending appeal, Justice Alito had agreed with the more common-sense view of finality in Justice Breyer's *Guzman Chavez* dissent.[466] In that earlier case, Justice Alito had expressly linked finality to the immediate ability of officials to implement the removal.[467] That ability was lacking in *Guzman Chavez* because of the noncitizen's pending CAT claim.[468]

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461. *Id.* at 2296 (Breyer, J., dissenting).
462. *Id.*
463. *See Final*, *supra* note 432; *see also supra* text accompanying note 432.
464. *See, e.g.*, *Guzman Chavez*, 141 S. Ct. at 2287-88.
465. *Id.* at 2286; *see id.* at 2295 (Breyer, J., dissenting).
466. *See* Nken v. Holder, 556 U.S. 418, 440 (2009) (Alito, J., dissenting).
467. *Id.* at 440.
468. See *id.* at 439-40 (contending that, "[o]nce an order of removal has become final, it may be executed at any time"); *see also id.* (citing regulation 8 CFR § 1241.33(a), which states that, "once an order of deportation becomes final, an alien shall be taken into custody and the order shall be executed"). Justice Alito's failure to adequately assess ordinary meaning extended to the "exception clause" in 8 U.S.C. § 1231(a)(1)(A). This clause qualifies the detention provisions elsewhere in § 1231. 8 U.S.C. § 1231(a)(2). The exception clause states that, "*[e]xcept as otherwise provided* in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the '*removal period*')." *Id.* at § 1231(a)(1)(A) (emphasis added). As Justice Breyer noted in his dissent, to avoid an awkward and, hence, implausible reading, a court should construe the exception clause as rendering both the "removal period" and all of its attendant consequences—including mandatory

In contrast, the ordinary meaning of § 1226(a)—the statutory provision that authorizes bond—fits the case more snugly. Under § 1226(a), a noncitizen "may be . . . detained pending a decision on whether the alien is to be removed from the United States." But government officials may "release the alien on . . . bond."[469] As noted earlier in our discussion of *Nasrallah*, the ordinary meaning of the phrase, "whether the alien is to be removed," looks *forward*—at what physical acts will occur.[470] For a noncitizen who seeks withholding-only relief, the INA is clear that such a physical transfer cannot occur until the agency has considered and rejected her application.[471] In this sense, the ordinary meaning of § 1226(a), which would permit the noncitizen to obtain bond pending agency resolution of the withholding application, fits well with the facts in *Guzman Chavez*.

c. The Practice of Textualism and Purposivism's New Clothes

Searching for a rationale for the mandatory detention at issue in *Guzman Chavez*, Justice Alito hypothesized about legislative intent in a free-floating manner.[472] That approach echoed Justice Gorsuch's musings in *Niz-Chavez* on the evils of bureaucratic forms or Justice Kavanaugh's unsupported characterization in *Barton* of the stop-time rule as a "recidivist sentencing statute."[473] Speculating about legislative purpose, Justice Alito mused that Congress might have been concerned that noncitizens with reinstated removal orders could be flight risks, given their history of failing to comply with immigration law.[474] While that argument has some merit, given Congress's focus on deterring violations of immigration law, Justice Alito cited no text or legislative history as support.[475]

Moreover, at least in the withholding-only context, Justice Alito's point was markedly overinclusive as an explanation for why Congress would impose mandatory detention. In arguing that Congress rejected even the *mere possibility* that a noncitizen in withholding-only proceedings could post bond and obtain her release, Justice Alito did not consider the extensive vetting that accompanies withholding-only claims and the statutory provision for imposition of conditions on bond to

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detention—inapplicable when the section so provided. *See Guzman Chavez*, 141 S. Ct. at 2296-97 (Breyer, J., dissenting).

469. 8 U.S.C. § 1226(a)(2)(A).

470. *See supra* Part V.B.1.b.

471. 8 U.S.C. § 1231(b)(3).

472. *See* 141 S. Ct. at 2290-91.

473. *See* Barton v. Barr, 140 S. Ct. 1442, 1449 (2020); *see also* Niz-Chavez v. Garland, 141 S. Ct. 1474, 1478 (2021).

474. *Guzman Chavez*, 141 S. Ct. at 2290.

475. *Id.*

ensure a noncitizen's appearance.[476] A textual stewardship approach would consider these countervailing features of the text and regulatory landscape.

Finally, as Justice Breyer noted, detention has a negative impact on a noncitizen's ability to present a case on the merits.[477] Detained noncitizens have reduced access to research tools and to lawyers.[478] In this sense, detention is a self-fulfilling prophecy: hampered in access to research and counsel, noncitizens cannot adequately develop their cases. This adverse impact shows both the noise in the connection between *Nasrallah* and *Guzman Chavez*, and the path dependence in judicial decision making. To find power to review facts that was not in the INA, the *Nasrallah* majority cited the difficulties faced by CAT claimants in assembling evidence.[479] Yet, *Guzman Chavez*, citing the stylized conception of finality advanced in *Nasrallah*, used that conception to impede noncitizens' engagement on the merits.[480] As the connection between *Nasrallah* and *Guzman Chavez* shows, at least on divided statutory immigration cases, noise and error are not outliers at the Supreme Court. Instead, they are the salient emblems of current adjudication.

Textual stewardship would adjust that signage and the flawed methodology that drives it. Too often in recent Terms, in statutory immigration cases the Court's textualist practice amounts to repurposed purposivism. A commitment to textual stewardship would right the balance.

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476. *See* 8 U.S.C. § 1226(a)(2)(A) (authorizing release on bond subject to "conditions prescribed by[] the Attorney General" or her designates); *see also Guzman Chavez*, 141 S. Ct. at 2294 (Breyer, J., dissenting) (citing 8 CFR § 208.31(c), (e) (2021)) (citing elaborate procedures established by officials to ascertain noncitizen's credible fear of persecution or torture); *see also id.* at 2295 (noting that at a bond hearing, an IJ will focus on whether the noncitizen is likely to abscond and will simply deny bond if the noncitizen is a flight risk). 8 U.S.C. § 1226(a)(2)(A) (providing for bond of at least $1,500 and "conditions" on granting of bond as officials deem appropriate).

477. *Guzman Chavez*, 141 S. Ct. at 2297 (Breyer, J., dissenting).

478. *Id.* at 2295 (citing Robert A. Katzmann, *When Legal Representation Is Deficient: The Challenge of Immigration Cases for the Courts*, J. AM. ACAD. ARTS & SCIS., Summer 2014, at 37, 43-44).

479. Nasrallah v. Barr, 140 S. Ct. 1683, 1693 (2020) (citing wide range of "critical" factual issues that CAT claimant must address, including "political or other current conditions" in claimant's country).

480. *Guzman Chavez*, 141 S. Ct. at 2288 (citing *Nasrallah* for the proposition that the "validity of removal orders is not affected by the grant of withholding-only relief," and that therefore, "initiation of withholding-only proceedings does not render non-final an otherwise 'administratively final' reinstated order of removal").

VI. APPLYING TEXTUAL STEWARDSHIP TO CURRENT ISSUES

This Part applies textual stewardship to three current issues under the INA.[481] It first considers whether a theft offense includes takings arising from fraud.[482] It then addresses judicial review in the context of factual findings that are predicates for adjustment of status and the hardship determination made in non-LPR cancellation of removal.[483] Finally, this Part turns to whether a false representation of citizenship in the inadmissibility grounds requires a showing of materiality.[484]

A. Theft and Consent

Textual stewardship sheds light on the appropriate contours of a "theft offense" under the INA.[485] A "theft offense" is an "aggravated felony" under the INA which spurs substantial consequences, including not merely the prospect of removal, but also mandatory detention and ineligibility for LPR cancellation of removal.[486] The central question here is whether the term, "theft offense," includes only forcible takings, or whether it also includes takings arising from fraud. Under a textual stewardship approach, only forcible takings should count as "theft" offenses.

As a foundation for what constitutes a "theft offense," we turn again to the "categorical approach" that we discussed regarding *Pereida v. Wilkinson*.[487] That approach focuses on the elements of a generic offense, and then compares the elements required under the offense of conviction. Remember that if elements of the offense of conviction differ from the elements of the generic offense, the offense of conviction is not a "match" under the categorical approach.[488] Therefore, the noncitizen is not removable on that basis. The individual facts of the noncitizen's criminal case play no role. The categorical approach furthers efficiency in immigration adjudication because it does not require relitigating the facts of criminal proceedings. In addition, the categorical approach preserves the reliance interests of noncitizens.

A generic theft offense has the following elements in its definition: "[T]he 'taking of property or an exercise of control over property *without consent* with the criminal intent to deprive the owner of rights

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481. *See infra* Part VI.
482. *See infra* Part VI.A.
483. *See infra* Part VI.B.
484. *See infra* Part VI.D.
485. 8 U.S.C. § 1101(a)(43)(G).
486. HILLEL R. SMITH, CONG. RSCH. SERV., R45151, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY 10, 12 (2021).
487. 141 S. Ct. 754, 762-64 (2021); *see supra* Part IV.B.2.
488. Lopez-Aguilar v. Barr, 948 F.3d 1143, 1146-47 (9th Cir. 2020).

and benefits of ownership, even if such deprivation is less than total or permanent.'"[489] Some courts, including the Fourth Circuit and Ninth Circuit, have concluded that to constitute theft, a taking must be nonconsensual.[490] On this view, a taking involving fraud or deception does not qualify as a theft offense, since the rightful owner of the property has provided assent, even though the perpetrator may have obtained that assent through trickery.[491]

That narrower definition of a theft offense has a vital benefit for noncitizens. While fraud is also an aggravated felony, the requirements for fraud to qualify as an aggravated felony are more demanding. Under the statute, to constitute an aggravated felony, a fraud must entail a loss to the victim of over $10,000.[492] A lesser fraud may well constitute a CIMT.[493] However, since fraud of that type is not an aggravated felony, it does not render the noncitizen ineligible for LPR cancellation of removal.[494] For thousands of noncitizens, that distinction makes all the difference.

Other courts have pushed back, asserting that a theft offense should include any taking in which consent is not knowing and intelligent, including those involving fraud.[495] Taking this view, the Third Circuit has cited the *Black's Law Dictionary* and Model Penal Code definitions of theft, which include a wide range of offenses where the victim has not given knowing and intelligent consent to a taking.[496] Those crimes include embezzlement, extortion, and fraud.[497]

Under a textual stewardship approach, the appropriate result would be requiring a nonconsensual taking for a theft offense. First, consider ordinary meaning. *Merriam-Webster* gives an initial definition of theft as a "taking and removing of personal property."[498] The term, "removing," strongly suggests a physical taking. The dictionary's second definition is broader; it refers to an "unlawful taking," including "embezzlement" or "burglary."[499] Particularly because the resolution of ambiguity is important to reliance interests, the primary definition should control.

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489. *Id.* at 1147 (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 189 (2007)); *see* United States *ex rel.* Mylius v. Uhl, 203 F. 152, 153 (S.D.N.Y. 1913).

490. Mena v. Lynch, 820 F.3d 114, 117 (4th Cir. 2016); *Lopez-Aguilar*, 948 F.3d at 1148.

491. *Mena*, 820 F.3d at 117-18; *Lopez-Aguilar*, 948 F.3d at 1148.

492. *See* 8 U.S.C. § 1101(a)(43)(M).

493. *See id.*

494. 8 U.S.C. § 1229b(a)(3); 8 U.S.C. § 1101(a)(43)(M).

495. K.A. v. Att'y Gen., 997 F.3d 99, 108 (3d Cir. 2021).

496. *Id.* at 107.

497. *Id.*

498. *Theft*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/theft (last visited Jan. 15, 2022).

499. *Id.*

If we look beyond ordinary meaning, the same outcome applies. Under principles of textual economy, theft should be limited to nonconsensual takings. In the subparagraph describing a theft offense, Congress included "receipt of stolen property."[500] The same subparagraph also mentions "burglary."[501] Congress could have mentioned other offenses but limited its terms to those just described. That hardly bespeaks an intent to cover a whole "family" of offenses, as the Third Circuit claimed.[502]

Structural congruence echoes this sentiment. The aggravated felony provision of the INA includes fraud.[503] However, as noted above, it circumscribes fraud, limiting it to individual conduct causing a loss of over $10,000.[504] The limits that Congress placed on fraud as an aggravated felony suggest that Congress planned to clearly demarcate the boundary between theft and fraud, not blur that line. Moreover, the fraud provision would be superfluous if any fraud qualified as a theft offense.

Finally, as mentioned above, reliance interests make a difference here. Under the rule of lenity, courts resolve ambiguity in favor of criminal defendants.[505] For noncitizens making plea deals with a mind to immigration consequences, the same principle should apply. To avoid such disruption of legitimate expectations, courts should limit theft offenses to nonconsensual takings.

B. Judicial Review of Factual Findings and Hardship Determinations

This section addresses questions of judicial review and their interaction with an INA provision that restricts the role of the courts.[506] We already encountered this provision in *Nasrallah v. Barr*.[507] Here, the questions concern both judicial review of facts and the scope of judicial power to review questions of law after *Guerrero-Lasprilla v. Barr*.[508] The factual question concerns whether an applicant for adjustment had falsely represented his citizenship status in the past and was thus inadmissible and ineligible for adjustment.[509] Under textual stewardship, federal courts lack jurisdiction to review such factual questions arising

500. 8 U.S.C. § 1101(a)(43)(G).
501. *Id.*
502. *See K.A.*, 997 F.3d at 106.
503. 8 U.S.C. § 1101(a)(43)(M).
504. *Id.*
505. Barrett, *supra* note 1, at 117-18.
506. *See* 8 U.S.C. § 1252.
507. 140 S. Ct. 1683, 1688 (2020).
508. *Id.*; 140 S. Ct. 1062, 1067-70 (2020).
509. Patel v. Att'y Gen., 971 F.3d 1258, 1263, 1265 (11th Cir. 2020) (en banc) (finding no jurisdiction to review factual finding), *cert. granted*, Patel v. Garland, 141 S. Ct. 2850 (2021).

from discretionary decisions under the INA, although the next section suggests that federal courts can review legal issues in such cases.[510]

The second issue concerns whether federal courts can review a determination by DHS that a noncitizen has not shown "exceptional and extremely unusual hardship" to a close citizen or LPR relative required under non-LPR cancellation of removal.[511] Because this decision is discretionary, under textual stewardship, no review based on the facts or the weighing of hardships is appropriate, although a court could consider legal issues about the types of hardships that the agency can consider.

1. Review of Factual Findings Necessary for Adjustment of Status

As the Supreme Court indicated in a unanimous decision in *Kucana v. Holder*, the central feature of both of the questions discussed in this subsection is the statutory commitment to agency discretion.[512] Review of discretionary decisions authorized by the INA would significantly disrupt immigration enforcement and involve the courts in matters not suitable for judicial resolution. Fortunately, we need not read precedent to require roiling enforcement and distorting the judicial role.

a. Background and the Parties' Positions

A brief outline of the facts in *Patel v. Attorney General*[513] will provide some flavor of why review of factual findings there would exceed the courts' province. Patel was a candidate for adjustment of status, based on his labor certification.[514] As we know from our earlier discussion of *Sanchez v. Mayorkas*,[515] to be eligible for adjustment Patel had to show that he had been inspected and admitted *and* that he was admissible.[516] The latter inquiry turned into a massive headache for Patel.

Inadmissibility includes a provision that we will address in the next Subpart; that provision makes a noncitizen inadmissible if she "falsely represents" her citizenship status "for any purpose or benefit" under the INA or any other federal or state law.[517] According to the government in Patel's removal proceeding, Patel had stated on a Georgia driver's

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510. *See infra* Part VI.C.

511. 8 U.S.C. § 1229b(b)(1)(D).

512. 8 U.S.C. § 1252(a)(2)(B); *see also* 558 U.S. 233, 245-46 (2010) (noting that restrictions on review in §§ 1252(a)(2)(A)–(C) cover "statutory provisions," not situations in which the agency has by rule selected matters for the exercise of its discretion).

513. 971 F.3d at 1258.

514. *Id.* at 1262-63.

515. 141 S. Ct. 1809 (2021).

516. *Id.* at 1811; *Patel*, 971 F.3d at 1263.

517. 8 U.S.C. § 1182(a)(6)(C)(ii)(I).

license application that he was a U.S. citizen, and had failed to provide his alien registration number, which the license bureau required of noncitizens.[518] Since obtaining a driver's license is clearly a "benefit" under the statute, the question was whether Patel had falsely represented his citizenship status, and if he had intentionally done so.[519] Patel asserted that he had in fact provided his alien registration or "A" number to the Georgia DMV, and that any failure to follow instructions on filling out the form was a mistake, at best.[520] The IJ in Patel's case disagreed, ruling that the license application featured a checked box for citizenship status, without any evidence that Patel had provided the DMV with information about his immigration situation.[521] After the BIA affirmed the IJ, Patel sought review in the Eleventh Circuit Court of Appeals.[522]

Interestingly, the Attorney General and Patel agreed on some features of his appeal.[523] The Attorney General asserted that a provision of the INA allowed some review of both law and facts.[524] This provision generally precludes review of "any judgment regarding the granting of relief" under the adjustment of status provision, as well as other provisions dealing with discretionary relief.[525] The government interpreted this clause narrowly.[526] According to the government, courts had jurisdiction to review factual findings regarding eligibility for adjustment of status, such as whether Patel had triggered the false-representation inadmissibility ground.[527] However, even if Patel met all of the eligibility requirements, officials still retained discretion to deny adjustment of status;[528] according to the Attorney General, the discretionary element of such decisions was not subject to review.[529] In response, the Eleventh Circuit held that the statute was clear that courts lacked jurisdiction to review factual decisions regarding adjustment of status.[530]

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518. *Patel*, 971 F.3d at 1263-64.
519. *Id.* at 1262-63.
520. *Id.* at 1263. In addition, Patel argued that even he had made a false representation, that representation was not material, since Georgia law does not bar all noncitizens from obtaining driver's licenses. *Id.* at 1263-64.
521. *Id.* at 1264.
522. *Id.* at 1264-65.
523. *Id.* at 1272.
524. *Id.* at 1278.
525. 8 U.S.C. § 1252(a)(2)(B)(i).
526. *Patel*, 971 F.3d at 1262.
527. *Id.*
528. 8 U.S.C. § 1255(a) (noting that the status of a noncitizen may be adjusted by the Attorney General in his discretion).
529. *Patel*, 971 F.3d at 1270.
530. *Id.* at 1271-76.

b. Ordinary Meaning and Textual Economy

The initial question here was one of ordinary meaning. As the Eleventh Circuit noted, "judgment" is a broad term that can apply to virtually any ruling by a court or tribunal.[531] While courts can dispose of legal questions through judgments, they can find facts in judgments, too. The term, "any," preceding the statutory term, "judgment," also connoted broad application—this was not merely some judgment or a few judgments; it was "any judgment." The same breadth applied to the term "regarding." A matter "regarding" an item is "related to" that item—in other settings, such as the duty of confidentiality, "relating to" is a broad category.[532] A similar reading should prevail here.

Textual economy provides another cue. Congress crafted this clause in painstaking fashion, inserting an itemized list that included adjustment of status, cancellation of removal, and other discretionary calls.[533] In addition, Congress provided a residual "catch-all" provision that limited judicial review of "any other decision or action" by executive branch officials that was "specified under this subchapter to be in the discretion" of those officials.[534] *Kucana* made clear that each part of § 1252(a)(2)(B) referred to decisions that the INA—not a government regulation—made discretionary.[535] Suppose the government was correct that only the discretionary component of decisions was insulated from review, while factual findings were reviewable. Clause (i) of subparagraph (B) would then be surplusage, since the catch-all provision in clause (ii) already insulates "any . . . decision or action . . . in the discretion" of government officials.[536] It seems incongruous that Congress would carefully craft the itemized list in clause (i) with the expectation that judicial interpretation would slough it off as mere superfluity. A more robust reading of clause (i) saves this clause from that fate. That may lead to some harsh results, although review of questions of law is still available under § 1252(a)(2)(D).[537] The key question is not whether results are harsh, but rather, whether a court is acting as a faithful agent of the Congress in interpreting the statute. If the answer is that the court is hewing to its agent role, textual stewardship would support the broader view of the restriction in clause (i). Justice Kavanaugh's opinion in *Nasrallah* supports this view, suggesting that

531. *Id.* at 1281.

532. *See* MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS'N 2021) (requiring that lawyers keep confidential any information "relating to the representation of a client").

533. 8 U.S.C. § 1252(a)(2)(B)(i).

534. Kucana v. Holder, 558 U.S. 233, 237, 239, 246-47 (2010) (citing 8 U.S.C. § 1252(a)(2)(B)(ii)).

535. *Id.* at 246-47.

536. *Patel*, 971 F.3d at 1272.

537. *See* U.S.C. § 1252(a)(2)(D).

courts lack jurisdiction over a "factual challenge" to discretionary decisions, such as adjustment of status.[538] In such cases, the exercise of discretion fulfills Congress's plan.

C. Review of Hardship Determinations in Non-LPR Cancellation of Removal

Under textual stewardship, the hardship determination made in non-LPR cancellation of removal is exactly the kind of discretionary decision that Congress wished to insulate.[539] In the wake of the Court's decision in *Guerrero-Lasprilla* holding that reviewable questions of law included mixed questions of law and fact, some courts have held that decisions about hardship are subject to judicial review.[540] However, that view upsets the balance that Congress struck.

1. Discretion's Ordinary Meaning

Under the textual stewardship approach recommended here, a court would first consider the ordinary meaning of the term, "discretionary." *Merriam-Webster* defines "discretionary" as "left to *individual* choice or judgment."[541] The weighing of incommensurate hardships or equities is discretionary in precisely that sense.

In making a hardship determination under non-LPR cancellation of removal, an immigration official will weigh personal, clinical, and educational attributes of the noncitizen's U.S. citizen or LPR spouse, parents, and children.[542] A decisionmaker will have to carefully consider hardships to a noncitizen's U.S. citizen or LPR family members prompted by either separation from the noncitizen or the need to relocate to the noncitizen's home country.[543] For example, a noncitizen might show that his two U.S. citizen children have significant disabilities or medical conditions for which services and treatment would be lacking in the noncitizen's country of origin.[544] In the course of that consideration, a decisionmaker must weigh whether such hardships meet the rigorous

538. *See* 140 S. Ct. 1683, 1694 (2020).

539. *See* 8 U.S.C. § 1229b(b)(1)(D) (requiring finding that removal would result in "exceptional and extremely unusual hardship" to a U.S. citizen or LPR).

540. *See Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1070-71 (2020); *see also* Gonzalez Galvan v. Garland, 6 F.4th 552, 555 (4th Cir. 2021); Cuauhtenango-Alvarado v. Att'y Gen., 855 Fed. Appx. 559, 560-61 (11th Cir. 2021).

541. *See Discretionary*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/discretionary (last visited Jan. 15, 2022) (emphasis added).

542. *See* Figueroa v. Mukasey, 543 F.3d 487, 491 (9th Cir. 2008) (analyzing the decision of an immigration official regarding hardships related to a child's medical, personal, and educational attributes).

543. *See, e.g.*, *id.* at 491.

544. *Id.*

statutory standard.[545] Such decisions involve complex and incommensurate weighing of factors, leading to a conclusion on whether the hardships alleged are markedly different in kind and degree from the hardships that attend *any* removal.[546] As Judge Bibas of the Third Circuit found in a recent decision, that weighing of factors constitutes the "quintessential discretionary judgment" that § 1252(a)(2)(B)(i) insulates from judicial review.[547]

The *manner* in which decisionmakers weigh such factors can raise "questions of law" that are reviewable under 8 U.S.C. § 1252(a)(2)(D).[548] For example, suppose that a decisionmaker decided that only "unconscionable" hardships were worthy of consideration.[549] Resort to that skewed standard would present a legal question appropriate for judicial review.[550] While open-minded consideration of the evidence must be the decisionmaker's guiding star, a decisionmaker who short-circuits that consideration with idiosyncratic tests unmoored to the statute would be exceeding the power that Congress has delegated to the executive branch. Moreover, courts can readily compare the artificially narrow constraints that the decisionmaker has imposed on her deliberations with the open consideration that the statute requires. In this fashion, as with motions to reopen, available review acts as a check on arbitrary executive action. But review of agency decisions on hardship that do not adopt such artificial constraints threatens to impinge on the discretion that the decision requires.

2. Text, Structure, and Discretion

Under the textual stewardship approach, judicial review of routine hardship determinations would also violate the textual economy norm. If review extended this far under § 1252(a)(2)(D), the insulation afforded by § 1252(a)(2)(B)(i) would shrink to a virtual "nullity."[551] Courts should not view legislative drafters as that heedless about their own time and effort.

Structural congruence tells the same tale. Consider the other types of relief specified in § 1252(a)(2)(B)(i). Relief under § 1182(h) is a

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545. *See id.* at 497; *see also* § 1229b(b)(1)(D).

546. *See, e.g.*, Cuauhtenango-Alvarado v. Att'y Gen., 855 Fed. Appx. 559, 559-61 (11th Cir. 2021).

547. Hernandez-Morales v. Att'y Gen., 977 F.3d 247, 249 (3d Cir. 2020) (quoting Mendez-Moranchel v. Ashcroft, 338 F.3d 176, 178-79 (3d Cir. 2003); *see also* Galeano-Romero v. Barr, 968 F.3d 1176, 1181-82 (10th Cir. 2020) (holding that hardship determination under non-LPR cancellation is discretionary).

548. *See* 8 U.S.C. § 1252(a)(2)(D).

549. *Figueroa*, 543 F.3d at 491-92.

550. *Id.* at 494-95.

551. *See Galeano-Romero*, 968 F.3d at 1183.

waiver of certain crime-based inadmissibility grounds that hinges, *inter alia*, on a showing of "extreme hardship" to a U.S. citizen or LPR spouse, parent, or child of a noncitizen.[552] The statute rests a grant of that waiver on the "discretion" of the Attorney General and his designates.[553] In grouping non-LPR cancellation together with § 1182(h) and other provisions requiring similar hardship determinations, Congress surely meant to convey the discretionary nature of each of these decisions. Courts should preserve that segment of the statute's latticework.

D. Materiality in False Representations of U.S. Citizenship

Textual stewardship also sheds light on whether the INA requires a showing of materiality to trigger the inadmissibility ground on false representations of U.S. citizenship.[554] To be inadmissible under this clause, a noncitizen must "falsely represent[]" herself to be a U.S. citizen "for any purpose or benefit" under the INA, "including [8 U.S.C. §] 1324a," or "any other Federal or State law."[555] Based on the text and structure of this and other sections of the INA, as well as the clause's legislative history, courts should require a showing of materiality. At the present time, however, courts must determine this legal issue on their own since the BIA's decision stating that view is too muddled to merit *Chevron* deference.[556]

1. Ordinary Meaning and the False-Representation Ground

The ordinary meaning of the statute favors this interpretation, although not without some ambiguity. Central to this inquiry is the work done by the word, "for" in "*for* any purpose or benefit." *Merriam-Webster*'s primary definition describes "for" as a "function word to indicate purpose, and the example given is, "a grant *for* studying medicine"; a secondary definition of "for" in describes it as a "function word to indicate suitability or fitness" and the example there is "ready

552. *See* 8 U.S.C. § 1182(h)(1)(B).

553. 8 U.S.C. § 1182(h); *see also id.* § 1182(i)(1) (directing that Attorney General, in her "discretion," may waive certain grounds of inadmissibility related to misrepresentations to immigration officials on a showing of "extreme hardship" to a noncitizen's citizen or LPR spouse or parent).

554. 8 U.S.C. § 1182(a)(6)(C)(ii)(I).

555. *Id.*

556. *See In re* Richmond, 26 I. & N. 779, 785-86 (B.I.A. 2016) (appearing to address materiality in course of discussing what counts as a "purpose or benefit" under the statute); Teye v. Att'y Gen., 740 Fed. Appx. 944, 949 (11th Cir. 2018) (O'Scannlain, J., concurring) (concluding that "[t]he BIA's [legal] conclusion [in *Richmond*] does not seem to follow from the statutory language it purports to interpret" in that section of the BIA decision and therefore does not merit *Chevron* deference).

for action."[557] The definitions and examples, taken together, suggest that the words connected by the "function word" "for" typically connote a means-ends relationship: the word preceding the connector, "for," will contribute materially to the realization of the word that follows the connector. Although in theory one could have an idiosyncratic or unfounded purpose "for" an act, item, or condition, such outliers are only marginally related to the definitions and examples given.

Consider more closely the example for the primary definition of "for": "a grant for studying medicine." The example indicates that a person or entity has provided funds to an applicant to fund the applicant's medical education. Without the means-ends relationship that materiality signals, the example ceases to make sense. Suppose an individual received a grant that was not formally linked to any particular purpose or set of requirements, such as the MacArthur Foundation's "genius grant."[558] Even if the recipient decided to attend medical school and used the grant to fund her education, we would not refer to the MacArthur funding as "a grant for studying medicine." The word "for" in this purposive sense implies some causal relationship between the words it connects.

The Supreme Court took a similar view of a differently worded statute in *Maslenjak v. United States*.[559] Interpreting a criminal statute that authorized prosecution of an individual who "knowingly procure[s], contrary to law, the naturalization of any person," the Court, in an opinion by Justice Kagan, held that the action or statement of the defendant had to be material to the grant of naturalization.[560] The statement would be material if a different action or statement would have caused a different result.

The statutory language in *Maslenjak* is clearer on this score than the language in the inadmissibility ground at issue. The term "procures" in the naturalization statute is more concrete than the faceless connector, "for," in the inadmissibility clause. Nevertheless, the ordinary language definitions for the two are not that far apart, given the reasonable inference that the purpose connoted by "for" is reasonable, not marginal. If a purpose must be reasonable, then ordinary language supports the requirement of materiality here, as it did in *Maslenjak*.[561]

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557. *For*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/for (last visited Jan. 15, 2022).

558. About MacArthur Fellows Program, MACARTHUR FOUND., https://www.macfound.org/programs/fellows/strategy (last visited Jan. 15, 2022).

559. 137 S. Ct. 1918 (2017).

560. *Id*. at 1922-925 (interpreting 18 U.S.C. § 1425(a) to require that an act charged under the statute be in "some kind of means-end relation" to naturalization and thus "somehow contributed to the obtaining of citizenship").

561. *Id.* at 1924.

2. Explaining the Text of the False-Representation Provision: A Cautious Return to Legislative History

Recourse to text and structure—here joined by legislative history—is useful because the largely grammatical, connective role played by the word "for" makes ordinary meaning less than fully dispositive. Textual economy has arguments on both sides, although the argument for requiring materiality is stronger. To engage in the comparative, probabilistic analysis that textual stewardship entails, first consider that Congress did not expressly impose a materiality requirement here, although it could have done so. Indeed, to bring in the question of statutory structure, a court should note that a neighboring provision includes an express materiality test, finding inadmissible any noncitizen who, "by fraud or willfully misrepresenting a material fact, seeks to procure . . . admission into the United States."[562] That structural issue requires further attention later in this discussion. But the mere absence of an express materiality requirement should not in itself be fatal; after all, the naturalization statute in *Maslenjak* was also silent on that score.

The second textual point with opposing arguments deals with the canon against superfluity. On the one hand, a materiality requirement would make much of the first part of the false-representation redundant. In light of the immediately preceding ground, which already bars material representations "to procure" a "benefit" under the INA,[563] barring material misstatements of citizenship status "for any purpose or benefit" under the INA seems redundant.

The best response—which also includes a look at legislative history—focuses on the single example of a "benefit under this Act" provided in the provision: the employer sanctions provision, 8 U.S.C. § 1324a. Understanding this cross-reference requires assistance from legislative history to rescue the reference itself from meaninglessness. On its face, the cross-reference is odd, because § 1324a—while it imposes substantial duties on employers to ensure that they only hire either U.S. citizens or noncitizens authorized to work—imposes *no* duties on applicants for employment.[564] Section 1324a requires employers to verify the documents presented by job applicants.[565] It also prescribes procedures for enforcing this requirement and imposing

562. 8 U.S.C. § 1182(a)(6)(C)(i).
563. *Id.*
564. 8 U.S.C. § 1324a(a)(1).
565. *See, e.g.*, 8 U.S.C. § 1324a(b)(1)(B) (listing documents that employers can accept as evidence that a job applicant is authorized to work).

penalties on employers who fail to comply.[566] However, § 1324a does not establish procedures or penalties for employment *applicants*.[567]

As of 1996, when Congress enacted the false-representation inadmissibility ground, the absence of penalties for job applicants created a gap. Suppose a noncitizen job applicant submitted a document to an employer that falsely portrayed that individual as a U.S. citizen. This would clearly be a material misrepresentation: employers are free to hire U.S. citizens without incurring sanctions.[568] But immigration law as it stood then did not address that issue. Wyoming Senator Alan Simpson, long a leader on immigration issues, resolved to address the anomaly.[569] Accordingly, Simpson sponsored an amendment making false representation of citizenship in the employment process or in other settings a ground for inadmissibility.[570] According to Simpson, adding this provision created a "major new disincentive for falsely claiming U.S. citizenship."[571] Expanding on this rationale, Senator Simpson envisioned that, under the amendment, noncitizens who unlawfully entered the U.S. "would . . . know that if they falsely claimed to be citizens and were caught, they could be deported and permanently barred."[572] That knowledge would harmonize with Congress's plan: ensuring that foreign nationals considering unlawful entry were "deterred from seeking jobs in the United States."[573]

Simpson's successful argument for adding the false-representation provision also explains why a materiality requirement would not render redundant the first part of the provision, dealing with "any purpose or benefit under" the INA. While the immediately preceding provision bars material misrepresentation to obtain an INA "benefit," merely getting a job is not an INA "benefit" in that sense. Simpson's amendment, with its reference to § 1324a, was an attempt to fill this gap by creating an immigration "disincentive" through inadmissibility. The false-representation provision is not limited to the job application setting. But it is reasonable to construe it as covering any situation in which documentation of citizenship would contribute to receiving a benefit or achieving a purpose. Indeed, without this understanding, the provision's reference to § 1324a would itself be superfluous.

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566. 8 U.S.C. § 1324a(e).

567. *See generally* 8 U.S.C. § 1324a (lacking procedures or penalties for employment applicants).

568. *See* 8 U.S.C. § 1324a(b)(1)(B)(i) (authorizing employers to treat U.S. passport as proof of employment authorization).

569. 142 CONG. REC. S4018 (daily ed. Apr. 24, 1996).

570. *Id.*

571. *Id.*

572. *Id.*

573. *Id.*

3. The False-Representation Provision and Statutory Structure

Taking a page from Justice Scalia's opinion for the Court in *Kungys v. United States*,[574] we can also see that clues from structure favor requiring materiality. The counter-argument flags the immediately preceding provision, which expressly requires materiality and so arguably highlights materiality's absence in the false-representation clause.[575] But that is just the opening salvo on the structural front. Justice Scalia's analysis in *Kungys* turned on the function of the provision at issue: whether the provision addressed the requirement of good moral character or was essentially regulatory, focused on deterring undesirable activity.[576] Justice Scalia viewed good moral character as expressly linked to a provision elsewhere in the INA that penalized giving "false testimony for the purpose of obtaining any benefits" under the Act.[577] Giving false testimony under oath would indicate lack of good moral character, Justice Scalia explained, whether or not the false claims were material.[578]

Justice Scalia drew a different conclusion about provisions barring misrepresentation, which he viewed as regulatory in character.[579] As Justice Scalia noted, when a statute mentions misrepresentation but does not expressly include a materiality element, courts often infer it.[580] While the false representation provision does not use the term, "misrepresentation," it appears in a subparagraph with the heading, "Misrepresentation,"[581] and in the paragraph entitled "Illegal entrants and immigration violators."[582] That grouping seems focused on deterrence, not moral character. Other individuals covered include those noncitizens who fail to appear at a removal hearing;[583] stowaways;[584] smugglers;[585] and abusers of student visas.[586] In each of those cases, Congress has sought to identify and deter conduct that undermines the immigration system. Reading the false-representation provision in harmony with those other provisions, it seems logical to infer that the

574. 485 U.S. 759 (1988).
575. 8 U.S.C. § 1182(a)(6)(C)(i).
576. *Kungys*, 485 U.S. at 781-82.
577. *Id.* at 765 n.3, 782 (citing 8 U.S.C. § 1101(f)(6)).
578. *Id.* at 779-80.
579. *See id.* at 771-72.
580. *Id.* at 770.
581. 8 U.S.C. § 1182(a)(6)(C).
582. *Id.* § 1182(a)(6).
583. *Id.* § 1182(a)(6)(B).
584. *Id.* § 1182(a)(6)(D).
585. *Id.* § 1182(a)(6)(E).
586. *Id.* § 1182(a)(6)(G).

false-representation provision is of a similar character.[587] This would suggest that the false-representation provision has a materiality requirement.

4. The Case Against *Chevron* Deference

Courts will have to reach this conclusion on their own, because the BIA's opinion in *In re Richmond*[588] is confused. As Judge O'Scannlain noted, the BIA seemed to conflate the issue of whether the false representation of citizenship by the noncitizen must be material with the issue of whether the representation involves a "purpose or benefit."[589] This confusion about the rationale for the BIA's conclusion does not meet the reasonableness test of *Chevron*'s Step 2.[590] While a textual stewardship approach would find that the statute clearly required proof of materiality, a court hesitant to reach this conclusion should remand to the BIA for a fuller and more precise account of the Board's reasoning.

VII. CONCLUSION

In the specialized world of immigration law, generalist judges face significant challenges. Many practitioners have been active in the field on a daily basis for decades. They have hard copies—imagine that—of the INA on their desks, and consult those detailed pages routinely, with the book often miraculously popping open at particularly well-thumbed passages. The federal appellate judge, in contrast, can manage only an occasional foray into these nooks and crannies. But the judge must have a stable, replicable approach each time duty calls. Unfortunately, the divided statutory interpretation in immigration decisions of the last two Supreme Court Terms fail to meet this standard.

This Article has analyzed the cascade of poorly reasoned statutory immigration decisions from the Supreme Court as an instance of "noise" in expert judgment.[591] Kahneman and his distinguished co-authors have shown how seasoned professionals exhibit wide swings both over time and in comparison with colleagues.[592] The portrait is alarming, from physicians in good standing who diagnose tuberculosis, cancer, and even strep throat at markedly varying rates to political and economic forecasters whose predictions bob up and down like buoys in a turbulent

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587. *See* SCALIA & GARNER, *supra* note 1, at 195-98 (discussing *noscitur a sociis* (know a word by its neighbors) canon).

588. 26 I. & N. 779 (B.I.A. 2016).

589. Teye v. Att'y Gen., 740 Fed. Appx. 944, 948-49 (11th Cir. 2018) (O'Scannlain, J., concurring).

590. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

591. *See supra* Part IV.

592. KAHNEMAN ET AL., *supra* note 16, at 140-42, 259-60, 276-78.

sea.[593] Judges performing the solemn job of sentencing vary to a disturbing degree, as do forensic analysts whose findings, television has taught, are the last word in scientific precision.

In experts' production of noisy judgments, the biggest culprit is overconfidence. First impressions drive decisions, hindering a neutral, detached view of data. For collective bodies, such as appellate tribunals, the multiple paths to a decision and the shifting value rankings of the voting participants combine to produce inconsistency and path dependence. Noise and error are unavoidable companions.

The arena of statutory interpretation exacerbates these problems. Each of the dominant tropes of the two dominant schools of thought—textualism and purposivism—warns against the potential for manipulation in the other's approach.[594] If even one of these camps is correct or each is correct half the time, that is a recipe for error that reduces judicial deliberation to the venue of a backroom dice game.

The Supreme Court's recent divided statutory immigration decisions are Exhibit A for this gloomy prognosis. In *Niz-Chavez v. Garland*, Justice Gorsuch's aversion to bureaucratic forms corralled enough support to impose an onerous single-notice requirement that the INA did not require.[595] In *Nasrallah v. Barr*, Justice Kavanaugh's worthy concern for CAT claimants expanded judicial review of CAT denials beyond Congress's plan.[596] *Nasrallah*'s stylized view of final orders of removal submerged ordinary meaning and led to the Court's decision in *Johnson v. Guzman Chavez*, which expanded mandatory detention.[597] While *Nasrallah* expanded remedies for noncitizens, Justice Alito's opinion for the Court in *Guzman Chavez* contracted relief, all the more because detention adversely affects noncitizens' ability to mount defenses to removal.[598]

To remedy this interpretive default, this Article proposes a model of textual stewardship. Textual stewardship sequences the interpretive process, focusing first on establishing ordinary meaning as a centerpiece of interpretation, rather than an afterthought sandwiched between the position that the opinion-writer had always wanted to state and rote replies to the other side's claims. That sequencing disrupts overconfidence, enhancing reflection. As a second step, textual stewardship looks to textual economy, asking whether a reading adds or subtracts words from the statute. Moreover, to establish the probability

593. *Id.*; Fierro et al., *supra* note 66, at S82-S84.
594. *See, e.g.*, SCALIA & GARNER, *supra* note 1, at 18-19.
595. 141 S. Ct. 1474, 1486 (2021).
596. 140 S. Ct 1683, 1694 (2020).
597. Johnson v. Guzman Chavez, 141 S. Ct 2271, 2288, 2291 (2021).
598. *Id.* at 2286.

that a given reading fits Congress's framework, textual economy considers the net result of opposing examples. The reading that explains the text more comprehensively than its rivals is the best candidate for consistency with Congress's plan.

Textual stewardship also looks to structural congruence. Too often, arguments from structure in immigration law confuse apples with oranges. Structural congruence looks comprehensively at structural parallels to the statute at issue, ensuring that each example tracks the instant statute's contours.

In addition, textual stewardship will, at least as a last resort, use both legislative history and the substantive canons favoring reliance interests. Legislative history can help clarify broad language, although it should not be a safety valve for elected representatives who either cannot agree on more specific text or would be embarrassed by including in a statute a description that they have eagerly inserted in a committee report. While favoring a reading based on statutory text furthers the public's ties with courts, canons such as the presumption against retroactivity and the rule of lenity further noncitizens' reliance interests, ensuring that a noncitizen can make an informed decision in considering a plea deal.

Having introduced textual stewardship, this Article proceeded to apply it. In defining a theft offense, reliance interests suggest limiting liability to those involving a nonconsensual taking. On judicial review, the Article recommended preserving discretionary decisions from judicial intrusion. On materiality in false representations of U.S. citizenship, textual stewardship would consult legislative history. Based in part on that resource, courts should read the INA as requiring this element. That holding would implement the overall structure of the inadmissibility grounds on misrepresentation.

If, as Justice Kagan has declared, "[w]e are all textualists now," courts should be the best interpreters they can be.[599] Textual stewardship seeks to adopt the best of the textualist approach to the study of the INA's difficult problems. It also seeks to promote reflective adjudication, in which jurists own and interrogate their own assumptions. That is the most effective way to reduce error and noise in immigration law and other legal domains.

599. Harvard Law School, *supra* note 180.