IMMIGRATION LAW — STATUTORY INTERPRETATION — SEVENTH CIRCUIT DEFERS TO AGENCY INTERPRETATION OF EVIDENTIARY STANDARDS. — *Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008).

Although they lessen the uniformity of our national laws,[1] circuit splits abound across jurisdictional lines. So it is that an alien residing legally in Maine can live under a different immigration law than his counterpart in Kentucky. By freeing agencies from the stare decisis effects of judicial interpretations of ambiguous statutory language, *National Cable & Telecommunications Ass'n v. Brand X Internet Services*[2] presented a means of mitigating this structural dilemma. Under *Brand X*, courts must defer to reasonable agency interpretations of ambiguous statutes even over conflicting precedent.[3] Although *Brand X* offered agencies another tool with which to claim deference from courts, it did nothing to clarify the preexisting doctrinal confusion about when such deference would be granted. Over the last decade, cases such as *United States v. Mead Corp.*[4] and *Barnhart v. Walton*[5] have transformed the Court's doctrine around deference to agencies from a simple two-part test to a convoluted multi-factor analysis.[6] Under *Brand X*, even apparently settled law is subject to this muddle.

Recently, in *Ali v. Mukasey*,[7] the Seventh Circuit deferred to a statutory interpretation put forth by the Board of Immigration Appeals, holding that an immigration court could consider additional evidence beyond the charging papers and judgment of conviction in classifying a criminal offense as a "crime involving moral turpitude."[8] In doing so, the court overturned several conflicting Seventh Circuit precedents with the explanation that "administrative discretion belongs to the agency rather than to the court."[9] This stark assertion bears no relationship to the current state of the doctrine surrounding deference. The court's failure to engage that doctrine saps the persuasive power from its opinion. But given the state of the Supreme Court's case law, it seems unlikely that even a better reasoned opinion could achieve the effect that *Brand X* seemed to promise and *Ali* aimed to deliver.

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[1] *See* Tafflin v. Levitt, 493 U.S. 455, 465 (1990) (acknowledging the inconsistency created by "a multimembered, multitiered federal judicial system").

[2] 545 U.S. 967 (2005).

[3] *See id.* at 982.

[4] 533 U.S. 218 (2001).

[5] 535 U.S. 212 (2002).

[6] *See Mead*, 533 U.S. at 226; *Barnhart*, 535 U.S. at 222.

[7] 521 F.3d 737 (7th Cir. 2008).

[8] *Id.* at 743.

[9] *Id.* at 742.

In December 2000,[10] Ibrahim Ali was convicted of conspiracy "to commit an[] offense against the United States, or to defraud the United States" for selling firearms without a license.[11] As a permanent resident alien, Ali was subject to removal but eligible to apply for discretionary relief unless he had been convicted of a "crime involving moral turpitude."[12] An immigration judge, drawing factual details from the presentence report prepared after Ali's trial, ruled that he had been convicted of fraud, which was well established as a crime involving moral turpitude.[13] He declared Ali ineligible to seek adjustment of status and ordered him removed from the United States.[14]

Ali appealed to the Board of Immigration Appeals (BIA). In 2007, the Board affirmed that Ali's offense was a crime involving moral turpitude.[15] Relying upon "wording in the pre-sentence report," the Board found "sufficient evidence to demonstrate that the respondent's conspiracy involved fraud."[16] The BIA found Ali ineligible for a waiver of inadmissibility and dismissed the appeal.[17]

Ali then appealed to the Seventh Circuit, claiming that the BIA had referred to impermissible materials to determine that he had been convicted of fraud. After distinguishing *Taylor v. United States*[18] and *Shepard v. United States*,[19] two Supreme Court precedents which might be thought to control,[20] Chief Judge Easterbrook explained that

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10 Brief for the Petitioner at 10–11, *Ali*, 521 F.3d 737 (7th Cir. Sept. 24, 2007) (No. 07-1970).

11 *Ali*, 521 F.3d at 739.

12 *Id.* at 738–39. Ali became subject to removal under 8 U.S.C. § 1227(a)(2)(C), but remained eligible to request cancellation pursuant to 8 U.S.C. § 1229a(a), unless, per 8 U.S.C. § 1227(a)(2)(A)(iii), his crime was also an aggravated felony — which it was. *Id.* Ali's marriage to an American citizen opened a final avenue of relief under 8 U.S.C. § 1182(h), unless his was a "crime involving moral turpitude" under 8 U.S.C. § 1182(a)(2)(A).

13 Transcript of the Oral Decision of the Immigration Judge at 5–6, *In re* Ali, No. A35 697 212 (Executive Office for Immigration Review, Chi., May 24, 2005) (citing presentence report). The immigration judge decided that dealing in firearms without the proper licenses was also a crime involving moral turpitude. *Id.* at 6.

14 *Id.* at 9–10.

15 *In re* Ali, No. A35 697 212 (B.I.A. Apr. 3, 2007).

16 *Id.* at 3.

17 *Id.*

18 495 U.S. 575 (1990).

19 544 U.S. 13 (2005).

20 Chief Judge Easterbrook noted that some courts, including some Seventh Circuit panels, "apply to immigration law the approach that *Taylor* and *Shepard* adopt for recidivist enhancements in federal criminal prosecutions." *Ali*, 521 F.3d at 741 (citations omitted). *Taylor* and *Shepard* both limit what evidence of convictions for prior crimes a judge can consult when sentencing a repeat offender. On Chief Judge Easterbrook's account, *Taylor* emphasized "the benefits of simple application, so that sentencing not be burdened by a retrial of the original prosecution," while *Shepard* stressed the jury's exclusive role as factfinder under the Sixth Amendment. *Id.* However, "[n]either of these reasons applies to immigration proceedings," which "are not criminal prosecutions, so the sixth amendment [does] not come into play. And how much time the agency wants to devote to the resolution of particular issues is, we should suppose, a question for the agency itself rather than the judiciary." *Id.*

"there are at least two distinct questions in immigration proceedings": "the fact of the prior conviction" and "the appropriate classification of that conviction."[21] The first has a close analogue in the criminal context, while the second does not: "'moral turpitude' just isn't relevant to the criminal prosecution; it is not as if 'turpitude' were an element of an offense."[22] The first question — "of what crime does the alien stand convicted?"[23] — is answered by statute. The Immigration and Nationality Act[24] (INA) lists a series of documents which may be consulted.[25]

The second question — "whether the agency may go beyond the record of conviction to characterize or classify an offense"[26] — had been addressed by the Seventh Circuit in *Hashish v. Gonzales*[27] and *Padilla v. Gonzales*,[28] which "state[d] that immigration officials must stick to the indictment and record of conviction when using an alien's convictions as the basis of removal."[29] The BIA, however, had addressed the issue itself in *In re Babaisakov*,[30] which Chief Judge Easterbrook described as holding that "additional evidence may be taken by the immigration judge when necessary."[31] Disagreeing with "the weight of authority at the circuit court level,"[32] the Board wrote that "we do not believe there is any sound legal principle that constrains inquiry to the record of conviction if the search involves as-

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[21] *Id.*

[22] *Id.* at 742. Chief Judge Easterbrook recognized that the interpretive crux presented by "moral turpitude" was an instance of a larger dilemma. He cited the monetary loss suffered by a fraud victim as an additional fact that an immigration court would need to know even though no criminal jury had established it. *Id.* Whether a fraud was committed "for commercial advantage" was a third question. *Cf. In re* Babaisakov, 24 I. & N. Dec. 306 (B.I.A. 2007).

[23] *Ali*, 521 F.3d at 742.

[24] 8 U.S.C. §§ 1101–1537 (2006).

[25] *See Ali*, 521 F.3d at 742; *see also* 8 U.S.C. §§ 1101(a)(43)(M)(i), 1229a(c)(3)(B) (2006).

[26] *Ali*, 521 F.3d at 742.

[27] 442 F.3d 572 (7th Cir. 2006).

[28] 397 F.3d 1016 (7th Cir. 2005).

[29] *Ali*, 521 F.3d at 741.

[30] 24 I. & N. Dec. 306 (B.I.A. 2007). *Babaisakov* relied heavily on *In re Gertsenshteyn*, 24 I. & N. Dec. 111 (B.I.A. 2007), which "held that the parties could offer evidence outside the limits of a 'record of conviction' in proving the 'committed for commercial advantage' component" by which a fraud becomes an aggravated felony under the immigration laws. *Babaisakov*, 24 I. & N. Dec. at 312. *Gertsenshteyn* was recently vacated by the Second Circuit in *Gertsenshteyn v. U.S. Dep't of Justice*, 544 F.3d 137 (2d Cir. 2008).

[31] *Ali*, 521 F.3d at 742. *But see* Rebecca Sharpless, *Toward a True Elements Test:* Taylor *and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 1011–12 (2008). Professor Rebecca Sharpless suggested that Chief Judge Easterbrook "erred fundamentally when [he] understood . . . *Babaisakov* as creating the blanket rule that underlying circumstances are always fair game when categorizing offenses in immigration law." *Id.* at 1012.

[32] *Babaisakov*, 24 I. & N. Dec. at 316.

pects of the crime that go beyond the elements of the offense."[33] Noting that "crime involving moral turpitude" is an "open-ended" phrase in a statute that the BIA must administer, Chief Judge Easterbrook concluded that "the Board and other immigration officials are both required and entitled to flesh out its meaning."[34] So he applied *Chevron* deference to the BIA's statutory interpretation in *Babaisakov* and overruled *Hashish* and *Padilla*, finding that the Board had "fully developed its own position, for administrative discretion belongs to the agency rather than to the court."[35]

Chief Judge Easterbrook read *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[36] and its progeny to promise that, so long as an agency's interpretation is reasonable, all courts will defer to it notwithstanding prior precedent to the contrary. If the doctrine could be made to work this way, it would be a great victory for the administrative state. But the ambiguities inherent within *Chevron* prevent it from making good on this considerable promise. Instead of eliminating substantive conflicts over interpretation, it transposes them into arguments over whether an agency has authority to interpret, whether it has actually interpreted, and whether some other principle of jurisprudence should negate its interpretation. Yet in *Ali*, Chief Judge Easterbrook chose not to engage with the full complexity of what *Chevron* has become. This omission weakens his opinion and costs it the opportunity to contribute to the ongoing project of mapping *Chevron*'s disputed terrain.

Prior to *Brand X*, most courts and commentators would have assumed that the stare decisis effect of prior judicial decisions foreclosed an agency's ability to exercise interpretive discretion. *Brand X* came as the capstone of a series of decisions in which the Supreme Court revisited its doctrine of judicial deference to agency interpretations of law. As first articulated in *Chevron*, courts confronting an agency interpretation of law are to engage in a two-part analysis, asking first "whether Congress has directly spoken to the precise question at issue."[37] Then, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[38] Courts should

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[33] *Id.* at 317. The *Babaisakov* Board therefore concluded that an immigration judge had the authority to "consider any evidence, otherwise admissible in removal proceedings, including witness testimony, bearing on the loss to the victim in an aggravated felony case involving" fraud or deceit which may have exceeded $10,000. *Id.* at 321.

[34] *Ali*, 521 F.3d at 739 (internal quotation marks omitted).

[35] *Id.* at 742 (citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005)).

[36] 467 U.S. 837 (1984).

[37] *Id.* at 842.

[38] *Id.* at 843.

defer to reasonable agency interpretations of statutory silences or ambiguities.[39] Though the Court may have thought it was merely codifying an analysis that had become common practice,[40] *Chevron* was recognized almost immediately as a major intervention in administrative law. In the years that followed, the decision's scope was clarified[41] and its interactions with other doctrines elaborated,[42] but the core analysis remained substantially unrevised.[43]

That analysis contains several indeterminacies. In particular, two questions that logically precede the *Chevron* analysis continue to bedevil it. The first is how to know when an agency is entitled to interpret a statutory silence or ambiguity. The second is how to know when an agency has actually interpreted.[44] *Mead* attempted to answer both of these questions.[45] Justice Souter's formulation in *Mead* was glossed by Justice Breyer the following Term in *Barnhart v. Walton*.[46] Taken together, *Mead* and *Barnhart* suggest that courts should defer when (but perhaps not only when) a long-standing agency interpretation of a gap in an important, complicated statute that the agency is authorized to interpret through use of its related expertise has been promulgated so as to exercise the agency's delegated authority. Little wonder that lower courts have struggled to apply these cases.[47]

*Brand X* claimed for this newly muddled precedent the territory once assumed to be governed by stare decisis. The case announced a simple rule: "A court's prior judicial construction of a statute trumps

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[39] *Id.*

[40] *See id.* at 845 (describing the "well-settled principles" on which the decision rests).

[41] *See, e.g.*, Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990) (holding that *Chevron* does not require deference to administrative interpretations of private rights of action); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (holding that where Congress has articulated two different standards, the agency may not conflate them through interpretation).

[42] *See, e.g.*, DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) (suggesting that *Chevron* deference will not be conferred upon agency interpretations that raise serious constitutional questions).

[43] For a history of the evolution of *Chevron*, see Linda Jellum, Chevron*'s Demise: A Survey of* Chevron *from Infancy to Senescence*, 59 ADMIN. L. REV. 725 (2007).

[44] *See generally* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006).

[45] 533 U.S. 218, 226–27 (2001) ("[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.").

[46] 535 U.S. 212 (2002). Justice Breyer ascribes the Court's grant of *Chevron* deference to "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time." *Id.* at 222 (citing *Mead*, 533 U.S. 218).

[47] *See generally* Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003).

an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[48] In announcing that rule, *Brand X* called into question any precedential opinion that did not make clear whether it was merely offering the best reading of a statute, or whether its reading was the only permissible one.[49] Though Justice Stevens may have been right that making the extent of judicial deference to administrative interpretations a matter of timing would make no sense,[50] *Brand X* added another point of dispute to an already convoluted doctrine, while significantly expanding the number of cases in which that doctrine would come into play. Yet this somewhat troubling decision held out to agencies the rejuvenating promise that administrative deference would be a renewable resource. There would be no precedential sclerosis in the administrative state.

After *Brand X*, all courts owe deference to the BIA's reasonable interpretations of statutory ambiguities no matter when those interpretations are issued. Even if twelve circuit courts issued twelve different "best" interpretations of an ambiguous provision in the INA, the Board could always attract deference for its superseding interpretation. Deference would produce consistency across jurisdictions. And consistency is a hallmark of fairness. Before *Brand X*, a circuit that spoke first was assumed to drain interpretative discretion from the agency. After *Brand X*, a decision such as *Ali* becomes possible. Indeed, *Ali* demonstrates the potential of that decision, reading *Babaisakov* to replace a series of confusing, conflicting decisions within its own circuit. *Ali* deploys *Brand X* to wipe clean a barely legible slate and inscribe *Babaisakov* — a new, authoritative agency interpretation — upon it.

Chief Judge Easterbrook wrote the *Ali* opinion with the certainty of a man who had solved a puzzle. Although other circuits have announced a different rule, applying "the *Taylor* and *Shepard* approach directly to immigration cases,"[51] the failure of those courts to arrive at his solution can (he seems to say) be explained in one of three ways.

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[48] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

[49] *Id.* at 1018 (Scalia, J., dissenting) ("Does this mean that in future statutory-construction cases involving agency-administered statutes courts must specify (presumably in dictum) which of the two they are holding? And what of the many cases decided in the past, before this dictum's requirement was established?").

[50] *See id.* at 983 (majority opinion) (pointing out the absurdity of a rule in which "whether an agency's interpretation of an ambiguous statute is entitled to *Chevron* deference would turn on the order in which the interpretations issue"). Of course, it can be argued that the Court did hold the opposite in *Neal v. United States*, 516 U.S. 284 (1996). "Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law." *Id.* at 295.

[51] *Ali*, 521 F.3d at 742 n.†.

Some courts have failed to attend to the constitutional differences between criminal and immigration law, and therefore held themselves bound by *Taylor* and *Shepard* when they are not. Others, failing to "discuss the significance of 8 U.S.C. § 1229a(c)(3)(B),"[52] have either applied *Taylor* and *Shepard* by analogy or created a rule of their own, not realizing that the statute guided the inquiry into convictions. And a third set of courts have handed down their rulings without the benefit of the BIA's authoritative interpretation as articulated in *Babaisakov*. With *Taylor* and *Shepard* distinguished, § 1229a(c)(3)(B) properly noted, and *Babaisakov* in place, there was no reason that the circuits should persist in their disagreement. When Chief Judge Easterbrook wrote that his was "the first court of appeals to take account of both § 1229a(c)(3)(B) and *Babaisakov*,"[53] he strongly implied that all courts which take account of both will of force reach the same result. This coming consistency has been made inevitable by *Babaisakov* and *Brand X*.

Yet a look beyond the Seventh Circuit shows how confusions within the *Chevron* doctrine and disagreements over its proper scope frustrate the promise of deferential uniformity. Instead of issuing conflicting interpretations of an immigration statute's meaning, courts differ on when they should grant deference to an agency's interpretation. The end result is much the same: the fragmentation of a national immigration system, such that an alien's ability to remain in the country can hinge on the jurisdiction in which his case is heard. In writing *Ali*, Chief Judge Easterbrook elides this trouble with an easy axiom: "administrative discretion belongs to the agency rather than to the court."[54] This formulation is indisputably true, but *when* is it true — and *why*? Chief Judge Easterbrook gives a full account of why the BIA receives deference for its definition of "crime involving moral turpitude." But why should the BIA attract deference for its categorical interpretation of criminal statutes or the convictions that are handed down under them? Why is the evidence that the Board can consider a question for the agency and not for the court? Chief Judge Easterbrook does not say.

Other appellate courts have given a fuller account of when and why they apply *Chevron*, but these sister circuits quarrel with *Ali* at every step of its analysis. Should the BIA receive deference for its interpretation of "crime involving moral turpitude," a term found in an organic statute which it must administer? The proposition seems uncontroversial, and Chief Judge Easterbrook provides a convincing de-

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[52] *Id.*
[53] *Id.*
[54] *Id.* at 742.

fense of it. Yet the Fifth Circuit holds that the BIA deserves no deference for its determination that state statutory crimes involve moral turpitude because the agency is interpreting the criminal statute rather than the INA in making that classification.[55] And the Second Circuit, which follows *Ali* in deferring to the agency definition and distinguishing *Taylor* and *Shepard*, disagrees with it nonetheless, holding that "the BIA's decision to treat a petitioner's conviction as one involving moral turpitude (*i.e.*, its interpretation of the petitioner's statute of conviction and, if necessary, record of conviction)" is not entitled "to the same deference as the BIA's determination that the presence of a particular element or elements makes a crime one of 'moral turpitude' (*i.e.*, its interpretation of an ambiguous term in the INA)."[56] Judge Calabresi notes that "in our Circuit, we defer to the latter . . . but review the former *de novo*."[57] Still other circuits disagree about the impact of the *Taylor* and *Shepard* analysis on the question. The Fourth Circuit believes that the cases are binding in the immigration context;[58] the Ninth Circuit has adopted their rule as a prudential matter[59] but may remain free to defer to *Babaisakov* if the court's ruling was only a "best" reading of the INA. Despite the force of Chief Judge Easterbrook's argument, reasonable minds can differ — and *Brand X* will not constrain them.

Perhaps the aim of *Ali* is unachievable: uniformity may be too much to ask. But if Chief Judge Easterbrook (or another judge bringing similar ambitions to a similar conundrum) hopes to affect decisions outside of his own jurisdiction, he will need to engage with the fullness of the *Chevron* doctrine, as modified by *Mead*. *Brand X* offers agencies the opportunity to revisit judicial interpretations of law; it offers courts a means by which to step back from certain precedents. Yet it conditions both offers upon a convincing *Mead* analysis.

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[55] *See* Garcia-Maldonado v. Gonzales, 491 F.3d 284, 288 (5th Cir. 2007) ("We give *Chevron* deference to the BIA's interpretation of the INA when appropriate, but we review *de novo* the BIA's interpretation and evaluation of state law in deciding whether a particular state law offense is a [crime involving moral turpitude]." (footnote omitted)). Moreover, the Eleventh Circuit (without defending the practice) relies on its own precedents rather than the BIA's in making such classifications. *See* Vuksanovic v. U.S. Attorney Gen., 439 F.3d 1308, 1311 (11th Cir. 2006) ("While 'moral turpitude' is not defined by statute, we have recognized it involves '[a]n act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.'" (quoting Itani v. Ashcroft, 298 F.3d 1213, 1215 (11th Cir. 2002))).

[56] Gertsenshteyn v. U.S. Dep't of Justice, 544 F.3d 137, 146–47 n.9 (2d Cir. 2008).

[57] *Id.* (referring to the court's decision in *Wala v. Mukasey*, 511 F.3d 102, 105 (2d Cir. 2007)).

[58] *See* Soliman v. Gonzales, 419 F.3d 276, 284 (4th Cir. 2005) ("In assessing whether Soliman's Virginia state court conviction was for a theft offense, we are obliged to utilize the categorical analysis approach spelled out in *Taylor.*" (citation omitted)).

[59] *See* Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1067 (9th Cir. 2007) ("To determine whether a conviction is for a crime involving moral turpitude, we apply the categorical and modified categorical approaches established by the Supreme Court in *Taylor*." (citation omitted)).