

## 20 U.S.C. § 1406(b)

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*“The manifold ways in which we are continually blindsided by our categories cannot be overemphasized.”<sup>1</sup>*

*“The black four of hearts might, for example, be identified as the four of either spades or hearts. Without any awareness of trouble, it was immediately fitted to one of the conceptual categories prepared by prior experience. One would not even like to say that the subjects had seen something different from what they identified.”<sup>2</sup>*

### INTRODUCTION

In E.B. White’s *The Trumpet of the Swan*, Louis is a young bird who is mainstreamed into public school.<sup>3</sup> Although exceptionally bright, Louis has a disability. He cannot speak.<sup>4</sup> First, Louis learns to read and write, but he finds that his fellow trumpeter swans are unable to understand his written words on his portable chalkboard because they “had [n]ever seen a slate before, or a piece of chalk.”<sup>5</sup> The swans believe the only proper way to communicate is the way to which they are accustomed:

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1. DOUGLAS HOFSTADTER & EMMANUEL SANDER, SURFACES AND ESSENCES: ANALOGY AS THE FUEL AND FIRE OF THINKING 293 (2013).

2. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 63 (4th ed. 2012).

3. See E.B. WHITE, THE TRUMPET OF THE SWAN 68-74 (spec. ed. 2000).

4. See *id.* at 41, 51.

5. *Id.* at 81-82, 87.

trumpeting.<sup>6</sup> Then, Louis's father acquires a trumpet that enables Louis to make noises despite his disability.<sup>7</sup> Under the Individuals with Disabilities Education Act (IDEA),<sup>8</sup> Louis's trumpet would be considered an assistive device, and therefore Louis's school might be required to provide services relating to the device, like cleaning the spit valves.<sup>9</sup> However, not all children with disabilities will receive the services that schools are required to provide under the statute.

Recently, the Department of Education promulgated regulations that eliminate the IDEA requirement that schools "map" the cochlear implants of deaf students.<sup>10</sup> The Department of Education has thwarted Congress's will. Congress should do something! But, it turns out, it has. In 1983, Congress enacted 20 U.S.C. § 1406(b), a one-of-a-kind law that forbids the Department of Education from promulgating any regulation that "procedurally or substantively lessens" protections afforded to children and parents under the regulations in effect in 1983.<sup>11</sup>

Yet like the other swans who were unable to read Louis's chalkboard,<sup>12</sup> lawyers, judges, and scholars appear to have been unable to process § 1406(b). After nearly thirty years,

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6. See, e.g., *id.* at 88 ("A Trumpeter Swan that couldn't trumpet was a bust as far as [Serena] was concerned.").

7. See *id.* at 89-95.

8. Although IDEA has gone by many different names, see, e.g., *infra* notes 25, 29, and accompanying text, and § 1406(b) used to be § 1407(b), see *infra* notes 63-64 and accompanying text, this Article uses the modern designations of the Act and Section, except when making a historic point.

9. Cf. WHITE, *supra* note 3, at 106.

10. Improving the Academic Achievement of the Disadvantaged; Individuals with Disabilities Education Act—Assistance to States for the Education of Children With Disabilities, 72 Fed. Reg. 17,748 (Apr. 9, 2007) (codified at 34 C.F.R. pts. 200, 300); Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540 (Aug. 14, 2006) (codified at 34 C.F.R. pts. 300, 301).

11. Education of the Handicapped Act Amendments of 1983, Pub. L. No. 98-199, sec. 6, § 608(b), 97 Stat. 1357, 1359 (codified as amended at 20 U.S.C. § 1406(b) (2006)).

12. See WHITE, *supra* note 3, at 81-82, 87.

no judge has ever struck down a regulation under § 1406(b), and this is the first Article to extensively consider § 1406(b).

How did this happen? As discussed above, the trumpeter swans in White's book were habituated to thinking and communicating only through trumpeting noises. Similarly, this Article argues that expert legal reasoners have been trained to think in certain analytical models that this Article calls "categories."<sup>13</sup> Because § 1406(b) does not mesh with any pre-existing categories that expert legal reasoners—like judges or litigators—have acquired, these expert legal reasoners do not fully process it, even though it is duly enacted federal law. That is, the consequence of these categories is a cause for concern, even for laws created by Congress and consequently codified.

Part I of this Article explains the circumstances that gave rise to § 1406(b) and shows how it has since been ignored by courts, litigants, and scholars in the thirty years since it was enacted. During the same thirty years, the Supreme Court weakened IDEA's purpose, and the Court and lower courts made *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>14</sup> *Auer v. Robbins*,<sup>15</sup> and others the dominant models in administrative deference—the same conceptual space that § 1406(b) was meant to occupy. The combination of these trends can be seen in *Petit v. United States Department of Education*,<sup>16</sup> the most in-depth engagement of § 1406(b) to date.

Part II explains the model of legal reasoning focused on categories and argues that expert legal thinkers are driven by their mental maps of the law. It suggests that some categories are formed by branching off from other categories, and that the way a category gains power is through familiarity. Without any subsequent interpretation<sup>17</sup> or an

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13. See *infra* Part II.A.

14. 467 U.S. 837 (1984).

15. 519 U.S. 452 (1997).

16. 675 F.3d 769 (D.C. Cir. 2012).

17. Cf. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 126 (1960 ed.) (citing Jethro Brown for the proposition that "a statute till construed, is not real law[; i]t is only 'ostensible' law").

analogous statute to guide legal reasoners with regard to it, § 1406(b) is unable to be categorized and therefore intuitively appears to have no meaning.<sup>18</sup> Meanwhile, general and wholly judge-made doctrines like *Chevron* and *Auer* reverberate from court to court, judge to judge, and case to case, with each voice giving the doctrines more force and wider application as they resonate.<sup>19</sup> Because *Chevron* and *Auer* are deferential regimes, judges thus give power to the Department of Education—the executive branch—to set IDEA standards, even though Congress specifically tried to limit judicial and executive discretion that would weaken protections for students with disabilities.

Finally, Part III makes two normative arguments. First, it argues that § 1406(b) must become “categorized,” a process with close kinship to canonization. To become a powerful category, § 1406(b) must become familiar to judges and litigators. Therefore, the first half of Part III focuses on a publicity campaign meant to emphasize the authority of § 1406(b). Next, Part III argues why § 1406(b) should be so categorized. Section 1406(b) should be given full consideration by judges and lawyers both because democratic accountability requires that judges and agencies defer to explicit policy choices made by Congress and because the policy choice embodied in § 1406(b) helps compensate for the Supreme Court’s mistaken understanding of the intent of IDEA. Section 1406(b)’s specific purpose is to prevent future Secretaries of Education from implementing the standards rejected in 1983 and, therefore, to protect vulnerable students with disabilities.

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18. Arguably, another example of this can be seen in Judge Bork’s assertion that the Ninth Amendment—not an amendment in most judges’ toolboxes—functioned like an incomplete sentence even though the full text is readily available for interpretation. See Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 IND. L.J. 759, 791 (1994) (quoting Robert H. Bork, *The Bork Disinformers*, WALL ST. J., Oct. 5, 1987, at 22).

19. Cf. CARDOZO, *supra* note 17, at 21 (“Every judgment has generative power. It begets in its own image.”).

## I. THE HISTORY OF IDEA AND § 1406(B)

The first Part of this Article describes the history of § 1406(b) and IDEA.<sup>20</sup> Section 1406(b) can only be seen as a reaction by a liberal Congress to the Reagan Administration's attempts to promulgate regulation that would lessen requirements on state and local departments of education to provide certain services for students with disabilities. Section 1406(b)'s method of preempting regulation that lowers that floor has never been replicated in any other American law.<sup>21</sup>

Then, Part I describes the meager history of IDEA litigation, focusing on *Petit*, and the simultaneous rise of *Chevron* and other general deference cases. Thus, Part I shows how Congress created an innovative law to limit agency discretion, but space for review of agency action has become occupied with and by judge-made deference doctrines instead.

### A. *The Legislative History of IDEA and § 1406(b)*

#### 1. Federal Education Legislation for Students with Disabilities Before § 1406(b)(2)

Quickly following the groundbreaking Elementary and Secondary Education Act of 1965 (ESEA),<sup>22</sup> Congress passed the Elementary and Secondary Education Amendments of 1966, which added a new Title VI to the ESEA.<sup>23</sup> Title VI gave grant money to states on the condition that they submit plans that assured the Commissioner of Education that the money they received would be used for projects that “meet the special educational and related needs of handicapped children” or at least “give reasonable promise of substantial

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20. For the Supreme Court's brief overview of the early history of IDEA, see *Board of Education v. Rowley*, 458 U.S. 176, 179-81 (1982).

21. Searches of federal and state materials failed to unearth any similar statute.

22. Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

23. Pub. L. No. 89-750, sec. 161, §§ 601-610, 80 Stat. 1191, 1204-08.

progress toward meeting those needs.”<sup>24</sup> In 1970, Congress again made changes to ESEA with the 1970 Amendments that redesignated Title VI as the Education of the Handicapped Act.<sup>25</sup> The new Title VI again provided grants to states conditioned on receipt of plans and created several other programs designed to help children with disabilities.<sup>26</sup>

In 1974, responding to two district court cases that indicated that children with disabilities required better access to education,<sup>27</sup> Congress increased funding as an “interim measure” that “for the first time required recipient States to adopt ‘a goal of providing full educational opportunities to all handicapped children.’”<sup>28</sup>

The next year, the basic framework for IDEA was enacted in the Education for All Handicapped Children Act of 1975 (EAHCA).<sup>29</sup> Unlike earlier statutes, EAHCA required states to do more than merely set a goal for providing educational opportunities. Under EAHCA’s—and now IDEA’s—scheme, each state must submit a plan ensuring that “all children with disabilities residing in the State between the ages of 3 and 21, inclusive” receive a “free

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24. *Id.* sec. 161, § 604(a).

25. Pub. L. No. 91-230, § 601, 84 Stat. 121, 175.

26. *See id.* §§ 601-662.

27. The two cases were *Pennsylvania Association for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), *modified*, 343 F. Supp. 279 (E.D. Pa. 1972), and *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972). *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 180 & n.2 (1982) (crediting those two cases for the creation of 1974 and 1975 legislation); *see also* William D. White, Comment, *Where To Place the Burden: Individuals with Disabilities Education Act Administrative Due Process Hearings*, 84 N.C. L. REV. 1013, 1015-17 (2006) (describing the cases and relating them to Congress’s 1970s legislation).

28. *Rowley*, 458 U.S. at 180 (quoting Education Amendments of 1974, Pub. L. No. 93-380, sec. 101, § 615(c), 88 Stat. 484, 583).

29. Pub. L. No. 94-142, 89 Stat. 773. Indeed, the framework is so similar to the modern IDEA that courts apply to IDEA cases construing EAHCA. *See, e.g.*, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 232-33 (2009) (using *Sch. Comm. v. Dep’t of Educ.*, 471 U.S. 359 (1985), which construed the Education of the Handicapped Act, to establish the legal baseline for the issue presented); Alyssa Kaplan, Note, *Harm Without Recourse: The Need for a Private Right of Action in Federal Restraint and Seclusion Litigation*, 32 CARDOZO L. REV. 581, 590 n.60 (2010) (noting that courts continue to apply *Rowley*, which construed EAHCA).

appropriate public education” (FAPE) in order to receive grants.<sup>30</sup> A FAPE must include, among other things, statutorily defined “related services” that are “provided at public expense, under public supervision and direction, and without charge” and are based on an “individualized education program” (IEP) created for each child with a disability.<sup>31</sup> In addition to these requirements in the plan itself, EAHCA “impose[d] extensive procedural requirements upon States receiving federal funds under its provisions.”<sup>32</sup> Four years after EAHCA, Congress created the Department of Education and made its Secretary a member of the cabinet.<sup>33</sup>

During the 1960s and the 1970s, the federal government dramatically increased its role in education, primarily to help disadvantaged groups, but the movement met political headwind in the 1980s.<sup>34</sup> In his 1980 campaign for the presidency, former California Governor Ronald Reagan promised he would abolish the recently created cabinet-level Department of Education.<sup>35</sup> Although Reagan never fulfilled

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30. 20 U.S.C. §§ 1411-1412 (2006); *see also* Education for All Handicapped Children Act, sec. 5, § 614.

31. 20 U.S.C. § 1401(9); *see also id.* §§ 1401(14), 1414(d); Education for All Handicapped Children Act, sec 4, § 602; sec. 5, § 611.

32. *Rowley*, 458 U.S. at 182.

33. *See* Department of Education Organization Act, Pub. L. No. 96-88, § 201, 93 Stat. 668, 671 (1979) (codified at 20 U.S.C. § 3411 (2006)).

34. *See* Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 138-39 (2013) (“[T]he federal government’s focus in the 1950s, 60s, and 70s was primarily on expanding equity and access for disadvantaged groups—African Americans, the poor, the disabled . . . . The march toward deeper federal involvement in education came to a halt altogether in the 1980s.”); *cf.* Laura C. Bornstein, *Contextualizing Cleburne*, 41 GOLDEN GATE U. L. REV. 91, 106 (2010) (“Through the 1960s and 1970s, the federal government was increasingly attentive to the problems facing [Americans with mental disabilities].”).

35. *See, e.g.,* Hedrick Smith, *Reagan Calls for Repeal of Limits on Campaign Funds and Spending*, N.Y. TIMES, Dec. 14, 1979, at B10 (“[T]he former California Governor said in an interview that if he was elected President he would seek to dismantle the new Department of Education . . . .”); *see also* Shannon K. McGovern, Note, *A New Model for States as Laboratories for Reform: How Federalism Informs Education Policy*, 86 N.Y.U. L. REV. 1519, 1520 n.7 (2011)

that bold promise, supporters of federal education funding had reason to fear a Reagan Administration because Reagan proposed and implemented steep cuts to the California school system. For instance, Reagan proposed eliminating the state board of education's full-time staff.<sup>36</sup> Later, Reagan cut the State Department of Education's budget by twenty percent.<sup>37</sup> Moreover, other Republican presidential candidates like Texas Governor John Connally and George Bush adopted Reagan's position.<sup>38</sup>

## 2. Bell's 1982 Regulations Show Congress the Need to Shield Its Act from the Department of Education

When Reagan became President, he staffed his administration with hardline conservatives who wanted to eliminate the Department of Education.<sup>39</sup> However, Reagan's first Secretary of Education, Terrel Bell, was not one of those hardliners.<sup>40</sup> Bell had previously expressed "support for

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(noting that Reagan-Republican opposition to federal involvement in education began shortly after the creation of the cabinet-level Department of Education).

36. See *State Senate GOP Leader Hits Some Reagan Economies*, L.A. TIMES, Apr. 4, 1967, at I3.

37. See Robert Fairbanks, *Rafferty Loses Power, Money in New Budget*, L.A. TIMES, July 6, 1970, at I3.

38. See *Excerpts from Transcript of Debate Among 7 G.O.P. Candidates*, N.Y. TIMES, Feb. 21, 1980, at B12 ("I'd abolish the Department of Education." (quoting John Connally)); Warren Weaver, Jr., *Running Mates Play Down Differences in Their Positions*, N.Y. TIMES, July 18, 1980, at A10 ("Mr. Bush's views mirror [Reagan's] on . . . abolition of the Department of Education . . .").

39. For instance, Education Secretary Terrel Bell said that "radical nuts' and conservative right-wing zealots on the White House staff harassed him constantly" and "a 'lunatic fringe' of midlevel staff members tried to abolish all federal education programs, including aid to the handicapped." *Ex-Education Chief Hits White House 'Nuts'*, CHI. TRIB., Mar. 14, 1986, § 1, at 14. Similarly, Clarence Thomas wrote of the pressure from administration conservatives while he worked in the Department of Education between 1981 and 1982: "Working in the Reagan administration, you often got the feeling that no black person—especially one who, like me, worked on civil rights policy—could ever be conservative enough for some of the people who had supported the president early on." CLARENCE THOMAS, *MY GRANDFATHER'S SON: A MEMOIR* 144 (2007).

40. See Douglas Alexander, *The Firing of Ed Curran*, in *STEERING THE ELEPHANT: HOW WASHINGTON WORKS* 316, 318 (Robert Rector & Michael Sanera

creation of the separate Education Department”<sup>41</sup> and was “a staunch believer in federal spending on schools.”<sup>42</sup>

However moderate Bell may have been personally, the Reagan Administration immediately and repeatedly proposed slashing funding for students with disabilities and turning federal education funding into more block grants despite bipartisan congressional opposition.<sup>43</sup> While Congress could block budget cuts, the Administration did not need Congressional approval to issue regulations that would require provision of fewer services from the states that administered IDEA.

On August 4, 1982, Bell released proposed rules that would make sweeping changes,<sup>44</sup> such as eliminating “[r]equirements that schools get parents’ written consent to educational plans for their handicapped children,” lessening the preference for mainstreaming, and making the provision of “[r]elated medical services . . . including eyeglasses, insulin

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eds., 1987) (describing Bell as “a man fully identified with the education establishment Reagan’s people had set out to abolish”).

41. Noel Epstein & Lee Lescaze, *Terrel Bell Reported Choice To Become Education Secretary*, WASH. POST, Jan. 7, 1981, at A1. Bell would later produce a plan to eliminate the Education Department’s cabinet-level status. See Spencer Rich & Noel Epstein, *President To Weigh Options on Education Department*, WASH. POST, Nov. 10, 1981, at A3 (describing Bell’s plan and proposed alternatives).

42. Judy Gibbs, *Education Rerun for Bell?*, BOS. GLOBE, Jan. 8, 1981, at 8.

43. See *GOP Joins Democrats in Battle over Budget*, CHI. TRIB., Mar. 3, 1982, § 1, at 1 (noting bipartisan opposition to Reagan’s proposed education budget cuts); John Hildebrand, *Budget Cuts Go to School*, NEWSDAY (N.Y.), Apr. 16, 1981, at B3 (noting that under Reagan administration proposals “[f]ederal aid for handicapped or disadvantaged students and for districts that are in the process of racial desegregation would be reduced by 25 per cent”); *More Cuts Slated for Education*, CHI. TRIB., Sept. 20, 1981, § 1, at 4 (“The Reagan administration will again ask Congress for billion dollar cuts in grants and loans to college students and programs to help teach the poor and handicapped . . .”).

44. Assistance to States for Education of Handicapped Children, 47 Fed. Reg. 33,836 (proposed Aug. 4, 1982). For statements describing the import of these regulations, see, for example, 128 CONG. REC. 27,637 (1982) (statement of Rep. Leo Zeferetti) (“[I]f they are allowed to go into effect, [the regulations] would wipe out the decade of gains in basic civil rights for the handicapped.”).

injections or other medication" optional.<sup>45</sup> Within a week, the proposals drew "heavy fire from groups representing the handicapped."<sup>46</sup>

Congress quickly swung into action. On August 10, 1982, Representative Mario Biaggi introduced a House resolution<sup>47</sup> that disapproved of the proposed regulations because the existing "regulations have provided ample safeguards for handicapped children."<sup>48</sup> The same day, Senator Lowell Weicker<sup>49</sup> added an amendment to a supplemental appropriations bill expressing the sense of the Congress that the regulations not be adopted until Congress reconvened.<sup>50</sup> The Senate approved the amendment with a massive majority, ninety-three to four,<sup>51</sup> and it ultimately became law.<sup>52</sup>

In response to the congressional and public pressure, Bell withdrew the controversial parts of the regulations<sup>53</sup> and apparently did not finalize any of the regulations.<sup>54</sup>

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45. Joanne Omang, *Bell Withdraws 6 Proposals for Educating Handicapped*, WASH. POST, Sept. 30, 1982, at A1.

46. Charles R. Babcock, *Congress Challenges Education Plans for Handicapped*, WASH. POST, Aug. 11, 1982, at A4.

47. H.R. Res. 558, 97th Cong. (1982).

48. 128 CONG. REC. 20,620 (1982) (statement of Rep. Mario Biaggi).

49. Weicker was himself the father of a child with Down's syndrome. Keith B. Richburg, *Education Aide Defends Stance on Handicapped*, WASH. POST, Apr. 18, 1985, at A3.

50. See 128 CONG. REC. 20,061-62 (1982) (statement of Sen. Lowell Weicker).

51. 128 CONG. REC. 20,063 (1982).

52. Supplemental Appropriations Act, 1982, Pub. L. No. 97-257, § 305, 96 Stat. 818, 874-75.

53. See Susan Heller Anderson, *The Reagan Effect: Goals on Handicapped Meet Wide Resistance*, N.Y. TIMES, Nov. 14, 1982, (Fall Survey of Education), at 45 ("In a final admission of defeat, Terrel H. Bell, the Secretary of Education, recently withdrew the Reagan Administration's most controversial changes to the regulations governing education for the handicapped. . . . The proposed changes sparked angry protest from educators, legislators and parents the moment they were announced.").

54. The regulations continued to be on the Administration's agenda in April 1983, see Assistance to States for Education of Handicapped Children, 48 Fed. Reg. 17,962 (Apr. 25, 1983), but are not listed in the *Federal Register* thereafter.

Even though Congress won that skirmish, members of Congress complained that the Reagan Administration was willing to abuse procedural rules. Under the then-existing framework, Congress could reject final regulations by concurrent resolution within forty-five days under the General Education Provisions Act (GEPA), but the Act did not toll the forty-five-day period for recesses.<sup>55</sup> Both Biaggi and Weicker argued that the Reagan Administration deliberately issued the proposed regulations during a scheduled congressional recess.<sup>56</sup> Given the timing of these regulations, the Department's repeated submission of budgets that cut funding for students with disabilities,<sup>57</sup> and a leaked memo indicating that the Department of Education was considering how to circumvent Congress,<sup>58</sup> Congress needed stronger tools to turn back Administration efforts to reduce funding and mandated services for students with disabilities.<sup>59</sup>

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55. 20 U.S.C. § 1232(d) (1982) (repealed 1994).

56. See 128 CONG. REC. 20,062 (1982) (statement of Sen. Lowell Weicker) ("This amendment would postpone the start of the 45-day period allotted Congress for passage of a concurrent resolution . . ."); *id.* at 20,620 (statement of Rep. Mario Biaggi) (noting that his resolution "reaffirms the right of Congress to disapprove of any final regulations" and that regulations "should not become final during a time when Congress is in recess"); see also *id.* at 22,539 (statement of Sen. Robert Byrd) ("Great strides have been made in recent years, and I do not feel that any changes should be made in existing law until Congress has had an opportunity to review proposals . . .").

57. See *supra* note 43 and accompanying text.

58. See Jack Anderson, *A Deceptive Scheme that Hurts Education for the Handicapped*, NEWSDAY (N.Y.), Apr. 13, 1982, at 44 (describing a confidential memo written by Bell's special counsel that recommended sending controversial changes in parts to Congress to try to fool Congress).

59. Senator Ted Kennedy showed Congress's concern both with the Administration's substantive policy and its attempts to circumvent GEPA when he attacked the alleged author of the 1982 regulations. See 128 CONG. REC. 27,163 (1982) (statement of Sen. Ted Kennedy).

3. Following Bell's Regulations, Congress Created a Radical Law Limiting Its Delegation of Power so that Administrations Could Not Substantively Lessen Protections

Even though Congress stopped Bell from implementing the proposed regulations this time, there was nothing to prevent a future administration from proposing similar regulations at a later date. Therefore, Biaggi drafted, and Congress passed, a novel prophylactic measure that would become § 1406(b). Biaggi took credit for the new section, explaining that he drafted it in response to "the attempts made by Secretary Bell last year to gut existing regulations" and Bell's "tireless assault on the regulations governing this program."<sup>60</sup>

Biaggi's amendment prohibited the Secretary from proposing regulations that weakened existing protections. Biaggi explained: "The amendment also states that the Secretary cannot propose any regulations which—in the opinion of the committee—have the direct or indirect effect of weakening the protections for handicapped children under existing law and regulation."<sup>61</sup> With little other discussion of Biaggi's provision, Congress passed the Education of the Handicapped Act Amendments of 1983.<sup>62</sup> As codified, Biaggi's provision read:

The Secretary may not implement, or publish in final form, any regulation prescribed pursuant to this Act which would procedurally or substantively lessen the protections provided to handicapped children under this Act, as embodied in regulations in effect on July 20, 1983 (particularly as such protections relate to parental consent to initial evaluation or initial placement in special education, least restrictive environment, related services, timelines, attendance of evaluation personnel at IEP meetings, or qualifications of personnel), except to the extent that such

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60. 129 CONG. REC. 33,316 (1983) (statement of Rep. Mario Biaggi). Biaggi also noted that he strengthened Congress's veto authority "by extending the public comment period." *Id.*

61. *Id.*

62. Education of the Handicapped Act Amendments of 1983, Pub. L. No. 98-199, 97 Stat. 1357.

regulation reflects the clear and unequivocal intent of the Congress in legislation.<sup>63</sup>

The provision as passed in 1983 remained almost entirely unchanged over the next three decades.<sup>64</sup> Most recently, it was reenacted in 2004, as § 1406(b), as follows:

(b) PROTECTIONS PROVIDED TO CHILDREN.—The Secretary may not implement, or publish in final form, any regulation prescribed pursuant to this title that—

(1) violates or contradicts any provision of this title; or

(2) procedurally or substantively lessens the protections provided to children with disabilities under this title, as embodied in regulations in effect on July 20, 1983 (particularly as such protections related to parental consent to initial evaluation or initial placement in special education, least restrictive environment, related services, timelines, attendance of evaluation personnel at individualized education program meetings, or qualifications of personnel), except to the extent that such regulation reflects the clear and unequivocal intent of Congress in legislation.<sup>65</sup>

Under § 1406(b), the Secretary of Education is prohibited from implementing or publishing any regulation that “procedurally or substantively lessens . . . protections” that were “embodied in regulations in effect on July 20, 1983.”<sup>66</sup> Thus, § 1406(b) is a bold, “strongly worded prohibition”<sup>67</sup> that

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63. *Id.* sec. 6, § 608(b) (codified at 20 U.S.C. § 1407(b) (Supp I. 1983)).

64. In 1988, Congress changed “IEP” to “individualized education program.” Handicapped Programs Technical Amendments Act of 1988, Pub. L. No. 100-630, sec. § 101(d)(1), § 608(b), 102 Stat. 3289, 3290. In 1990, Congress changed “handicapped children” to “children with disabilities.” Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, sec. 901(b)(24), § 608(b), 104 Stat. 1103, 1143. In 1997, Congress changed “which” to “that” and redesignated it as § 1406. Individuals with Disabilities Education Act Amendments of 1997, 105 Pub. L. No. 17, sec 101, § 607, 111 Stat. 37, 47-48.

65. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, sec. 101, § 607(b), 118 Stat. 2647, 2660 (codified at 20 U.S.C. § 1406(b) (2006)).

66. *Id.*

67. Donna M. Sheen, Case Note, *Accommodating Disabilities: How Far Must Schools Go in Providing Related Services of a Medical Nature for Students with*

is meant to prevent regulations such as the ones proposed by Secretary Bell, and it requires courts to second-guess whether the Department of Education is furthering the policy goals of IDEA.

Section 1406(b) has been reauthorized so many times by Congresses controlled by both parties and signed into law by presidents of both parties,<sup>68</sup> suggesting strong bipartisan support for this limitation on the delegation of regulatory power to the Secretary of Education. Additionally, § 1406(b) offers children with disabilities, their parents, and allied interest groups the opportunity to try to get in litigation what they may fail to get from notice-and-comment by allowing them to dispute final regulations in court. The next Section shows that, despite the obvious institutional and political support for § 1406(b), courts and litigators have seemingly ignored this provision when determining how much deference to give to the Department of Education's regulations, while the Supreme Court has shrunk IDEA's scope and at the same time has expanded *Chevron's*.

B. *IDEA Litigation Lessens IDEA's Scope, § 1406(b) Litigation Is Rare and Tangential to Its Purpose, and Chevron and Auer Grow to Occupy the Field of Administrative Deference*

As the rest of this Part shows, § 1406(b) has been used rarely. Only once has a court addressed an argument for invalidating a regulation based on § 1406(b).<sup>69</sup> And in that case, the D.C. Circuit applied the *Chevron* and *Auer* doctrines instead of § 1406(b).

Section 1406(b)'s disuse is the result of three intertwined developments in caselaw since 1982. First, the Supreme

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*Disabilities?* Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66 (1999), 35 LAND & WATER L. REV. 625, 630 n.58 (2000).

68. President Clinton signed a version of § 1406(b) into law in 1997, Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, sec. 101, § 607(b), 111 Stat. 37, 47-48, and President Bush signed the current § 1406(b) into law in 2004, Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, sec. 101, § 607(b), 118 Stat. 2647, 2660.

69. *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769 (D.C. Cir. 2012).

Court has eroded IDEA, relying on the limited purpose that Justice Rehnquist ascribed to IDEA's authors. Second, in those same cases, the Supreme Court has excessively deferred to the Department of Education. Third, while the Supreme Court has been diminishing IDEA both substantively and procedurally, it has simultaneously been promoting more general models of administrative deference in *Chevron*, *Auer*, and other cases.

Following the discussion of these three trends in this Part I.B.1-2, Part I.B.3 describes the only three cases that mentioned § 1406(b) between its enactment and 2008. Then the concluding two Subsections of Part I.B describe recent circuit court cases showing both newfound interest in § 1406(b) and how no court has yet to use § 1406(b) to invalidate a regulation. In one case, the Eleventh Circuit used § 1406(b) to sustain a regulation, even though § 1406(b) was enacted to thwart regulations. And in *Petit*, the only case to consider whether a regulation should be invalidated under § 1406(b), the panel relied on *Chevron* and *Auer* rather than § 1406(b).

1. The IDEA that Never Came Together: Early Court Interpretations of the Education for All Handicapped Children Act Granted Excessive Deference to Regulations and Rewrote the Purpose of the Law

As the above capsule history of IDEA shows, Congress has been deeply engaged in the issue of special education for several decades. From Congress's Acts, it is clear that Congress—or at least a succession of Congresses at the moments of time when they expressed their wills<sup>70</sup>—wanted the states to provide help to students with disabilities, but exactly what and how much help was not clearly explained in the text of the Acts.

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70. See Thomas B. Bennett, Note, *The Canon at the Water's Edge*, 87 N.Y.U. L. REV. 207, 244 (2012) (describing the difficulty in determining the intent of "Congress" over time).

“[T]he practice of law has been aptly termed an art of prediction.”<sup>71</sup> What must be predicted is “the incidence of the public force through the instrumentality of the courts.”<sup>72</sup> In accordance with this construction, anyone trying to understand the law created by a novel, complex, and somewhat vague statutory scheme like IDEA<sup>73</sup> would want to know how courts will apply it in order to know what language will be given what effect.

The best way to know how courts apply law is usually to look to the earliest Supreme Court precedent on that law or part of the law. The Supreme Court will turn to its earliest precedent to describe a statute’s purpose, even when construing alternate portions of the statute or dealing with distinguishable fact patterns under *stare decisis*.<sup>74</sup> Then, given the judicial hierarchy, lower courts base their

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71. JEROME FRANK, *LAW & THE MODERN MIND* 51 (Transaction Publishers 2009) (1930).

72. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

73. See, e.g., *Bd. of Educ. v. Rowley*, 458 U.S. 176, 188 (1982) (“[The statutory definition of ‘free appropriate public education’] tends toward the cryptic rather than the comprehensive . . . .”); *Murray ex rel. Murray v. Montrose Cnty. Sch. Dist.*, 51 F.3d 921, 926-27 (10th Cir. 1995) (describing the dispute over the phrase “least restrictive environment”); Mark C. Weber, *Common-Law Interpretation of Appropriate Education: The Road Not Taken in Rowley*, 41 J.L. & EDUC. 95 (2012) (describing the difficulty in construing “appropriate education” in IDEA’s provision for a “free appropriate public education”); Judith Welch Wegner, *Variations on a Theme—The Concept of Equal Opportunity and Programming Decisions Under the Education for All Handicapped Children Act of 1975*, 48 LAW & CONTEMP. PROBS. 169, 176-79 (1985) (describing the ambiguity in free appropriate public education and its components); Note, *Enforcing the Right to an “Appropriate” Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103, 1103 (1979) (“In effect, the Act guarantees procedures whereby parents may challenge the appropriateness of their child’s educational program, but provides only the most general guidelines for resolving the substantive questions such challenges may present.”) (footnote omitted). See generally Michael S. Treppa, Comment, *The Education for All Handicapped Children Act: Trends and Problems with the “Related Services” Provision*, 18 GOLDEN GATE U. L. REV. 427 (1988) (describing the difficulty in construing the “related services” provision).

74. Cf. Nicholas S. Zeppos, *The Use of Statutory Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1093-94 & fig.1 (1992) (showing how in statutory interpretation cases before the Supreme Court, “[b]y most measures judicial decisions are the dominant source of authority”).

interpretations on Supreme Court precedent rather than the text of the relevant statute.<sup>75</sup> Again, the Supreme Court precedent, in turn, usually refers to the Supreme Court's own first case on the matter. Therefore, *Board of Education v. Rowley*, the first IDEA case before the Supreme Court,<sup>76</sup> and *Irving Independent School District v. Tatro*, the first case to discuss the deference to be given to Department of Education regulations,<sup>77</sup> are critical to the development of how IDEA is applied and, relatedly, why § 1406(b) is not applied.

As can be seen below, the Supreme Court has relied on its cramped holding that IDEA has a limited purpose—giving students with disabilities access to *some* educational benefit—and its naked assertion that the Department of Education has the power to promulgate IDEA regulations, while, at the same time, it has repeatedly ignored § 1406(b). Indeed, a later case, *Cedar Rapids Community School District v. Garrett F. ex rel. Charlene F.*, shows that the Supreme Court continues to give too much deference to IDEA regulations while ignoring § 1406(b).<sup>78</sup>

a. *Board of Education v. Rowley*. IDEA and its predecessor statutes teemed with terms of art that had no prior or certain meaning.<sup>79</sup> These then-uninterpreted phrases left open the possibility that IDEA required, in the words of one district court, “that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children.”<sup>80</sup> If IDEA had that sweeping purpose and no cost-benefit balancing, states would be required to provide very expensive services for all

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75. See Brian J. Levy, Note, *Who Wants To Know—And Why?: The Supreme Court's Secret Purposivist Test for Exemptions from Association Membership Disclosure Laws*, 87 N.Y.U. L. REV. 473, 511 n.207 (2012) (describing how lower courts interpret Supreme Court precedent rather than the underlying law).

76. 458 U.S. at 187 (noting that “[t]his is the first case in which” the Supreme Court interpreted IDEA).

77. 526 U.S. 66 (1999).

78. 468 U.S. 883 (1984).

79. See sources cited *supra* note 73.

80. *Rowley v. Bd. of Educ.*, 483 F. Supp. 528, 534 (S.D.N.Y. 1980), *aff'd per curiam*, 632 F.2d 945 (2d Cir. 1980), *rev'd*, 458 U.S. 176 (1982).

children with disabilities, even if the children could compensate for their disabilities.<sup>81</sup>

The first IDEA case before the Supreme Court was *Rowley*.<sup>82</sup> In *Rowley*, the parents wanted a school to provide a sign-language interpreter for their deaf daughter, Amy.<sup>83</sup> Amy “[wa]s an excellent lipreader,” who was performing better than the average child but was unable to hear all the information in class because of her hearing loss.<sup>84</sup> The district court and court of appeals both held that Amy had a statutory right to an interpreter under IDEA.<sup>85</sup>

Justice Rehnquist, generally hostile to the creation of individual rights and to federal encroachment on state power,<sup>86</sup> writing for five Justices, reversed.<sup>87</sup> Rehnquist limited the purpose of IDEA, creating a crucial but false touchstone for all subsequent construction of IDEA. Rehnquist looked to two district court opinions referenced in the Act’s legislative history<sup>88</sup> that held that there was “a right to public education for handicapped children . . . .”<sup>89</sup> Because those cases did not “purport[] to require any particular substantive level of education,” Rehnquist held that IDEA only required that the children with disabilities be “given

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81. *Cf. Cedar Rapids*, 526 U.S. at 77-78 (holding that IDEA is informed by “the cost concerns Congress may have had” and “the potential financial burdens imposed on participating States may be relevant to arriving at a sensible construction of the IDEA” but also that IDEA “does not employ cost in its definition of ‘related services’”); *Treppa*, *supra* note 73, at 440 (arguing that it was wrong for the Supreme Court to “allow[] financial ramifications to impact [lower courts’] decisions” as to what services were necessary for an appropriate education).

82. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 187 (1982).

83. *Id.* at 184-85.

84. *Id.* at 184-86.

85. *See Rowley v. Bd. of Educ.*, 632 F.2d 945, 946 (2d Cir. 1980) (per curiam), *rev'd*, 458 U.S. 176 (1982); *Rowley*, 483 F. Supp. at 529.

86. *See* David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 294 (1976).

87. *Rowley*, 458 U.S. at 179.

88. *Id.* at 193; *see supra* note 27.

89. Steven N. Robinson, Note, *Rowley: The Court’s First Interpretation of the Education for All Handicapped Children Act of 1975*, 32 CATH. U. L. REV. 941, 941 (1983).

access to an adequate, publicly supported education” and that “the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.”<sup>90</sup> In so doing, *Rowley* rejected the idea that States had an obligation to “maximize the potential of handicapped children ‘commensurate with the opportunity provided to other children.’”<sup>91</sup>

Rehnquist’s version of IDEA’s purpose was immediately attacked in Congress.<sup>92</sup> It is generally agreed that Rehnquist’s legislative history argument was wrong,<sup>93</sup> and that the *Rowley* standard is flawed.<sup>94</sup> Moreover, as scholars have argued, each successive reimplementation of IDEA appears to reject the *Rowley* standard.<sup>95</sup> As these scholars

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90. *Rowley*, 458 U.S. at 193, 200-01.

91. *Id.* at 189-90 (quoting *Rowley v. Bd. of Educ.*, 483 F. Supp. 528, 534 (S.D.N.Y. 1980), *aff’d per curiam*, 632 F.2d 945 (2d Cir. 1980), *rev’d*, 458 U.S. 176 (1982)).

92. See 128 CONG. REC. 20,964 (1982) (statement of Rep. Charles Dougherty) (disagreeing with *Rowley* because the policy that the Court rejected was “exactly where we intended to go”).

93. See, e.g., Amy J. Goetz et al., *The Devolution of the Rowley Standard in the Eighth Circuit: Protecting the Right to a Free and Appropriate Public Education by Advocating for Standards-Based IEPs*, 34 HAMLINE L. REV. 503, 509-11 (2011) (arguing that the *Rowley* majority’s version of IDEA’s purpose was based on a “largely selective reading of the legislative history” while lauding “the well-reasoned and articulate dissent”); Weber, *supra* note 73, at 95- 96 & n.6, 104; Lauren A. Larson, Comment, *Beyond Conventional Education: A Definition of Education Under the Education for All Handicapped Children Act of 1975*, 48 LAW & CONTEMP. PROBS. 63, 69-70 (1985). *But see* Wegner, *supra* note 73, at 185 (arguing that IDEA’s “ambiguity and lack of specificity” means that no one arguing about its purpose “is able to refute the opposing views in an effective or convincing manner”).

94. See, e.g., Laura Noble, *The Meaning of a Free Appropriate Public Education for Homeless Children: An Analysis of the Stewart B. McKinney Homeless Assistance Act*, 23 STETSON L. REV. 429, 450 & n.124, 457 & n.181 (1994) (“Many scholars are not satisfied with the Supreme Court’s formula for calculating whether an educational program is appropriate. . . . [T]here exists voluminous scholarly criticism of the standard . . .”) (footnote omitted).

95. See, e.g., Ellen A. Callegary, *The IDEA’s Promise Unfulfilled: A Second Look at Special Education & Related Services for Children with Mental Health Needs After Garrett F.*, 5 J. HEALTH CARE L. & POL’Y 164, 174-76 (2002) (arguing that 1997 amendments to IDEA raised the floor higher than was set by *Rowley*); Maureen A. MacFarlane, *The Shifting Floor of Educational Opportunity: The Impact of Educational Reform on Rowley*, 41 J.L. & EDUC. 45, 46 n.6 (2012) (citing

agree, when it passed each iteration of IDEA, Congress had a broader purpose than the *Rowley* Court said Congress did. But lower courts have generally held fast to the low standard for minimum IDEA compliance announced in *Rowley*.<sup>96</sup>

b. *Irving Independent School District v. Tatro*. *Rowley* was the first Supreme Court case to interpret IDEA, and it set judicially imposed limits on the purpose of the Act. The first IDEA case dealing with deference to the Department of Education was *Irving Independent School District v. Tatro*,<sup>97</sup> and it is therefore critical to the development—or lack thereof—of judicial consideration of § 1406(b).

In *Tatro*, the Court was called upon to interpret whether “clean intermittent catheterization” was a “related service” that a state would be required to provide as part of a FAPE.<sup>98</sup> One enumerated class of “related services” is “medical services,”<sup>99</sup> and the plaintiff argued that catheterization was a medical service.<sup>100</sup>

In the process of determining what these statutory phrases meant, a unanimous Court<sup>101</sup> declared the Department of Education’s regulations authoritative: “We begin with the regulations of the Department of Education, which are entitled to deference.”<sup>102</sup> In a footnote, the Court explained why the Department of Education’s regulations are “entitled” to such unqualified deference: “The Secretary

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sources); Andrea Valentino, *The Individuals with Disabilities Education Improvement Act: Changing What Constitutes an “Appropriate” Education*, 20 J.L. & HEALTH 139, 155 (2007) (arguing that the 2004 amendments to IDEA superseded *Rowley*); see also *Blake C. ex rel. Tina F. v. Dep’t of Educ.*, 593 F. Supp. 2d 1199, 1206 (D. Haw. 2009) (expressing confusion over a possible change in standards).

96. See Jane K. Babin, Comment, *Adequate Special Education: Do California Schools Meet the Test?*, 37 SAN DIEGO L. REV. 211, 227-30 (2000) (“[M]any courts have relied on *Rowley* to deny services . . .”).

97. 468 U.S. 883 (1984).

98. *Id.* at 885-86.

99. 20 U.S.C. § 1401(26) (2006); see also 20 U.S.C. § 1401(17) (1982).

100. *Tatro*, 468 U.S. at 886-87.

101. Justices Brennan, Marshall, and Stevens joined the entire opinion except a separate part dealing with attorneys’ fees. See *id.* at 896.

102. *Id.* at 891-92.

of Education is empowered to issue such regulations as may be necessary to carry out the provisions of the Act.”<sup>103</sup>

In this footnote, the Court neither mentioned § 1406(b)’s explicit limitations on deference to Department of Education regulations enacted a year earlier nor the Court’s own groundbreaking case, *Chevron*, decided roughly two weeks earlier.<sup>104</sup> Instead, readers, including other federal judges, were left with the flat assertion that the regulations “are entitled to deference.”<sup>105</sup> Recourse to § 1406(b)’s limitation on deference would not have changed the result in *Tatro* because the Court was relying on the very same regulations that set the floor for protections under § 1406(b).<sup>106</sup> However, by skipping the step of § 1406(b), the Court established a model for evaluating Department of Education regulations without § 1406(b).<sup>107</sup>

*c. Cedar Rapids Community School District v. Garrett F. ex rel. Charlene F.* The echoes of *Tatro*’s excessive and unlawful deference can be seen in *Cedar Rapids Community School District v. Garrett F. ex rel. Charlene F.*<sup>108</sup> In *Cedar Rapids*, the majority ignored arguments for less deference to Department of Education regulations, including the argument based on § 1406(b) made by the federal government in its amicus brief and at oral argument.<sup>109</sup>

The issue in *Cedar Rapids* was whether “continuous one-on-one nursing services” were “medical services,” a subset of “related services” that school districts would be statutorily

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103. *Id.* at 892 & n.9 (citing 20 U.S.C. § 1417(b)).

104. *Id.*; see also *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 67 U.S. 837 (1984); *infra* Part I.B.2.a.

105. *Tatro*, 468 U.S. at 891-92.

106. See *id.* at 892 (citing three regulations from 1983).

107. In a later case, the Court gave the Department of Education deference because the statute was ambiguous even before assessing its reasonability. *Honig v. Doe*, 484 U.S. 305, 325 n.8 (1988). Again, the Court failed to consider § 1406(b).

108. 526 U.S. 66 (1999).

109. Brief for United States as Amicus Curiae at \*7-8, 23-24, *Cedar Rapids*, 526 U.S. 66 (No. 96-1793); Transcript of Oral Argument at 44, *Cedar Rapids*, 526 U.S. 66 (No. 96-1793).

required to provide.<sup>110</sup> The *Cedar Rapids* majority explained that, because of its holding in *Tatro*, the definition of “medical services” would continue to be based on what had been “reasonably determined” by the Secretary of Education.<sup>111</sup> Because continuous one-on-one nursing services fell within the purpose of IDEA and definition of “medical services” that the Court previously limited in *Rowley* and *Tatro*, the Court approved the mandate of nursing services.<sup>112</sup>

Even though the Court did not directly consider regulations in *Cedar Rapids*, the Court majority, the federal government—which was seeking to expand services—and the dissenting Justices—who would deny nursing services—all discussed the deference owed to the Department of Education’s IDEA regulations.

The majority, in a footnote, maintained that, had the Department clarified its position as to what constituted a medical service excluded from the statute, the Court would have deferred under *Auer*.<sup>113</sup> In the footnote, the Court relied on *Tatro*’s deference to the Secretary’s determination and then unhelpfully “assume[d] that the Secretary has authority under the IDEA to adopt regulations that define the ‘medical services’ exclusion . . . ; and the Secretary surely has the authority to enumerate the services that are, and are not, fairly included within the scope of § 1407(a)(17).”<sup>114</sup> Not only did the Court weigh in to assert super-strong deference to the Department’s power to issue and interpret its IDEA regulations, it did so without considering the clear statutory limits on delegation in § 1406(b) that were raised, if tangentially, by the federal government.

The federal government’s § 1406(b) argument was at least somewhat counterintuitive. In its brief and during oral argument, the government argued that, in § 1406(b), Congress codified the opposite of everything the proposed

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110. *Cedar Rapids*, 526 U.S. at 73.

111. *Id.* at 73-75.

112. *Id.* at 79.

113. *Id.* at 74 n.6 (citing *Auer v. Robbins*, 519 U.S. 452, 462 (1997)).

114. *Id.*

regulations included.<sup>115</sup> Because Reagan’s 1982 proposed regulations allowed for consideration of costs when determining whether nursing services were related services in regulations, § 1406(b) showed that Congress disapproved that consideration.<sup>116</sup> Although some of the Justices engaged the § 1406(b) argument in oral argument,<sup>117</sup> no Justice mentioned § 1406(b) in the opinions in *Cedar Rapids*. Dissenting, Justice Thomas, joined by Justice Kennedy, raised a different deference argument. More than a decade after the fact, Thomas explained that the *Tatro* Court failed to perform all of the steps in *Chevron*: “Unfortunately, the Court in *Tatro* failed to consider this necessary antecedent question [*Chevron* Step One] before turning to the Department of Education’s regulations implementing IDEA’s related services provision. The Court instead began ‘with the regulations of the Department of Education, which,’ it said, ‘are entitled to deference.’”<sup>118</sup>

The dissent shows that *Tatro* granted super-strong deference to the Department—beyond that of *Chevron* and *Auer*—but that since *Tatro*, *Chevron* had become a more prominent model through which to view questions of deference to administrative regulations. Moreover, Thomas’s warning is a reminder that the majority was again modeling excessive deference to the Department of Education regulations.

In *Cedar Rapids*, the Supreme Court did not include § 1406(b) in its analysis of regulations and was extremely deferential to the Department of Education. In *Tatro*, the Supreme Court suggested deference without limit. In *Cedar Rapids*, the Court also assumed what appears to be virtually

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115. See Brief for United States as Amicus Curiae, *supra* note 109, at \*7-8, 23-24; Transcript of Oral Argument, *supra* note 109, at 44.

116. See Brief for United States as Amicus Curiae, *supra* note 109, at \*7-8, 23-24; Transcript of Oral Argument, *supra* note 109, at 44. Advocacy groups raised a similar argument in their amicus brief. See Brief of Nat’l Ass’n of Prot. & Advocacy Sys. et al. as Amici Curiae at \*10 n.4, *Cedar Rapids*, 526 U.S. 66 (No. 96-1793). The school district responded that “[j]ust because Congress went on in 1983 and said you can’t lessen the procedural or substantive rights, I don’t think you can say they endorsed” the bright-line test proposed by the Government. Transcript of Oral Argument, *supra* note 109, at 54.

117. Transcript of Oral Argument, *supra* note 109, at 53-55; see also *id.* at 30.

118. *Id.* at 80 (Thomas, J., dissenting) (quoting *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891-92 (1984)).

unlimited deference, relying on *Auer*. The dissenting Justices also would have ignored § 1406(b) and would have relied on *Chevron*.

The next Subsection gives a brief synopsis of these general deference regimes, which apply to regulations beyond the education context, and shows that they have expanded and multiplied since the passage of § 1406(b). As can be seen in *Cedar Rapids* implicitly and *Petit* explicitly, a broad reading of these doctrines, particularly *Auer*, would cause them to eclipse § 1406(b) in practice.

## 2. Generalized Deference Models Have Dramatically Expanded in the Past Thirty Years

a. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* At roughly the same time Representative Biaggi crafted § 1406(b) to prevent a particular administrative agency, the Department of Education, from adopting regulations that would weaken the statute, and the Supreme Court gave statute-specific deference to that same agency in *Tatro*, the Supreme Court created its current paradigm for deference to *all* agencies in *Chevron*.<sup>119</sup> Both § 1406(b) and *Chevron* seek to answer the same question: When does an agency have the power to issue a binding interpretation of a statute? *Chevron* says an agency can interpret when Congress delegates the power, often implicitly, and the statute is ambiguous.<sup>120</sup> Section 1406(b) says the Department can only interpret IDEA if its interpretation does not diminish rights existing in 1983.

Before *Chevron*, subject-matter specific interpretation regimes used to be the norm. The Court made its decisions to defer to agencies on a case-by-case—or at least subject-by-subject—basis.<sup>121</sup> Indeed, the Supreme Court still applies a

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119. 467 U.S. 837 (1984).

120. *Id.* at 842-43.

121. Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for Chevron* U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275, 1281 (“The *Chevron* analysis is remarkable not in its deference to the EPA’s interpretation of the 1977 amendments, but in its apparent substitution of the Court’s longstanding case-by-case approach to such questions with a blanket rule of required deference to

“continuum of deference regimes,” applicable in different situations.<sup>122</sup> But, in the past three decades, following the lead of the influential D.C. Circuit,<sup>123</sup> *Chevron* has become the key deference regime that tells judges to defer to an agency when an agency interprets a statute.<sup>124</sup> It is a “foundational, even a quasi-constitutional text—the undisputed starting point for any assessment of the allocation of authority between federal courts and administrative agencies.”<sup>125</sup> Certainly its role in law school casebooks prolongs its life and heightens its importance.<sup>126</sup>

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the implementing agency’s interpretation in the event of statutory silence or ambiguity.”); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1120-21 (2008) (“By 1984, the Court had already announced *Chevron*-like or *Chevron*-lite deferential approaches in labor law, tax law, treaty interpretation, securities law, environmental law, and other areas.”).

122. Eskridge & Baer, *supra* note 121, at 1090, 1097 n.47 (“One would expect that the perception of a *Chevron* Revolution would have discouraged litigants from challenging some legally vulnerable agency interpretations that would have been challenged under a regime perceived to be more skeptical, while agencies would be encouraged to defend a broader array of interpretations they might have abandoned under the previous regime.”).

123. See Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1, 58 (2013) (describing the ascendancy of *Chevron* analysis in the D.C. Circuit and the migration of its canonical status to the Supreme Court); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 838 (2001) (“The decision first took on the status of a canonical statement about deference in the hands of Reagan-appointed judges on the D.C. Circuit.”).

124. “[A] staple of modern federal administrative law doctrine is the principle of judicial deference to administrative interpretations of both congressional statutes and agency regulations. The seminal case on judicial deference to reasonable agency statutory interpretations is, of course, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*” Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock’s Domain*, 79 GEO. WASH. L. REV. 1449, 1449 (2011).

125. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188 (2006). As will be discussed in Part II, *infra*, *Chevron*’s text is not foundational. Rather, the analytical model derived from *Chevron* and cases analyzing *Chevron* is.

126. See, e.g., James Salzman & J.B. Ruhl, *New Kids on the Block—A Survey of Practitioner Views on Important Cases in Environmental and Natural Resources Law*, 25 NAT. RESOURCES & ENV’T 45, 46 (2010) (arguing that *Chevron* is unlikely to “fall out of favor given its role as a mainstay of law school case books for administrative law”); Eric R. Womack, *Into the Third Era of Administrative Law:*

*Chevron* has been discussed in-depth elsewhere, so the reader will be spared another rendition of how a unanimous six-member Court approved the Reagan Environmental Protection Agency's "bubble concept,"<sup>127</sup> and in so doing, accidentally created a universal standard for handling regulations.<sup>128</sup> The key takeaway from *Chevron* is a two-step<sup>129</sup> "*Chevron* test" to determine whether an agency's interpretation gets "*Chevron* deference." Under the *Chevron* test, a court "employ[s] traditional tools of statutory construction" to determine "whether Congress has directly spoken to the precise question at issue."<sup>130</sup> If the statute "unambiguously authorizes or forecloses" the agency's rule, then a court "follow[s] Congress's express policy choice."<sup>131</sup> If the statute is ambiguous, "step two of *Chevron* requires that [a court] defer to [the agency's] reasonable interpretation."<sup>132</sup>

Although that test is very deferential, another deference regime created—or, perhaps, revived—after *Chevron* is at least as likely to apply in a hypothetical § 1406(b) case. Because the major issue in a § 1406(b) case is what rights were created by the regulations in effect on July 20, 1983, the interpretation of those *regulations* is almost as important as

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*An Empirical Study of the Supreme Court's Retreat from Chevron Principles in United States v. Mead*, 107 DICK. L. REV. 289, 289 n.4 (2002) ("[M]ost scholars would agree that no [administrative law] class would be complete without a comprehensive review of the *Skidmore* and *Chevron* decisions.").

127. See generally Jack L. Landau, *Chevron*, U.S.A. v. NRDC: *The Supreme Court Declines to Burst EPA's Bubble Concept*, 15 LEWIS & CLARK ENVTL. L. REV. 285 (1985).

128. See Lawson & Kam, *supra* note 123, at 30 ("[W]hen *Chevron* was briefed and argued in the Supreme Court, no one thought it was a case involving any serious, general question about the standard of review for questions of law. Instead, all the parties and the Justices understood the case to be an important but relatively narrow dispute about the permissibility of the 'bubble concept' under the Clean Air Act, with no broader implications for administrative law doctrine.").

129. Sometimes *Chevron* is described as having a third step, "Step Zero." See generally Sunstein, *supra* note 125.

130. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, 843 n.9 (1984).

131. *Sierra Club v. EPA*, 536 F.3d 673, 677 (D.C. Cir. 2008).

132. *Id.* (citing *Chevron*, 467 U.S. at 842-43).

the interpretation of IDEA. When a court considers an agency's interpretation of regulations, it applies a much stronger form of deference, generally known as *Auer* deference.<sup>133</sup>

b. *Thomas Jefferson University v. Shalala*. In *Thomas Jefferson University v. Shalala*, the Supreme Court revived the dormant doctrine now known as *Auer* deference.<sup>134</sup> Under this standard of deference,

an agency's interpretation of its own regulations . . . must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation. In other words, [a court] must defer to the Secretary's interpretation unless an alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation.<sup>135</sup>

This deference is so strong that the *Thomas Jefferson* majority deferred to the agency's interpretation of its regulation even though Justices Thomas, Stevens, O'Connor, and Ginsburg held that the agency's interpretation "r[a]n[] afoul of the plain meaning of the regulation and therefore [wa]s contrary to law in violation of the Administrative Procedure Act."<sup>136</sup>

c. *Auer v. Robbins*. In *Auer v. Robbins*<sup>137</sup> and successive cases, "the Supreme Court seems to be sending the lower courts an unmistakable, if implicit, message that they should confer extraordinary deference on agency interpretations of

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133. *Auer* deference is also known as *Seminole Rock* deference. Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 82 (2011) ("But the Court now refers to the [*Seminole Rock*] doctrine by reference to its 1997 opinion in *Auer v. Robbins*." [hereinafter Pierce, *Studies of Judicial Review*]).

134. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994).

135. *Id.* (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), and *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988)) (citations omitted) (internal quotation marks omitted).

136. *Id.* at 518 (Thomas, J., dissenting). *But see id.* at 506 (majority opinion) (concluding that "the Secretary's interpretation is a reasonable construction of the regulatory language").

137. *Auer v. Robbins*, 519 U.S. 452 (1997).

agency rules.”<sup>138</sup> This deference is so strong that one recent study found that the Supreme Court defers to agency interpretation of agency rules ninety-one percent of the time.<sup>139</sup>

Indeed, *Auer* greatly magnifies the power of that broad *Thomas Jefferson/Seminole Rock* deference because *Auer* allows for deference to an agency’s interpretation of its own regulations made *after* a dispute about the regulations arises.<sup>140</sup> In *Auer*, a unanimous Court relied on the Department of Labor’s interpretation of its own regulations that was provided in an amicus brief to the Supreme Court. The Court held that the Department of Labor’s position in its amicus brief was not “unworthy of deference” because it arrived in “the form of a legal brief.”<sup>141</sup> *Auer*, however, includes limiting language that would appear to be a key caveat. The *Auer* Court explained it would defer to the Department of Labor’s legal brief because it was not a “*post hoc* rationalizatio[n] advanced by an agency seeking to defend past agency action against attack” nor was there reason to “suspect that the interpretation does not reflect the agency’s fair and considered judgment on the matter in question.”<sup>142</sup>

However, the routine and perfunctory way in which many courts have deferred to an agency’s litigation position suggests that courts do not seriously consider any caveats to

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138. Pierce, *Studies of Judicial Review*, *supra* note 133, at 85.

139. Eskridge & Baer, *supra* note 121, at 1099 tbl.1. However, another study concluded that lower courts were apparently roughly equally as deferential to *Chevron* arguments as to *Auer* arguments. Richard J. Pierce & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 520 (2011).

140. See Stephen M. Johnson, *Bringing Deference Back (But for How Long?): Justice Alito, Chevron, Auer, and Chenery in the Supreme Court’s 2006 Term*, 57 CATH. U. L. REV. 1, 11, 33 (2007) (commenting that, in *Auer*, the Court said that “the most recent interpretation appeared to be prepared in response to the litigation” and noting more recent cases in which the Supreme Court deferred to post hoc rationalizations); Stephenson & Pogoriler, *supra* note 124, at 1493-94 (suggesting that all litigation briefs are “post hoc”).

141. *Auer*, 519 U.S. at 462.

142. *Id.* (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)) (internal quotation marks omitted).

*Auer*.<sup>143</sup> That is, in many cases, courts assert there is no reason to believe the agency's position is not fair and considered, and then they defer to the agency without explaining how that conclusion was reached.<sup>144</sup> This is true even though courts have reason to be skeptical that litigation positions are fair and considered as a general matter.<sup>145</sup> For instance, during a lawsuit, an agency might assert an opinion about its regulation even though "no policy-making official has even considered, much less approved, the position the lawyer is taking in litigation."<sup>146</sup> In some circumstances, the Court and some lower courts do take the "fair and considered" caveat seriously.<sup>147</sup> Indeed, *Auer* deference may wither away

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143. See Elbert Lin & Brendan J. Morrissey, *No Notice, No Deference: Agency Deference After Christopher v. SmithKline Beecham Corp.*, 81 U.S.L.W. 228, at \*2, <http://www.wileyrein.com/resources/documents/LinMorrisseyBNA.pdf> ("These limits rarely come into play, however."); see also Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Interpretations*, 34 U.C. DAVIS. L. REV. 49, 55 (2000) (noting that, in the immediate aftermath of *Auer*, circuit courts took a broad reading of *Auer* and used it to grant deference to administrative interpretations in agencies' briefs); Richard J. Pierce, Jr., *Democratizing the Administrative State*, 48 WM. & MARY L. REV. 559, 611 (2006) (describing "the willingness of courts to defer to agency interpretations of ambiguous agency rules in enforcement proceedings, even when the interpretation urged in the enforcement proceeding is inconsistent with both the agency interpretation announced before the conduct at issue and with the agency's current rules") [hereinafter Pierce, *Democratizing*]; cf. Angstreich, *supra*, at 146-47 n.449 (noting that the D.C. Circuit explicitly, and the Supreme Court implicitly, placed the burden on the challenging party to show that the agency's interpretation was not fair and considered).

144. Courts assert without showing proof that an agency's position is fair and considered or that there is no reason to believe the agency's position is not fair and considered. See, e.g., *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1139 (2011); *AKM LLC v. Sec'y of Labor*, 675 F.3d 752, 754 (D.C. Cir. 2012).

145. See, e.g., *Stephenson & Pogoriler*, *supra* note 124, at 1493-94 (arguing against deference to litigation briefs).

146. Pierce, *Democratizing*, *supra* note 143, at 607.

147. See *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-67 (2012) (quoting *Auer*, 519 U.S. at 462) (internal quotation marks omitted); *Exelon Generation Co., v. Local 15, International Brotherhood of Electrical Workers*, 676 F.3d 566, 575-78 (7th Cir. 2012) (quoting *Auer*, 519 U.S. at 462) (internal quotation marks omitted).

in the near future,<sup>148</sup> but, to the extent that “not just a post hoc rationalization” is boilerplate allowing for deference to exactly such post hoc rationalizations, *Auer* is immensely powerful.

When *Auer* deference is given to the Department of Education,<sup>149</sup> it deprives § 1406(b) of effect. Section 1406(b) only constricts the power of the Department when the Department could be said to contravene pre-1983 regulations. If the Department can redefine the pre-1983 regulations under *Auer* whenever a party asserts that the Department’s present-day regulations contravene them, then § 1406(b) would only matter when the Department violates an unambiguous pre-1983 regulation. Thus, courts that do allow the Secretary of Education to reinterpret 1983 regulations at will give the Department the power to bypass all § 1406(b) challenges.<sup>150</sup>

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148. See Jonathan H. Adler, *Auer Deference Still Up for Grabs*, VOLOKH CONSPIRACY (June 18, 2012, 11:36 AM), <http://www.volokh.com/2012/06/18/auer-deference-still-up-for-grabs>.

149. Although the Department of Education is the actor that writes the regulations, it may be that, in a given litigation, state and local governmental units are the actors that seek *Auer* deference when the regulations do not require the provision of costly services. See, e.g., *D.L. ex rel. K.L. v. Balt. Bd. of Sch. Comm’rs*, 706 F.3d 256, 259-60 (4th Cir. 2013); *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 276-77 (3d Cir. 2012).

When a school district or state or local governmental unit is given *Auer* or *Chevron* deference because it relies on a Department of Education regulation, it also deprives the students of protections that may have been preserved under § 1406(b). See *N.D. ex rel. Parents v. Haw. Dep’t of Educ.*, 600 F.3d 1104, 1115 (9th Cir. 2010) (applying *Chevron* deference). *But cf. E.T. v. Bd. of Educ.*, No. 11-CV-5510, 2012 WL 5936537, at \*15-16 (S.D.N.Y. Nov. 26, 2012) (applying case law to hold against the parents in the face of *Auer* deference). Although in some situations, deference to the Department of Education may cut in favor of the student or parents. See, e.g., *Moorestown Twp. Bd. of Educ. v. S.D.*, 811 F. Supp. 2d 1057, 1071-74 (D.N.J. 2011).

150. *Auer* deference may have more play in the IDEA context because IDEA’s statutory framework and its controlling regulations may be more opaque than others. See, e.g., *Bd. of Educ. v. Rowley*, 458 U.S. 176, 188 (1982) (“[The statutory definition of ‘free appropriate public education’] tends toward the cryptic rather than the comprehensive . . . .”); *D.L.*, 706 F.3d at 259 (“The plain language of the statute and the regulations does not make clear whether public schools are required to provide services to students enrolled in private schools.”); *Ridley*, 680 F.3d at 276 (“[N]either the text of the IDEA nor the IDEA regulations provide

The power of this deference can be seen in *Cedar Rapids*.<sup>151</sup> In *Cedar Rapids*, the Supreme Court deferred to the Department's litigation position that would limit the provision of medical services<sup>152</sup> even though the Department "maintained conflicting positions" prior to the litigation.<sup>153</sup> As it did in *Cedar Rapids* and other cases,<sup>154</sup> the Department of Education can use *Auer* deference to make up new law when challenged.

In the mid-1990s, the same period when *Thomas Jefferson* and *Auer* were written, it was becoming increasingly clear that the Supreme Court's interpretation of agency actions was becoming untethered. For instance, the Supreme Court's rulings gave deference to administrative decisions even when those decisions were not meant to have the force of law.<sup>155</sup> At the same time *Chevron* was spreading its roots, § 1406(b)—meant to freeze, or at least set a floor on, the real world impact of the Department's IDEA regulations and prevent future Departments from interpreting away rights—was lying dormant. The next Subsections show that dormancy by describing the few cases that mention or consider § 1406(b).

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much guidance as to the effect of [a statutory] provision in this case.") *Taylor v. Vt. Dep't of Educ.*, 313 F.3d 768, 779 (2d Cir. 2002) (Sotomayor, J.) ("[T]he federal regulations are inartfully drafted.").

151. See *supra* Part I.B.1.c (describing *Cedar Rapids*).

152. *Cedar Rapids Cmty. Sch. Dist. v. Garrett F. ex rel. Charlene F.*, 526 U.S. 66, 74 n.6 (1999).

153. *Id.* at 83 n.3 (Thomas, J., dissenting).

154. See *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769 (D.C. Cir. 2012); Kay Hennessy Seven & Perry A. Zirkel, In the Matter of Arons: *Construction of IDEA's Lay Advocate Provision Too Narrow?*, 9 GEO. J. ON POVERTY L. & POL'Y 193, 211 (2002) ("[T]he Department of Education clarified its position in the *amicus curiae* brief submitted to the Delaware Supreme Court to support the parent advocates in *Arons*.").

155. See Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 4 (1996) ("Decisions and opinions of the Court have the effect of conferring the practical force of law upon documents and positions which under the APA and organic statutes do not possess the force of law.").

3. There Were Only Three § 1406(b) Cases Between Its Enactment and *Petit*, and None Considered Invalidating a Regulation Because that Regulation Lessened a Pre-1983 Protection.

Between the enactment of § 1406(b) in 1983 and *Petit* in 2008, only three federal or state cases touched on § 1406(b). None addressed the argument that a given regulation was invalid for procedurally or substantively lessening protections embodied in regulations in effect on July 20, 1983.

In the first case, *Board of Education v. Roy H.*, the district court cited § 1406(b) merely to support its argument that IDEA and its attendant regulations were designed to prize parental consent in the placement of students with disabilities.<sup>156</sup> In *Roy H.*, there was no dispute about the validity of a regulation.<sup>157</sup>

In the second case, *Murray ex rel. Murray v. Montrose County School District*,<sup>158</sup> the Tenth Circuit rejected the plaintiff's argument, which resembled the Government's argument in *Cedar Rapids*.<sup>159</sup> In *Murray*, the plaintiff argued that IDEA included a policy of "neighborhood schools" because Secretary Bell's proposed 1983 regulations allegedly would have ended a "neighborhood school" policy.<sup>160</sup> By passing § 1406(b), the plaintiff argued, Congress codified the opposite of all of Bell's proposed regulations.<sup>161</sup> The Tenth Circuit held that the plaintiff's creative argument was irrelevant because the "plain meaning of the statute," which did not refer to "neighborhood schools," controlled.<sup>162</sup> The

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156. No. 93 C 3252, 1995 WL 12249, at \*3 (N.D. Ill. Jan. 12, 1995) (construing then-§ 1407).

157. *See id.*

158. 51 F.3d 921 (10th Cir. 1995).

159. *See supra* note 116 and accompanying text.

160. *Murray*, 51 F.3d at 929-30 (construing then-§ 1407).

161. *Id.*

162. *Id.*

Supreme Court denied the plaintiff's certiorari petition,<sup>163</sup> which presented, among other questions, the question as to "[w]hether a 1983 amendment, 20 U.S.C. § 140[6](b), ratified the extant regulations and interpretations of the U.S. Department of Education."<sup>164</sup>

In the last case, *Michael ex rel. Stephen C. v. Radnor Township School District*, the plaintiff argued that policy memoranda issued by the Department of Education's Office of Special Education Programs did not have the force of law.<sup>165</sup> The district court, quoting *Chevron* at length, held that the memoranda had the force of law in part because the Secretary's interpretation was "reasonable," even though, under amendments to IDEA passed following the interpretation, the interpretation would not have had the force of law.<sup>166</sup> Although that holding should have concluded the case, the district court added that the memoranda had the force of law because the Secretary was empowered to issue regulations that did not procedurally or substantively lessen protections in the 1983 regulations and the plaintiffs did not show a regulation prior to 1983 that would have created rights that were lessened by the policy memoranda.<sup>167</sup> The district court thus read § 1406(b) in a very unusual manner, suggesting that the Secretary was empowered to give any statement the force of law so long as no pre-1983 regulations were violated—rather than reading § 1406(b) literally such that it only limited the promulgation of regulations intended to have the force of law. On appeal, the Third Circuit affirmed the district court, but made no reference to § 1406(b).<sup>168</sup>

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163. *Murray ex rel. Murray v. Montrose Cnty. Sch. Dist.*, 516 U.S. 909 (1995).

164. Petition for Writ of Certiorari at i, *Murray*, 516 U.S. 909 (No. 95-208).

165. *Michael C. ex rel. Stephen C. v. Radnor Twp. Sch. Dist.*, No. C.A. 98-4690, 1999 WL 89675, at \*3 & n.9 (E.D. Pa. Feb. 4, 1999), *aff'd*, 202 F.3d 642 (3d Cir. 2000).

166. *Id.*; *Michael C. ex rel. Stephen C. v. Radnor Twp. Sch. Dist.*, 202 F.3d 642, 650 n.6 (3d Cir. 2000).

167. *Michael C.*, 1999 WL 89675 at \*3 n.9.

168. *Michael C.*, 202 F.3d at 650 n.6.

These three cases were the first to mention § 1406(b), but none were used to argue that regulations promulgated by the Department violated parents' and children's rights under IDEA as embodied in pre-1983 regulations. That there were so few cases mentioning § 1406(b) and none that applied the literal text of § 1406(b) shows that § 1406(b) has essentially been ignored by courts and litigators. Other evidence that most lawyers have bypassed § 1406(b) can be seen in court cases and secondary sources that assert that the Department is owed deference but do not mention § 1406(b).<sup>169</sup> In these

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169. Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 70 (2005) (Breyer, J., dissenting) (“[S]hould some such need arise—*i.e.*, if nonuniformity or a particular state approach were to prove problematic—the Federal Department of Education, expert in the area, might promulgate a uniform federal standard, thereby limiting state choice.” (citing 20 U.S.C. § 1406(a) (Supp. IV 2000) and Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 891-93 (1984))); Alief Indep. Sch. Dist. v. C.C. *ex rel.* Kenneth & Nneka C., 655 F.3d 412, 417 (5th Cir. 2011) (“The Secretary of Education is authorized to issue regulations under the IDEA ‘to ensure that there is compliance with the specific requirements’ of the statute. 20 U.S.C. § 1406(a).”); Dixie Snow Huefner, Commentary, *The Final Regulations for the Individuals with Disabilities Education Improvement Act (IDEA ‘04)*, 217 ED. LAW REP. 1, 1 & n.3 (2007); Thomas A. Mayes, *Denying Special Education in Adult Correctional Facilities: A Brief Critique of Tunstall v. Bergeson*, 2003 B.Y.U. EDUC. & L.J. 193, 202 & nn.64-65 (“Congress has empowered the United States Department of Education to issue regulations to enforce the IDEA, and the judiciary largely defers to the Department’s interpretation and implementation of the statute.”) (footnotes omitted); Scott Goldschmidt, Comment, *A New IDEA for Special-Education Law: Resolving the “Appropriate” Educational Benefit Circuit Split and Ensuring a Meaningful Education for Students with Disabilities*, 60 CATH. U. L. REV. 749, 763 & nn.99-100 (2011) (“Congress has assigned the Department of Education as the administrative agency required to enforce the IDEA. As a result, the Department of Education has the responsibility to issue rules and regulations for the IDEA.”) (footnote omitted); Michael T. McCarthy, Note, *Don’t Get the Wrong IDEA: How the Fourth Circuit Misread the Words and Spirit of Special Education Law—And How To Fix It*, 65 WASH. & LEE L. REV. 1707, 1745 & n.230 (2008) (“For similar reasons as stated above, the ED is the most appropriate governmental body to tackle this problem—it possesses the necessary tools and the power to promulgate a rule that takes into account the vulnerabilities of school systems and parents.”). Both Mayes and Goldschmidt cite *Chevron* as the justification for judicial deference under § 1406(a). Mayes, *supra*, at 202 n.64; Goldschmidt, *supra*, at 763-64 & nn.101-05.

There is at one counterexample to this trend. In a footnote in another recent case, the Supreme Court of Minnesota held that IDEA regulations that defined “extracurricular and nonacademic activities” were valid in part because they did not procedurally or substantively lessen protections. See *Indep. Sch. Dist. No. 12 v. Minn. Dep’t of Educ.*, 788 N.W.2d 907, 912, 914 n.7 (Minn. 2010).

examples, echoes of *Tatro's* super-deference can be heard loud and clear while § 1406(b) has been ignored. Congress's clever response to Bell has essentially been unrun.

Two recent cases in the D.C. and Eleventh Circuits suggest an increased interest in § 1406(b). Confronting a § 1406(b) argument head-on, the D.C. Circuit relied on *Chevron*, *Thomas Jefferson*, and *Auer* to give deference to the Department's ad hoc interpretation and deny substantive protections provided by pre-1983 regulations. In *Jefferson*, the Eleventh Circuit used § 1406(b) to uphold a regulation, much as had been argued in *Cedar Rapids* and *Murray*.

#### 4. *Petit* Was the First Time a Court Seriously Grappled with § 1406(b), but It Was Still Too Deferential

The district and appellate courts in *Petit* were the first to openly address whether Department of Education regulations must be invalidated for procedurally or substantively lessening protections.<sup>170</sup> Rejecting the plaintiffs' § 1406(b) argument, the courts relied on *Chevron* to hold against the students.

The regulations at issue in *Petit* were 2006 regulations that the plaintiffs argued substantively lessened students' rights to school-funded mapping of cochlear implants.<sup>171</sup> Cochlear implants are devices implanted in the ear to help deaf children hear.<sup>172</sup> They consist of an external component with a microphone and processor and an internal component

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170. As noted above, the Supreme Court was confronted with a § 1406(b) argument in *Cedar Rapids* but chose not to address it. See sources cited *supra* notes 110-17 and accompanying text. In at least two other cases, circuit panels have ignored references to § 1406(b) in one of the parties' briefs. See *Ga. State Dep't of Educ. v. Derrick C.*, 314 F.3d 545 (11th Cir. 2002); Brief of Appellees at \*44-45, *Derrick C.*, 314 F.3d 545 (No. 02-11578); *McQueen ex rel. McQueen v. Colo. Springs Sch. Dist. No. 11*, 488 F.3d 868 (10th Cir. 2007); Opening Brief of Joshua McQueen, at \*15 n.2, *McQueen*, 488 F.3d 868 (No. 06-1169).

171. *Petit v. U.S. Dep't of Educ.*, 578 F. Supp. 2d 145, 149 (D.D.C. 2008) (explaining that whether the statute and regulations apply to mapping is the basis of the dispute).

172. *Id.* at 149-50.

that stimulates electrodes in the auditory nerve.<sup>173</sup> “Mapping” is the process by which a specialist adjusts the implant so that the internal component “provides the optimal amount of stimulation to the auditory nerve.”<sup>174</sup> Multiple mapping sessions are required to ensure that the implant works properly.<sup>175</sup>

In 2003, the parents of H.P., a young boy in New Hampshire, won a court victory against their school district when the district judge held that mapping was a “related service” that the school district was required to provide for H.P. under IDEA.<sup>176</sup>

Shortly thereafter, in 2004, IDEA was comprehensively amended.<sup>177</sup> When the 2004 Amendments were reported out of the Senate Committee on Health, Education, Labor, and Pensions, the Senate Committee report explained that the Committee did “not intend that mapping a cochlear implant, or even costs associated with mapping . . . be the responsibility of a school district.”<sup>178</sup> This conclusion was based on the Senate bill’s proposed changes to the definitions of “assistive technology device” and “related services” that would have excluded “a medical device that is surgically implanted, or the post-surgical maintenance, programming, or replacement of such device, or an external device connected with the use of a surgically implanted medical device.”<sup>179</sup>

If the Committee bill had been passed unchanged, there would be no argument as to whether Congress wanted mapping included as a related service. Thereafter, however, the language that clearly removed mapping from related

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173. *Id.*

174. *Id.*

175. *See id.*

176. *See* Stratham Sch. Dist. v. Beth P., No. 02-135-JD, 2003 WL 260728, at \*1 (D.N.H. Feb. 5, 2003).

177. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended at 20 U.S.C. §§ 1480-1482) (2006).

178. S. REP. NO. 108-185, at 8 (2003).

179. *Id.* at 8, 102, 107.

services was deleted unanimously in what was called a “technical amendment.”<sup>180</sup> If the amendment was, in fact, purely technical, mapping would still be forbidden by statute. However, the Committee’s designation of the amendment as “technical” is irrelevant to the interpretation of its substantive import. The Supreme Court assesses whether “technical” amendments make substantive changes to determine whether to disregard legislative history and language that predates the amendment.<sup>181</sup> Therefore, as chairman of the committee and the sponsor of the amendment would aver after the passage of the 2004 Amendments, the purpose of the “technical amendment” was in part to remove the restriction that eliminated mapping as a related service.<sup>182</sup>

Comprehensive regulations soon followed the passage of the 2004 Amendments.<sup>183</sup> Although these regulations were

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180. See 150 CONG. REC. 9375-76 (2004); see also S. Amend. 3150 to S. 1248, 108th Cong. (2004). Compare 20 U.S.C. § 1401(1)(B), (26)(B) (“The term does not include a medical device that is surgically implanted, or the replacement of such device.”), with S. REP. NO. 108-185, at 102, 107 (“The term does not include a medical device that is surgically implanted, or the post-surgical maintenance, programming, or replacement of such device, or an external device connected with the use of a surgically implanted medical device (other than the costs of performing routine maintenance and monitoring of such external device at the same time the child is receiving other services under this Act).”).

181. Compare *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1407-08 (2010) (disparaging the usefulness of legislative history for an earlier draft because “[s]ignificant substantive changes—including the introduction of the term we are construing in this case—were inserted without floor debate, as ‘technical’ amendments”), with *Bloate v. United States*, 130 S. Ct. 1345, 1349 n.2 (2010) (noting that the Court was citing to a statute according to how it was currently codified rather than how it was codified during the appeal below because Congress’s “technical changes . . . did not change the substance of any provision relevant here”).

182. Letter from Sen. Judd Gregg to Margaret Spellings, Sec’y of Educ., June 24, 2005, reprinted in *J. App.* at 41-42, *Petit v. U.S. Dep’t of Educ.*, 675 F.3d 769 (D.C. Cir. 2011) (No. 11-5033).

183. See *Improving the Academic Achievement of the Disadvantaged; Individuals With Disabilities Education Act—Assistance to States for the Education of Children With Disabilities*, 72 Fed. Reg. 17,748 (Apr. 9, 2007) (codified at 34 C.F.R. pts. 200, 300); *Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities*, 71 Fed. Reg. 46,540 (Aug. 14, 2006) (codified at 34 C.F.R. pts. 300, 301).

“convoluted (and often contradictory)” and could actually be read to include mapping as a related service,<sup>184</sup> the comprehensive regulations interpret “related services” not to include “mapping,”<sup>185</sup> while allowing children with cochlear implants to receive other related services,<sup>186</sup> such as routine checking of hearing aids and external components of surgically implanted medical devices.<sup>187</sup> When promulgating the regulations, the Secretary of Education relied on the Senate Committee report without taking into account that the report was based on the language deleted by the “technical amendment.”<sup>188</sup> The “maintenance, programming, or replacement” of a surgically implanted device was no longer outside the ambit of “related services.” As a result, the regulations that excluded mapping rested on language that was disapproved by the Senate Committee, never considered by the full Congress, and never enacted into law.

Shortly after the promulgation of the regulations, a district court in Tennessee held that a preschooler, A.U., was entitled to have her school pay for the mapping she had already received until the regulations were promulgated because the regulations clearly excepted mapping from the category of related services.<sup>189</sup>

Both H.P. and A.U.’s district courts held that IDEA and its attendant regulations provided for mapping as a related service. Neither the statute nor its regulations changed markedly since 1983 with regard to audiology services.<sup>190</sup> Assuming those district courts were correct, any regulation that excluded mapping “substantively lessen[ed] the protections provided to children with disabilities . . . , as

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184. See *Petit v. U.S. Dep’t of Educ.*, 675 F.3d 769, 792-93 (D.C. Cir. 2012) (Henderson, J., concurring).

185. 34 C.F.R. § 300.34(b)(1) (2013).

186. *Id.* § 300.34(b)(2)(i).

187. *Id.* § 300.113.

188. See *Children With Disabilities and Preschool Grants for Children With Disabilities*, 71 Fed. Reg. at 46,569-70 (citing S. REP. NO. 108-185, at 8 (2003)).

189. See *A.U. ex rel. N.U. v. Roane Cnty. Bd. of Educ.*, 501 F. Supp. 2d 1134, 1143-44 (E.D. Tenn. 2007).

190. See 20 U.S.C. § 1401(17) (1982); 34 C.F.R. §§ 300.13(a), 300.13(b)(1) (1983).

embodied in regulations in effect on July 20, 1983” without the “clear and unequivocal intent of Congress in legislation.”<sup>191</sup>

Together, the families of H.P. and A.U. sued the Department of Education in the United States District Court for the District of Columbia, arguing that the offending regulations were contrary to law, in violation of § 1406(b) and the Administrative Procedure Act.<sup>192</sup> Applying the *Chevron* test, the district court granted the Department summary judgment on the plaintiffs’ Administrative Procedure Act claims.<sup>193</sup>

Two years later, the district court turned to the plaintiffs’ other claims, including their § 1406(b) claims.<sup>194</sup> The plaintiffs argued that the new regulations (1) contradicted the statute and (2) substantively lessened protections in effect in 1983.<sup>195</sup> First, to figure out whether the regulations contradicted the statute, the district court relied on *Tatro* to determine that it should defer to the Department’s regulations when dealing with ambiguities in the statute.<sup>196</sup> Then, to determine whether the Department was abridging protections embodied in its pre-1983 regulations, the district court used *Thomas Jefferson* deference, which allowed the Department to redefine its old regulations in the middle of the litigation.<sup>197</sup>

The plaintiffs appealed but fared no better before the D.C. Circuit. Indeed, the court of appeals used the same analytic frameworks as the district court. First, the court of

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191. See Complaint ¶ 29, *Petit v. U.S. Dep’t of Educ.*, 578 F. Supp. 2d 145 (D.D.C. 2008) (No. 07-1583 (RMU)).

192. *Petit*, 578 F. Supp. 2d 145.

193. See *id.* at 154-60.

194. *Petit v. U.S. Dep’t of Educ.*, 756 F. Supp. 2d 11, 11-12 (D.D.C. 2010), *aff’d*, 675 F.3d 769, 785 (D.C. Cir. 2012).

195. *Id.* at 15.

196. *Id.* at 16 (“In determining the standard for its review of the plaintiffs’ IDEA claim, the court takes instruction from the Supreme Court’s decision in [*Tatro*].”).

197. *Id.* at 16-18 (“Although *Tatro* failed to specify the amount or type of deference to which the Secretary’s regulations are entitled, the court finds guidance in [*Thomas Jefferson*, among other cases].”).

appeals dismissed the plaintiffs' statutory argument by giving *Chevron* deference to the Department's new regulations, holding that the term "audiology services" in the statute was ambiguous, and the Department's regulations were owed deference because they were "rationally related to the goals of the IDEA."<sup>198</sup>

Then, in an alternative holding, the D.C. Circuit made short work of the plaintiffs' § 1406(b) argument. The D.C. Circuit applied *Thomas Jefferson* deference to allow the Department of Education to redefine the arguably ambiguous pre-1983 regulations, so that the term "audiology services" in the pre-1983 regulations did not include mapping.<sup>199</sup> *Thomas Jefferson* deference was appropriate, the majority said, "[b]ecause the Department has never previously interpreted the 1983 regulations with respect to the question of mapping."<sup>200</sup>

But this is beside the point. The Department's position after 1983 should not be relevant in a § 1406(b) argument if § 1406(b) is to have any meaning. Allowing the Department to interpret away protections through interpretation of its own rules, a procedure with fewer safeguards than the regulations that § 1406(b) constrains, makes no sense.

The decision to apply *Thomas Jefferson*—which, again, is essentially another name for *Auer* deference—was critical. Had the circuit not applied *Auer* deference, it would have been confronted with the question as to whether the regulation's definition of "audiology services"—an unbounded list that included the "[d]etermination of the child's need for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification"<sup>201</sup>—included mapping, knowing that the import of § 1406(b) was that Congress required no substantive diminution of any protections in the 1983 regulations. Indeed, § 1406(b) seems even more applicable in *Petit* than in a case involving other regulations

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198. *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 780-85 (D.C. Cir. 2012).

199. *See id.* at 790-91.

200. *See id.* at 790. *But see infra* note 210 and accompanying text.

201. *Petit*, 675 F.3d at 790 (quoting 34 C.F.R. § 300.13(b)(1) (1983)).

because § 1406(b) bars any regulation that “procedurally or substantively lessens the protections provided to children with disabilities . . . [p]articularly as such protections relate[] to . . . related services.”<sup>202</sup>

Without this *Thomas Jefferson/Auer* deference, the best result would be to invalidate the 2006 anti-mapping regulations on the grounds that they substantively lessen protections embodied in the pre-1983 regulations. Thus, *Auer*, a judicial doctrine of deference, defanged the plaintiffs’ § 1406(b) argument, even though § 1406(b) is a statutory tool to limit deference.

Not only was the application of *Thomas Jefferson/Auer* in *Petit* inappropriate because of its implications for § 1406(b), but it was also (1) inconsistent with both *Gonzales v. Oregon*,<sup>203</sup> and *Auer* itself and (2) a misreading of the pre-1983 regulations. *Gonzales* created a new “canon” that prohibits *Auer* deference when an agency alleges to be interpreting its own regulation or rule that merely parrots the statute.<sup>204</sup> One of the 1983 regulations that the Department alleged to be interpreting merely repeated the definition of “related services” at the time in its inclusion of “audiology” as a related service.<sup>205</sup> It is true that the 1983 regulations then went on to define “audiology,” which was undefined in the statute. But the 1983 regulation defining “audiology” was non-exclusive. The definition was an open-ended list following the word “includes,” and one of the items following the word “includes” was “selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.”<sup>206</sup>

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202. 20 U.S.C. § 1406(b) (2006).

203. *Gonzales v. Oregon*, 546 U.S. 243 (2006).

204. *Id.* at 257 (“Simply put, the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute. An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.”).

205. *Compare* 34 C.F.R. § 300.13(a) (1983), *with* 20 U.S.C. § 1401(17) (1982).

206. 34 C.F.R. § 300.13(b)(1).

The circuit seemed to recognize that it was applying the same analysis to the Department's interpretation of the statute as it did to the Department's interpretation of the pre-1983 regulations when it attacked the plaintiffs' argument about how to interpret the regulation as being cumulative of its *Chevron* argument.<sup>207</sup> This suggests that the regulation was merely parroting the statute. Yet rather than lower its level of deference—the D.C. Circuit should have been looking to see whether the regulation substantively lessened rights rather than whether it was plainly erroneous or inconsistent with the regulation under *Thomas Jefferson/Auer* or not contrary to the plain language under *Chevron*—the D.C. Circuit simply applied roughly the same deference as it did under *Chevron*.<sup>208</sup>

Most importantly, the circuit's application of *Thomas Jefferson/Auer* was inappropriate in *Petit* because it violated the key caveat in *Auer* itself. The Department of Education's position in *Petit* did not even rise to the level of a "post-hoc rationalization," which, according to *Auer*'s caveat, would receive no deference.<sup>209</sup> The Department's "position" in *Petit* was even weaker than a post hoc rationalization because, in oral argument before the D.C. Circuit, Department's counsel claimed the Department had never taken a position at all on whether the 1983 regulations considered mapping a "related service!"<sup>210</sup> The panel gave no indication that it considered the issue regarding when the Department took its position, looking only to whether the Department's interpretation was clearly inconsistent. Indeed, it did not even mention the key buzzwords "post hoc rationalization" or "fair and considered

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207. See *Petit*, 675 F.3d at 790 ("But, as Appellants admit, this is the same argument that they advance at *Chevron* step one.").

208. See *id.* at 778, 780, 791 (relying on a *Chevron*-based holding in *Nat'l Cable Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2004) and discussing whether judicial precedent makes the plaintiffs' interpretation the unambiguous one).

209. See *supra* notes 141-48 and accompanying text.

210. See Oral Argument at 43:06-43:49, *Petit*, 675 F.3d 769 (No. 11-5033), available at <http://www.cadc.uscourts.gov/recordings/recordings.nsf/DocsByRDate?OpenView&count=100&SKey=201111> (conceding that whether mapping was a related service before the 2004 Amendments is "something that the Secretary hasn't taken a position on," adding "this is something that the Secretary never had occasion to address").

judgment.” Its explanatory parenthetical for *Auer* stated, “agency’s interpretation of its own regulation has controlling weight unless it is plainly erroneous or inconsistent with the regulation.”<sup>211</sup>

In addition to, and as a result of, all of those problems, the Circuit’s application of *Thomas Jefferson/Auer* yields troubling policy incentives. Applying deference in this situation creates incentives for agencies to issue broad or vague regulations and never interpret them unless challenged.<sup>212</sup> Thus, in the IDEA/§ 1406(b) context, when the Department is given deference on its pre-1983 regulations, and its 1983 regulations are allowed to parrot the statute, the Department has no incentives to modernize or otherwise clarify vague 1983 regulations. Indeed, the vaguest pre-1983 regulations are now the Department’s greatest asset should the Department want to lessen or otherwise vary protections.

*Petit* was the first case since the enactment of § 1406(b) where a court considered a § 1406(b) argument to invalidate a regulation. But, as seen above, the D.C. Circuit read § 1406(b) such that it hardly constrained the Department. Under § 1406(b), litigants and courts were supposed to use 1983 regulations as a fixed floor for substantive and procedural rights below which the Department could not go. As the D.C. Circuit read the statutory scheme by giving *Thomas Jefferson/Auer* deference, the floor is not fixed but rather controlled by the Department—the very entity § 1406(b) was meant to constrain.

While it is possible that the D.C. Circuit’s acknowledgement of the literal meaning of § 1406(b) could cause more courts to consider such arguments, *Petit* does not seem to have jumpstarted interest in § 1406(b). Instead, *Petit* has been cited as both an exemplary *Chevron* case and for the

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211. *Petit*, 675 F.3d at 793 (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

212. See *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (“[D]eferring to an agency’s interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases.”).

proposition, following *Thomas Jefferson*, that an agency is entitled to deference for its own regulations.<sup>213</sup>

*Petit's* understanding of IDEA regulation deference analysis—apply *Chevron* or *Auer*—is often promoted by the Department. For instance, the Department recently argued that its interpretation in another case “warrants substantial deference because [the Department] has implementing authority for the IDEA, and this interpretation is reasonable and ‘fill[s] any gap left’ by the IDEA’s ambiguous terms.”<sup>214</sup>

However, there has been one post-*Petit* case so far in which a court considered § 1406(b). In that case, *Philip C. ex rel. A.C. v. Jefferson County Board of Education*,<sup>215</sup> § 1406(b) was used to stop the invalidation of a regulation and, perhaps even more ironically, that § 1406(b) argument was raised by the Department of Education.

##### 5. *Philip C. ex rel. A.C. v. Jefferson County Board of Education*

In *Philip C. ex rel. A.C. v. Jefferson County Board of Education*, a county school board appealed a district court decision that upheld a regulation, 34 C.F.R. § 300.502, that requires schools to pay for “independent educational evaluations” (IEEs).<sup>216</sup> In that litigation, both the parents—who won below—and the United States government argued to the Eleventh Circuit that § 1406(b) required upholding the regulation. They reasoned that, because a pre-1983 regulation required schools to pay for IEEs, a regulation that requires the schools to pay for IEEs today must be upheld.<sup>217</sup>

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213. See *Hearth, Patio & Barbecue Ass’n v. U.S. Dep’t of Energy*, 706 F.3d 499, 503-04 (D.C. Cir. 2013); *Colo. River Cutthroat Trout v. Salazar*, 898 F. Supp. 2d 191, 200 (D.D.C. 2012); *United States v. Regenerative Scis., LLC*, 878 F. Supp. 2d 248, 258 (D.D.C. 2012).

214. Brief for the United States as Amicus Curiae Supporting Appellant at 13, *E.M. ex rel. E.M. v. Pajaro Valley Unified Sch. Dist.*, *appeal docketed*, No. 12-15743 (9th Cir. Apr. 4, 2012) (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984), and citing 20 U.S.C. § 1406(a)).

215. 701 F.3d 691 (11th Cir. 2012), *cert. denied*, 134 S. Ct. 64 (2013).

216. See *id.* at 698.

217. See Brief of Appellees at 15, *Jefferson Cnty.*, 701 F.3d 691 (No. 11-14859) (“1406 forbids the Secretary of Education from promulgating any regulation

The Eleventh Circuit agreed that the Department's regulation must be upheld under four separate rationales.

Under its primary holding, the Eleventh Circuit adopted the § 1406(b) arguments that the Supreme Court ignored in *Cedar Rapids* and the Tenth Circuit rejected in *Murray*. Under these arguments, § 1406(b) codifies the opposite of whatever Secretary Bell proposed before 1983.<sup>218</sup> In this case, the Eleventh Circuit held that because the proposed regulations, "in part, would have significantly curtailed a parent's right to a publicly financed IEE," § 1406(b) makes the opposite proposition a mandate of the statute.<sup>219</sup>

In its first alternative holding, the Eleventh Circuit relied on the presumption that Congress was aware of earlier court holdings that held that parents had a right to a publicly financed IEE.<sup>220</sup> In its second alternative holding, the Eleventh Circuit held that the statute itself clearly mandated publicly financed IEEs.<sup>221</sup> In its third and final alternate holding, the Eleventh Circuit applied basic *Chevron* analysis, asserting that the regulation was not contrary to the statute and was also reasonable.<sup>222</sup>

The primary holding is the most interesting because it makes *Jefferson County* the first case in which § 1406(b) was held to prevent a right from being substantially lessened. However, the right was protected by upholding a regulation rather than invalidating one. This is strange. As the school

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which affords a parent less procedural protection than did IDEA's 1988 regulations. Since parents had the right to a publicly funded IEE in 1988, 34 C.F.R. 300.502 is valid."); Brief For the United States as Amicus Curiae Supporting Plaintiffs-Appellees at 7, *Jefferson Cnty.*, 701 F.3d 691 (No. 11-14859) ("Because the 1983 version of the regulations afforded parents a right to a publicly funded IEE, Congress's enactment of § 1406(b)(2) and subsequent reauthorizations of the IDEA in 1990, 1997, and 2004, reaffirm that parents have a right to a publicly funded IEE in appropriate circumstances."); see also 34 C.F.R. § 300.503 (1983).

218. See *supra* Part I.B.1.c (describing *Cedar Rapids*); *supra* notes 158-64 and accompanying text (describing *Murray*).

219. See *Jefferson Cnty.*, 701 F.3d at 696.

220. *Id.* at 696-97.

221. *Id.* at 697.

222. *Id.* at 698.

board-defendant noted, “[Section 1406(b)] does not (and does not purport to) constitute a delegation of rulemaking authority to the Secretary; rather, it is a restriction on the Secretary’s authority to regulate.”<sup>223</sup> The Eleventh Circuit turned § 1406(b) into an abstract principle—reverse Secretary Bell’s proposed regulations and prevent such regulations from being proposed in the future—rather than a specific command.

Thus, *Jefferson County* speaks to § 1406(b)’s indeterminacy of function and weakness of reputation. First, *Jefferson County*’s use of § 1406(b) to uphold a regulation shows that courts do not yet know what § 1406(b) means and does.<sup>224</sup> Second, *Jefferson County*’s backstopping its “primary,” § 1406(b) holding with (not one, not two, but) three alternative holdings strongly suggests they were uncomfortable letting § 1406(b) pull the weight of their analysis. Thus, the Eleventh Circuit was compelled to buttress that argument with “real” authorities: congressional intent, congressionally passed text, and *Chevron*.

As can be seen from the above, § 1406(b) appears to be a powerful tool that has done nothing but rust. The next Part argues that categorization, a generally beneficial process correlated with expertise, has prevented legal reasoners from grasping this tool.

## II. CATEGORY AS CONCLUSION

This Part argues that successful legal thinkers rely on “categories” and § 1406(b) has been ignored because it does not fit existing categories. Part II.A offers a brief definition of what this Article means by a category. Part II.B explains that it is not § 1406(b)’s uniqueness that prevents it from becoming a category, but rather its unfamiliarity. Finally, Part II.C shows that categories are *derived* from cases, but are not coextensive with them. These derivations are distortions. That is the cases lose something in the

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223. Reply Brief of Appellant at 9, *Jefferson Cnty.*, 701 F.3d 691 (No. 11-14859).

224. When a new category is created or has yet to be created, perceptions of its metes and bounds vary wildly. Cf. HOFSTADTER & SANDER, *supra* note 1, at 229 (“However, the possible interpretations for [an example of an ad-hoc category] are extremely diverse . . .”).

compression to categories, much, for instance, as Audobon's paintings of wild birds do not truly recreate the bird. Thus, Part II.C shows some dimensions of the *Chevron* and *Auer* opinions that were flattened out in the categorization process and suggests how they can be restored.

A. *This Article's Definition of "Category"*

"The basic pattern of legal reasoning is reasoning by example."<sup>225</sup> In the minds of skilled legal thinkers, these examples tend to coalesce into categories,<sup>226</sup> like medical malpractice and community standards or athletic injury and assumption of the risk. Roughly speaking, a category is the most specific applicable flowchart or series of questions,<sup>227</sup> including, for example, the standard of review.<sup>228</sup> It should come as no surprise to any law student who prepared an

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225. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1 (1949). If legal thinking is about analogies, *cf.* Michael J. Gerhardt, *How a Judge Thinks*, 93 MINN. L. REV. 2185, 2195 (2009) (reviewing RICHARD POSNER, HOW JUDGES THINK (2008)) (arguing that "reasoning by analogy" is "omnipresen[t] in judicial decision making"), it is also about categories, *see* HOFSTADTER & SANDER, *supra* note 1, at 19 ("[I]t is misleading to insist on a clear-cut distinction between analogy-making and categorization, since each of them simply makes a connection between two mental entities in order to interpret new situations that we run into by giving us potentially useful points of view on them.").

226. *Cf., e.g.*, Karl N. Llewellyn, *The Case Law System in America*, 88 COLUM. L. REV. 989, 1015-16 (Paul Gewirtz ed., Michael Ansaladi, trans.) (1988) (describing how a lawyer predicts a rule by grouping certain salient cases together).

227. *See, e.g.*, Vikram Amar, *The First Amendment in the 2009 Term: It's All About How You Frame It*, 37 PREVIEW U.S. SUP. CT. CASES 347, 350 (2010) ("The choice of the 'reasonable' and viewpoint-neutral test—that is, the choice of the appropriate doctrinal box or category on the First Amendment case law flowchart—essentially dictated the result.").

228. *See* FEDERAL COURTS STANDARDS OF REVIEW 67, 67-74 (Harry T. Edwards & Linda A. Elliott eds., 2007) (describing how a standard of review is outcome determinative).

“attack outline” or flowcharts for a law school exam<sup>229</sup> that legal thinking is composed of these analytic models.<sup>230</sup>

These categories are so powerful that they can and do overwhelm the literal text of a statute as with § 1406(b).<sup>231</sup> That judges often apply some sort of consensus understanding of the meaning of a law rather than the literal text of a legal rule is well understood.<sup>232</sup>

When a lawyer or a judge is confronted with a problem, he or she has to figure out which analytic model is the most salient in order to “apply the law.” To accomplish this, one could sit down with all known hornbooks and figure out what law is applicable in most situations. As would be evident to anyone staring at the mountain of bound paper,<sup>233</sup> or as is taught to law students even before they arrive, the first choice is to find a subject.<sup>234</sup> *Is it a torts case? No, this is an*

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229. See, e.g., Barbara Glesner Fines, *Lessons Learned About Classroom Teaching from Authoring Computer-Assisted Instruction Lessons*, 38 WM. MITCHELL L. REV. 1094, 1108 (2012) (explaining the teaching power of flowcharts).

230. See Jay M. Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661, 696 (1989) (“Lawyers and judges engaged in paradigmatic classification use a set of models or exemplars to identify cases with doctrinal categories.”).

231. For another example in which courts’ repetition have created a “wrong” category, see Brian J. Levy, *De Novo Denied: District Courts’ Reliance on Camardo Is Clear Error*, 82 FORDHAM L. REV. RES GESTAE 8 (2013), [http://fordhamlawreview.org/assets/res-gestae/volume/82/8\\_Levy.pdf](http://fordhamlawreview.org/assets/res-gestae/volume/82/8_Levy.pdf).

232. For instance, in a 1933 book, Professor Llewellyn noted that Judges Swan and Crane among others recognized that judges were not merely following the “verbal formula” or a statute or any other stated rule. Llewellyn, *supra* note 226, at 1015, 1017-18 & 1018 n.3.

233. See Mila Sohoni, *The Idea of “Too Much Law,”* 80 FORDHAM L. REV. 1585, 1602-03 nn.96-105 (2012).

234. See RONALD DWORKIN, *LAW’S EMPIRE* 251 (1986) (“The compartmentalization of law into separate departments is a prominent feature of legal practice. Law schools divide courses . . . . Legal and judicial arguments respect these traditional divisions. Judicial opinions normally begin by assigning the case in hand to some department of law, and the precedents and statutes considered are usually drawn exclusively from that department.”); John A. Powell & Caitlin Watt, *Corporate Prerogative, Race, and Identity Under the Fourteenth Amendment*, 32 CARDOZO L. REV. 885, 889 (2011) (“Sadly, one of the byproducts of law school is to teach lawyers to separate out and categorize cases. We are taught that *Lochner* is a civil rights case or that *Slaughter-House* is a corporations case.”). It is for this reason that Kuhn’s analogy between a paradigm and a textbook is inescapable. See Margaret Masterman, *The Nature of a Paradigm*, in

*education or administrative law case.* For instance, in constitutional law, First Amendment and Equal Protection are types of cases. *Is this about whether a regulation is properly enacted under the Administrative Procedure Act? No, this is a case where the issue is how to interpret the statute.* Just as it has turned out that the so-called “indivisible” atom<sup>235</sup> can be divided and further subdivided, each category can be further divided<sup>236</sup> until such division is no longer conceptually useful. For instance, within Equal Protection, one would likely stop at the tiers of scrutiny. Within First Amendment, one might decide a problem was a “public forum” problem and then within that, a limited public forum.<sup>237</sup> Often, the relevant analytic models have the names of cases, like the *O’Brien* test for expressive conduct<sup>238</sup> or the *Twombly/Iqbal* standard for Rule 12(b)(6) of the Federal

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CRITICISM AND THE GROWTH OF KNOWLEDGE 59, 62 (Imre Lakatos & Alan Musgrave eds., 1970) [hereinafter CRITICISM].

235. See, e.g., K.L. Planken, *Brownian Motion and Molecular Size*, VAN’T HOFF LAB. FOR PHYSICAL AND COLLOID CHEMISTRY 6 (2003), available at <http://www.seit.adfa.edu.au/staff/sites/hrp/Literature/articles/karel3Avogadro.pdf>; U.S. DEP’T OF ENERGY, FSC-6910, 1 DOE FUNDAMENTALS HANDBOOK: NUCLEAR PHYSICS & REACTOR THEORY 2 (Jan. 1993), available at <http://www.hss.doe.gov/nuclearsafety/techstds/docs/handbook/h1019v1.pdf> (“For almost 100 years after Dalton established the atomic nature of atoms, it was considered impossible to divide the atom into even smaller parts.”).

236. Cf. Feinman, *supra* note 230, at 699-700 (“There are different levels of paradigms.”).

237. It is well known that “the First Amendment” is actually a series of seemingly unrelated analytical models. See generally HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (Jamie Kalven ed., 1988); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987); see also Frederick Schauer, *Harry Kalven and the Perils of Particularism*, 56 U. CHI. L. REV. 397, 398 n.3 (1989) (book review) (collecting sources); Levy, *supra* note 75, at 473 (creating such an analytic model under specific circumstances).

238. See, e.g., Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 676 n.394 (2008) (describing the *O’Brien* test without referring to the facts of *O’Brien*); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 74-75 (same); Martin H. Redish & Howard M. Wasserman, *What’s Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 281 n.301 (1998) (referring to the *O’Brien* test without citing to *O’Brien*) (1998); see also *United States v. O’Brien*, 391 U.S. 367 (1968).

Rules of Civil Procedure.<sup>239</sup> *Oh, I see. It's about deference to the agency so it's Chevron. And the plaintiffs are challenging the agency's interpretation of its own rules, so it's Auer.*

In the same way an observer could follow a path from living creatures on Earth to Animalia to Chordata to Vertebrata to Aves to Anseriformes to Anatidae to *Cygnus* to *buccinators*,<sup>240</sup> one could place a case in its most fitting category by following a branching tree down to its most useful degree of specificity. This analogy makes clear, however, that much of the “choosing” of an analytic model happens “automatically.” A well-trained birdwatcher who sees the swan is unlikely to consider whether the swan might be a rock, a lizard, or even a duck. The range of choices for categorization the birdwatcher would consider would be fairly narrow and specific.<sup>241</sup> By contrast, someone who knows so little about birds that “swan” conjures up, say, family

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239. Here, the individual opinions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), are so shorthand that many scholars have started referring to “*Twiqbal*,” the gestalt distillation. See, e.g., David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203 (2013).

240. See AMBER TRAVSKY & GARY P. BEAUVAIS, U.S. DEP'T INTERIOR, SPECIES ASSIGNMENT FOR THE TRUMPETER SWAN (*CYGNUS BUCCINATOR*) IN WYOMING, 24 fig.1 (Oct. 2004), available at <http://www.blm.gov/pgdata/etc/medialib/blm/wy/wildlife/animal-assessmnts.Par.56489.File.dat/TrumpeterSwan.pdf>; see also HOFSTADTER & SANDER, *supra* note 1, at 242 (“[I]f one examines any domain at all carefully, one finds that it is filled to the brim with categories and interconnections among them, and that such links form such a complex pattern that it would astonish an outsider, who would have been tempted to see the domain in the simplest possible way: as just one main overarching genus with a few species one level below it.”).

241. For example, in *Trumpet of the Swans*, Sam who “knew a lot about birds” was seemingly able to identify Trumpeter Swans because they were “great white birds with their long white necks and black bills.” WHITE, *supra* note 3, at 2, 6.

friendly ballet,<sup>242</sup> an independent film,<sup>243</sup> or difficult-to-perceive risk<sup>244</sup> would have to start from scratch.

Indeed, if much of this categorization did not happen without conscious thought, lawyers would approach each problem from the standpoint of the person who hopes to find the answer from a mountain of hornbooks.<sup>245</sup> As experts who have seen quite a few birds are more likely to know a sparrow from a swan, so, too, are more experienced lawyers, like judges, able to determine category without conscious forethought.

Thus, in most situations, deft and intuitive categorization is to be commended. An eagle-eyed lawyer who can convert a client's narrative about his troubles with his or her neighbor into a "textbook" nuisance action, for instance, will have a real leg up on an inexperienced lawyer who is unable to categorize as quickly.<sup>246</sup> Similarly, the archetype of a great judge is one who, through a combination of intuition and learning, is about to "cut to the heart" of an issue.<sup>247</sup>

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242. See *State v. House*, 676 P.2d 892, 896 (Or. Ct. App. 1984) (en banc) (Rossman, J., dissenting) ("We discern a marked difference between the type of live public show this statute applies to and performances of 'Romeo and Juliet' and 'Swan Lake.'"), *modified*, 681 P.2d 173 (Or. Ct. App. 1984) (en banc), *aff'd*, 698 P.2d 951 (Or. 1985).

243. See *Glatt v. Fox Searchlight Pictures, Inc.*, No. 11 Civ. 6784, 2013 WL 2495140, at \*1 (S.D.N.Y. June 11, 2013).

244. See Alec Orenstein, Note, *A Modified Caremark Standard To Protect Shareholders of Financial Firms from Poor Risk Management*, 86 N.Y.U. L. REV. 766, 798 n.192 (2011) (describing Nassim Nicholas Taleb's concept of a "black swan").

245. Cf. HOFSTADTER & SANDER, *supra* note 1, at 21 ("Thus our categories keep us well informed at all times, allowing us to bypass the need for direct observation. If we didn't constantly extrapolate our knowledge into new situations—if we refrained from making inferences—then we would be conceptually blind. We would be unable to think or act, doomed to permanent uncertainty and to eternal groping in the dark.").

246. See, e.g., *Andrews v. Andrews*, 88 S.E.2d 88, 92-93 (N.C. 1955) (holding that attracting wild geese could be a nuisance); *Scott v. Bay*, 3 Md. 431, 438 (Ct. App. 1853) (recounting a lawyer's argument that a British court held firing a gun to scare ducks away from a decoy pond was a nuisance).

247. See, e.g., Dolores K. Sloviter, Dedication, *Memorial Tribute to the Honorable Albert Branson Maris*, 62 TEMP. L. REV. 471, 474 (1989) ("Judge Maris also had an uncanny knack in dealing with administrative issues facing the court;

Indeed, judges, who have the broadest knowledge and a tremendous number of cases to solve, rely on these “automatic” categories. As one study found, “[i]ntuitive responses can also emerge from repetition of the same deliberative procedure” and “conversion of deliberative judgment into intuitive judgment might be the hallmark of expertise.”<sup>248</sup> Thus, lawyers with the most experience and skill—like judges—are the most likely to have the most powerful attachment to categories. The slotting of cases into problems happens at an unconscious level,<sup>249</sup> particularly among stronger and more experienced legal reasoners,<sup>250</sup> such that a case intuitively appears to fit a particular model. The next Subsection explains how some of these categories are created while others fail to be created.

### B. *Cases, Caveats, and Categories*

This Subsection explains the difference between a “caveat” and a “subcategory.” This Subsection further argues that categorization affects major cases—not just odd ducks like § 1406(b). In particular, it argues that categories are not the same as cases, but rather imperfect derivations from cases. This argument is advanced by showing that *Chevron*

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he cut to the heart of the matter and put it in its appropriate perspective.”); Craig Peyton Gaurner, *Judge Koger Exemplified What a Judge Should Be*, BANKR. CT. DECISIONS WEEKLY NEWS & COMMENTS, Jan. 28, 2003, at 6 (“In weighing the facts and law in cases pending before him, Judge Koger would quickly cut to the heart of the matter. His independent knowledge of the law was broad . . .”). Similarly, Hindu legend reveres the swan for its purported ability to drink only the milk out of a solution composed of watered-down milk. Gregory C. Frankel, *Separating the Milk from the Water: It Is All About Priorities*, 80 U. DET. MERCY L. REV. 479, 479 (2003).

248. Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 8, 30 (2007).

249. See Feinman, *supra* note 230, at 697 (“The judge’s perceptions of the patterns in this realm preconsciously initiate the process of classification . . .”).

250. Cf. HOFSTADTER & SANDER, *supra* note 1, at 342-43 (“For different people, the salience of a given feature depends on their expertise in the given domain. . . . [E]xperts, who in theory, could see and pay attention to all the same shallow features as the novices are using, are ignoring those features, almost as if they didn’t see them, just the way seasoned drivers ignore the color of the gearshift they are using; . . .”); *id.* at 427; FREDERICK SCHAUER, THINKING LIKE A LAWYER 5 (2009).

and *Auer* have become particular analytic models, unrelated to their dicta. In so doing, it explains why courts have not paid sufficient attention to the limitations of the *Auer* doctrine intimated in the case of the same name.<sup>251</sup>

### 1. Caveats and Subcategories Defined

Thus, dicta or policy rationales in a given case often become “caveats” or “subcategories.” “Caveat,” as defined by this Article, is the limiting language or policy rationale in a case that is not considered when the category gets applied. Because judges and lawyers apply the models derived from cases rather than the cases themselves, they may not notice that the model they apply no longer fits within the boundaries built by its homonymous case.<sup>252</sup>

On the other hand, there are clearly “subcategories,” in which a new branch buds from an existing one. For instance, Kuhn explains that an observer who chanced upon a black swan would believe he or she had encountered a different bird.<sup>253</sup> That resembles the process of “subcategorization.” Examples of these abound in the law. For instance, “separate but equal” went from a one-step analysis—a justification for state-sponsored racial segregation—<sup>254</sup> to a two-step analysis under which the key analytical framework was actually scrutinizing for equality.<sup>255</sup> Similarly, *Parents Involved in Community Schools v. Seattle School District No. 1* took very seriously *Grutter v. Bollinger*’s assertion of “a government interest in student body diversity ‘in the context of higher education,’” creating separate models of analyzing

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251. Cf. Bennett, *supra* note 70, at 207 (describing how the Supreme Court has offered shifting policy rationales for its canon against extraterritorial application without reconsideration of the canon and without acknowledging that its original principles no longer made sense).

252. See *supra* notes 209-11 and accompanying text.

253. See Thomas S. Kuhn, *Logic of Discovery or Psychology of Research?*, in CRITICISM, *supra* note 234, at 1, 17-19.

254. See *Plessy v. Ferguson*, 163 U.S. 537, 547 (1896); see also *id.* at 552 (Harlan, J., dissenting).

255. See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 344 (1938).

affirmative action for higher education and other schooling.<sup>256</sup> As a final example, *Auer* is essentially a subcategory of *Thomas Jefferson* or *Seminole Rock*.

This process of turning cases into categories supports the argument that statutes, too, may need to be turned into categories to be applied. Much “law” is produced by Congress and the courts but only some of it fits into lawyers’ and judges’ mental outlines.

## 2. *Chevron*’s Caveats Show the Difference Between Case and Category

“The *Chevron* decision did not spawn the *Chevron* doctrine, so there is no reason to expect [the decision] to clarify [the doctrine].”<sup>257</sup> Indeed, the *Chevron* opinion is full of advice about what types of administrative decisions should receive more or less deference that rarely, if ever, gets discussed when the *Chevron* test is applied. For instance, the language of the *Chevron* opinion strongly implies that an agency’s longstanding interpretation of a regulation should be subject to closer judicial scrutiny.<sup>258</sup> Naturally, this is a position that is not implied by the more concentrated *Chevron* test or category,

Indeed, each one of these caveats could result in another level within the analytical model. For instance, *Chevron* asserts that agencies are an appropriate tool for resolving conflicts because they are democratically accountable through the president.<sup>259</sup> If this were taken seriously, it would

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256. 551 U.S. 701, 722-23 (2007) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003)).

257. Lawson & Kam, *supra* note 123, at 74; cf. Connor N. Raso & William N. Eskridge, Jr., *Chevron as Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1765 (2010) (“Deference regimes (*Chevron*, *Skidmore*, *Seminole Rock/Auer*) are more like *canons* of statutory construction than binding *precedents*.”).

258. *See id.* at 863-64 (“[T]he agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.”).

259. *See id.* at 865 (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . .”).

mean that regulations issued by independent agencies would deserve less deference.

Similarly, agencies involved in day-to-day operations of a statute are owed more deference than a body that simply makes policy and moves on.<sup>260</sup> It is also true that the agency is assumed to have “great expertise.”<sup>261</sup> Thus, a court dealing with a new agency interpreting a new statute would be faced with a conundrum.

At first it may seem silly to argue that these statements in *Chevron* should have any bearing on the test that bears its name because they are dicta. But “[b]y virtue of the case’s facts, *Chevron*’s holding applied only to EPA policy decisions reached through a formal rulemaking process undertaken to fill a gap in a statutory scheme Congress authorized the agency to administer with the force of law.”<sup>262</sup> The fact is that some of *Chevron*’s reasoning was distilled and turned into a test that was applied in circumstances beyond the case and some was not. Yet such caveats can always transform into full-blown categories, as the Supreme Court may do with *Auer*’s caveats.

### 3. The *Auer* Issue in *Petit* Turns on Whether “Post Hoc Rationalization” Is a Caveat or Subcategory

*Auer* states that deference can only be given to a litigation position if the interpretation is “the agency’s fair and considered judgment on the matter in question” and if it is not a “*post hoc* rationalizatio[n]’ advanced by an agency seeking to defend past agency action against attack.”<sup>263</sup> Just

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260. See *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)). Thanks to the brilliant Kirti Datla for this point.

261. *Chevron*, 467 U.S. at 865.

262. John S. Kane, *Deference as Death Sentence—The Importance of Vigilant Judicial Review of Refugee-Claim Denials*, 47 U. LOUISVILLE L. REV. 279, 292-93 (2008).

263. *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)); see also *Bigelow v. Dep’t of Def.*, 217 F.3d 875, 878 (D.C. Cir. 2000) (“*Auer* held that so long as there is no basis to suspect that the agency’s position represents anything less than its considered opinion, deference is appropriate.”).

as the *Petit* Court applied the shopworn *Auer* standard rather than the nuances of the *Auer* opinion, other courts have as well.

Although dissents and concurrences have hinted at the limitations of *Auer*,<sup>264</sup> some lower courts have stated that *Auer* means mandatory deference to agency litigation positions without consideration as to whether the litigation briefs represent the fair and considered judgment or post hoc rationalizations.<sup>265</sup>

However, the Supreme Court may be reviving the limits on the *Auer* category from the *Auer* decision. In *Christopher v. SmithKline Beecham Corp.*, the Court explained *Auer* deference as a rule in a category: “*Auer* ordinarily calls for deference to an agency’s interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief.”<sup>266</sup> But then the Court listed all of the caveats, including the possibility that the agency’s position might not be its “fair and considered judgment on the matter” or it might be merely a “post hoc rationalizatio[n].”<sup>267</sup>

In *Christopher*, the Court did not wind up applying those caveats. Rather, it created a new one—that because the

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264. See *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (“It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well. . . . [D]eferred to an agency’s interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases.”); *Cedar Rapids Cmty. Sch. Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 83 & n.3 (1999) (Thomas, J., dissenting) (“We cannot defer to a regulation that does not exist.”).

265. See *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 485 (6th Cir. 2012) (quoting *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011) (quoting *Auer*, 519 U.S. at 461)); *Ass’n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 442 (D.C. Cir. 2012) (“An agency’s permissible interpretation of its own regulation normally ‘must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation,’ even when the interpretation is first articulated in the course of litigation.” (quoting *Thomas Jefferson*, 512 U.S. at 512 (internal citations omitted))); *New Cingular Wireless PCS, LLC v. Finley*, 674 F.3d 225, 236 n.7 (4th Cir. 2012) (“The Supreme Court recently noted that an agency’s interpretation of its regulations in an amicus brief is worthy of deference.” (citing *Chase Bank*, 131 S. Ct. at 880 (quoting *Auer*, 519 U.S. at 461))).

266. 132 S. Ct. 2156, 2166 (2012).

267. *Id.* (quoting *Auer*, 519 U.S. at 462) (internal quotation marks omitted).

interpretation in question would “impose potentially massive liability,” it does not provide “fair warning.”<sup>268</sup> Whether *Christopher*’s emphasis on the limits of *Auer* may give them new life is yet unknown.<sup>269</sup> But it is through such repetition and schematization<sup>270</sup> that the *Auer* limits could gain force. The next Subsection explains that repetition is important because it leads to familiarity and categorization.

C. *Is § 1406(b) an “Ugly Duckling?”: Familiarity and Similarity in Categorization*

In the fairy tale, the “Ugly Duckling,” the mother duck treats the titular cygnet as though he were her son because he was born near ducks and swam like a duck.<sup>271</sup> She expects such birds to be ducks.<sup>272</sup> Almost every other bird accepts this miscategorization, except one old bird.<sup>273</sup> But that old bird is also unable to conceive of the novel circumstance that the “ugly duckling” can be a swan.<sup>274</sup> The old bird thinks that the cygnet is a poult because the old bird remembers a turkey egg hatching near duck eggs.<sup>275</sup> So powerful is this categorization

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268. *Id.* at 2167 (quoting *Gates & Fox Co. v. OSHA Review Comm’n*, 790 F.2d 154, 156 (D.C. Cir. 1986)). Under this rationale, larger regulations, and therefore likely larger regulated entities, would be spared *Auer* deference. For concerns about due process notifications and the regulatory state, see generally Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169 (2013).

269. Compare *George v. Junior Achievement of Cent. Ind., Inc.*, 694 F.3d 812, 816 (7th Cir. 2012) (quoting *Christopher*, 132 S. Ct. at 2165-69, to show that “the [Supreme] Court as a whole has flagged the subject [of deference to agency briefs] for further attention”), with *Foster v. Nationwide Mut. Ins. Co.*, 710 F.3d 640, 649 (6th Cir. 2013) (“Ordinarily, an agency interpretation of its own ambiguous regulations is entitled to *Auer* deference.” (citing *Christopher*, 132 S. Ct. at 2166)).

270. See, e.g., *Drake v. FAA*, 291 F.3d 59, 68-69 (D.C. Cir. 2002).

271. Hans Christian Andersen, *The Ugly Duckling*, PROJECT GUTENBERG (Nov. 8, 2008), <http://www.gutenberg.org/ebooks/27200>.

272. See *id.*

273. See *id.*

274. See *id.*

275. *Id.*

that even when the duckling realizes he is a swan, he thinks of the time when he “*was an ugly duckling.*”<sup>276</sup>

This story, and the above-described failure of judges and lawyers to come to grips with the strange § 1406(b), suggests that categorization can fail to take the weird and unusual into account. If legal reasoners are trained to overlay similarity and order on a disordered world, perhaps § 1406(b) is too much of an ugly duckling to gain relevance.

Hardly. In fact, it could be argued that the opposite is often true.<sup>277</sup> Kuhn argued that when an observer encountered a black swan, after believing that all swans were white, he or she would rethink the category of swans or create a new category for the black bird.<sup>278</sup> Similarly, aficionados of the contact sport, “Duck, Duck, Goose,” would readily note that the more rarely encountered bird is the more readily remembered.

When a case stands for an extreme position<sup>279</sup> or has exceedingly unusual facts,<sup>280</sup> it can become a benchmark or a

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276. *Id.* (emphasis added).

277. *Cf.* JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* 32-33 (Harcourt 1964) (1936) (“That it reached conclusions quite different from what the ordinary uninstructed person would expect, added, I suppose, to its intellectual prestige.”); WHITE, *supra* note 3, at 146 (“People like strange events and queer happenings . . .”).

278. *See* Kuhn, *supra* note 253, at 1, 17-19.

279. *See, e.g.,* *United States v. Lopez*, 514 U.S. 549, 560 (1995) (suggesting *Wickard v. Filburn*, 317 U.S. 111 (1942) was an important case because it is “the most far reaching example of Commerce Clause authority over intrastate activity”); *Korioth v. Brisco*, 523 F.2d 1271, 1276 (5th Cir. 1975) (relying on *Flast v. Cohen*, 392 U.S. 83 (1968) because it “now marks the limit in allowing taxpayers *qua* taxpayers standing to litigate a general constitutional claim”).

280. *Cf.* G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 182 (2000) (“[S]cholars . . . had begun to devote regular attention to new and ‘novel’ cases in common law fields. . . Corbin especially proposed that the heart of legal analysis lay in . . . ‘novel’ fact situations.”); Samuel Issacharoff, *The Content of Our Casebooks: Why Do Cases Get Litigated?*, 29 FLA. ST. U. L. REV. 1265, 1265 (2002) (“The minds of future lawyers are sharpened by considering the misfortune of the fellow with chest hair on his palm; the people chasing each others’ foxes through the forest . . .”) (footnote omitted); Zigurds L. Zile, *Feature, Vosburg v. Putney: A Centennial Story*, 1992 WIS. L. REV. 877, 877, 984 (noting the immense popularity of the freakish case *Vosburg v. Putney*, 50 N.W. 403 (Wis. 1891), especially among casebook authors).

key teaching case. *Auer* is an example of the outer limits gaining prominence. *Auer* says that even an amicus brief can get deference and so that has become the new standard. Some strange ideas—the big and shocking Supreme Court holding, the “Eureka” paradigm change,<sup>281</sup> the bizarre fact-pattern—are captivating. Indeed, these ideas are so captivating that they are repeated as paradigmatic lessons and therefore one-in-a-million cases like *Marbury v. Madison*<sup>282</sup> or *Palsgraf v. Long Island Railroad*<sup>283</sup> are more familiar to American lawyers than the real run-of-the-mill cases that appear in court.

What makes a category a category, then, is not mundanity, but a form of familiarity that creates legitimacy.<sup>284</sup> Familiarity here does not mean simply an awareness of a given law. Judges would not refuse to apply laws simply because they had not yet encountered them. Rather, in this context, it means that some laws are so unconnected to data in the judicial mind that they appear to lack meaning.<sup>285</sup> Laws that lack such provenance may be especially daunting to enforce in the § 1406(b) context where the statute appears to allow a liberal judge to exercise his or her policy preference, helping, for instance, the deaf children in *Petit*.

Thus, judges require some sort of guide as to a law’s meaning. This can be done through a history of precedent or some other clear sign of legitimacy. For instance, while some

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281. See Kuhn, *supra* note 253, at 1, 5-6 (describing how Karl Popper’s “favourite examples” are all “startling and destructive in their outcome,” and how “[h]is emphasis is natural and common: the exploits of a Copernicus or Einstein make better reading than those of a Brahe or Lorentz,” but that such science is extraordinary and not normal).

282. 5 U.S. (1 Cranch) 137 (1803).

283. 162 N.E. 99 (N.Y. 1928).

284. Cf. BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 125-26 (Greenwood Press 1970) (1928) (“Many a statutory innovation that would seem of sinister or destructive aspect if it were considered in advance, has lost its terror with its novelty.”); HOFSTADTER & SANDER, *supra* note 1, at 390 (“Familiarity is crucial in analogy-making . . .”); *id.* at 386.

285. See *supra* notes 17-19, 73-75, 79 and accompanying text; cf. HOFSTADTER & SANDER, *supra* note 1, at 229 (“Understanding utterances like ‘Patsy is a pig’ . . . is not at all like understanding . . . ‘Patsy is a prawn’ . . .”).

judges mistakenly declared the Patient Protection and Affordable Care Act (PPACA) unenforceable,<sup>286</sup> most other courts recognized the legitimacy of this well-known but new law.<sup>287</sup>

The hold of familiar and legitimate laws on judges is so powerful that rules that judges commonly apply in one area of the law often become the rule in similar areas. For instance, in antidiscrimination and antiretaliation law, courts and lawyers often apply one statute's rules to another.<sup>288</sup> The desire to read these statutes in parallel is so powerful that, even though New York City amended its antidiscrimination law to state that it should not be read in parallel with federal law, the Second Circuit recently had to issue an opinion reminding courts to stop reading them in parallel.<sup>289</sup> Similarly, habeas exhaustion has spread from 28 U.S.C. § 2254 petitions, where it is statutorily required, to 28 U.S.C. § 2241 and 28 U.S.C. § 2255 petitions, where it is not.<sup>290</sup> Another example is how the Supreme Court applies the shopworn presumption against extraterritoriality in the face of widely different factual and legal circumstances.<sup>291</sup>

Courts and lawyers feel comfortable applying familiar analytic models to different situations because a clear category has been established. For example, when courts were originally confronted with the phrase "free appropriate

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286. See *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1307, 1310 (N.D. Fla. 2011) (grousing about the alleged novelty of the statute).

287. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2581 (2012) (describing the cases that upheld the PPACA).

288. See, e.g., *Lorillard v. Pons*, 434 U.S. 575, 578-83 (1978) (reading Fair Labor Standards Act precedent into the Age Discrimination in Employment Act); *Marchiano v. Berlamino*, No. 10 Civ. 7819, 2012 WL 4215767, at \*2-3 (S.D.N.Y. Sept. 20, 2012) (construing Age Discrimination in Employment Act, New York Human Rights Law, and New York City Human Rights Law (NYCHRL) retaliation claims under the Civil Rights Act Title VII law).

289. See *Mihalik v. Credit Agricole Chevreux N. Am., Inc.*, 715 F.3d 102, 108-09 (2d Cir. 2013) ("Nonetheless, district courts continued—erroneously—to apply federal standards to NYCHRL claims.").

290. See *Carmona v. U.S. Bureau of Prisons*, 243 F.3d 629, 630-34 (2d. Cir 2001).

291. See, e.g., *Bennett*, *supra* note 70.

public education,” they immediately drew on standards from different areas of the law.<sup>292</sup>

If certain categories tilt the analysis of problems toward certain results, more familiar categories are more likely to be applied, and there are network effects strengthening familiar categories,<sup>293</sup> then certain biases would tend to result. Facts will be more likely to be gathered, described, and analyzed in light of particular legal frameworks and particular outcomes become more likely.<sup>294</sup>

The history of § 1406(b) appears to be such an overreliance on categories. Even though § 1406(b) is a statutory limit on the Department of Education’s discretion, courts have been more likely to defer to regulations based on other judicial paradigms and lawyers have brought few § 1406(b) challenges. Next, *Chevron* and *Auer* deference are more likely to lead to upholding Department of Education regulations than a strict § 1406(b) model. Category thus becomes conclusion.

Part II described how categories can colonize a legal reasoner’s conceptual space and therefore suggests that judges have failed to consider and lawyers have failed to raise § 1406(b) arguments because other prominent categories occupy their understandings of administrative deference. Next, Part III suggests how § 1406(b) can break through and become a category and why § 1406(b) should be enforced more often.

### III. LET ONE THOUSAND, FOUR-HUNDRED AND SIX § 1406(B)S BLOOM!: HOW AND WHY TO GET MORE § 1406(B)

Part III makes two normative arguments regarding § 1406(b). First, Part III.A suggests specific publicity

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292. See, e.g., Larson, *supra* note 93, at 71-72 (“A few courts tried more unusual approaches, often borrowed from other areas of the law . . . .”) (footnotes omitted).

293. That is, if lawyers expect judges to be more interested in *Chevron* arguments than § 1406(b) arguments, they will present fewer § 1406(b) arguments. And if judges see fewer § 1406(b) arguments and more *Chevron* arguments, they might suspect the *Chevron* arguments are more legitimate.

294. Cf. Feinman, *supra* note 230, at 698 (“These judicially constructed representations describe the case and in turn evoke the range of available legal solutions.”).

campaigns that could lend greater legitimacy to Section 1406(b) in the minds of the relevant actors. Second, Part III.B argues that a more frequently used § 1406(b) would be beneficial because it would increase democratic accountability, experimentalism, and compensate for the damage done to IDEA by *Rowley*.

A. *Methods by Which § 1406(b) Can Gain Greater Prominence and Vitality*

While many Notes and Articles conclude by recommending that Congress enact a specific change or the Supreme Court overrule a precedent, the problem identified in this Article concerns law that already exists. The trick is getting it used.

If this Article is correct that the problem with § 1406(b) is not that it is inherently unenforceable, not that few IDEA disputes are resolved before courts,<sup>295</sup> not that the fact circumstances that trigger it have not appeared, not that judges just dislike it, or any other alternative, then the problem is generating a “permission structure”<sup>296</sup> for lawyers and judges to accept § 1406(b) as a valid category of cases.

1. Publicize § 1406(b) to Litigants

This Article has argued that § 1406(b) fails to register with litigants and judges as a *legitimate* category of litigation because it is less familiar. Therefore, an obvious answer is to increase familiarity through a publicity campaign. There are probably many ways to educate education law specialists

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295. See Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1423 n.43 (2011).

296. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 36 (1992) (“Our law reviews are now full of mediocre interdisciplinary articles. Too many law professors are ivory tower dilettantes, pursuing whatever subject piques their interest, whether or not the subject merits scholarship, and whether or not *they* have the scholarly skills to master it.”); David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 19, 2011, at A1 (quoting Chief Justice Roberts’s and Justice Breyer’s criticism of legal scholarship as too removed from practical experience).

about § 1406(b). For instance, continuing legal education or “CLE” lectures could be held on the subject. Increasing awareness among education litigators seems like an easy task because it is likely that they have existing networks<sup>297</sup> and media outlets<sup>298</sup> devoted to the topic of improving representation of students in special education. More to the point, education litigators are motivated to press as many strong claims as possible. Because education litigators look to win, the real key to widespread initiation of § 1406(b) suits would be judicial acceptance.

## 2. Publicize § 1406(b) to Judges

However, judges are likely harder to persuade about the merits of § 1406(b). Judges are primarily focused on getting the answer “right,” which, in turn, implies relying on stable, existing answers, as suggested in Part II.A.2 of this Article. Therefore, it seems like an “all-of-the-above” media strategy would be wise to create the permission structure for judges.

a. *Through Congressional Action.* Despite the fact that Congress does not need to say more to make § 1406(b) into law, passing more laws like it will make it likelier that it will be a category. Section 1406(b) sits like Chekhov’s gun, waiting to discharge.<sup>299</sup> If Congress starts hanging guns on the mantle of every legal protection that it wants to preserve,<sup>300</sup> courts will become more familiar with laws of that type.<sup>301</sup>

Thus, when Congress reauthorizes other legislation, particularly involving education or the rights of individuals with disabilities, it should have similar “lock-in” provisions. As litigants litigate on lock-in provisions in other contexts

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297. See, e.g., *Education Law Section*, N.C. BAR ASS’N, <http://educationlaw.ncbar.org/>. Of course, practitioners representing educators have their own organizations as well. See, e.g., EDUC. LAW ASS’N, <http://educationlaw.org/>.

298. See, e.g., EDUC. WEEK, <http://www.edweek.org/ew/index.html>.

299. See, e.g., Peter Brooks, “*Inevitable Discovery*”—*Law, Narrative, Retrospectivity*, 15 YALE J.L. & HUMAN. 71, 76 (2003) (“[T]he gun hung on the wall in Act I of the play is waiting to be discharged at someone’s head in Act III.”).

300. *But cf.* *Katko v. Briney*, 183 N.W.2d 657 (Iowa 1971).

301. See *supra* notes 288-92 and accompanying text.

and courts see them more frequently, the analytical model will become a common step that judges will expect.

Congress could also hold congressional hearings and press releases, but these may not reach judges.

b. *Through Cases and Amicus Briefs.* There are many obvious ways to bring judicial eyeballs to the text of § 1406(b). The most direct way to get judges to consider § 1406(b) as a normal category is to launch a multitude of suits to make § 1406(b) challenges seem as normal as other federal lawsuits.

Following that, the next most direct route to judicial eyeballs would be for an organization to file amicus briefs in IDEA cases. Indeed, as described above, the Department of Education's amicus brief in *Jefferson County* caused the Eleventh Circuit to construct its counterintuitive § 1406(b) holding.

c. *Through Academic Interest.* Another possible route to attracting judicial attention to § 1406(b) is increased academic interest. However, leading judges seen as "liberal" and "conservative" have announced that they no longer see value in legal scholarship because of its focus on abstract, abstruse, or multidisciplinary material at the expense of practicality.<sup>302</sup> For example, if an academic writes an article about § 1406(b) with the intention of promoting its use, but then gunks up the article with fuzzy talk about cognitive science gleaned from secondary sources, that article might not be read by a judge working on a case—or worse, the attempted multidisciplinary aspect of the article may associate the main idea with Ivory Tower, outside-the-mainstream thinking. That is, the judge might say that it is "for the birds."

d. *Through Seminars.* There are other direct ways to get judicial attention. For instance, interest groups in other

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302. See, e.g., Ezra Klein, "So About that 'Permission Structure' . . .," WASH. POST WONKBLOG (May 3, 2013, 3:47 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/05/03/so-about-that-permission-structure/> (describing the Obama Administration's theory that voters would only take the novel step of voting for a black candidate if third persons made that vote seem normal or permissible).

issues host seminars to educate judges on their positions.<sup>303</sup> Because § 1406(b) is such a narrow topic, the seminar would have to find allied issues or interest groups to support it.

e. *Through Potential Law Clerks.* A more indirect way of drawing more attention to § 1406(b) is through judicial law clerks. How much, if any, influence clerks have with their judges is a debated topic.<sup>304</sup> Even if clerks' influence on judges is de minimis, a clerk's framework of the law is easier to influence because it is so unformed and part of the "ideal" role of the clerk is to "introduce[] new ideas."<sup>305</sup> Therefore, educational material to law students, who, in turn, are future clerks, would be a low-cost way to try to introduce § 1406(b) to judges.

The above has described *how* to get judges to enforce § 1406(b). The next Subsection describes *why* judges should enforce it.

## B. *Why § 1406(b) Should Be Given More Prominence*

Section 1406(b) should be used more frequently because judges and agencies should respond to the will of Congress and thereby promote democratic accountability. Because this issue goes to the heart of the American system of government, it should be sufficient. For some, however, the appeal to democratic accountability may not be enough. After all, there are "many [federal] laws—environmental, securities, criminal, civil—that are rarely enforced."<sup>306</sup> Therefore, other reasons are also considered. Use of § 1406(b) promotes experimentation with and implementation of novel ideas, a philosophy of legislating that may be necessary to

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303. See Chris Young et al., *Corporations, Pro-business Nonprofits Foot Bill for Judicial Seminars*, CTR. FOR PUB. INTEGRITY (Mar. 28, 2013), <http://www.publicintegrity.org/2013/03/28/12368/corporations-pro-business-nonprofits-foot-bill-judicial-seminars>.

304. See, e.g., Todd C. Peppers et al., *Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks*, 71 ALB. L. REV. 623, 635 (2008) (noting the debate).

305. Arthur M. Boley, *Pretrial Motions in a U.S. District Court: The Role of the Law Clerk*, JUDICATURE, June-July 1990, at 44, 44.

306. Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left-Wing Law Professors Are Wrong for America*, 106 COLUM. L. REV. 2207, 2216 (2006) (book review).

circumvent the current deadlock at the federal level. Third, and finally, § 1406(b) should be used more frequently to ensure that the Department never promulgates regulations that promote the rejected Bell policies and to make up for *Rowley's* limitation of IDEA's purpose.

### 1. Democratic Accountability

Ironically, the problems that § 1406(b) meant to address—judges and agencies undermining Congress's provision of certain rights to students with disabilities—are also problems that prevent the enforcement of § 1406(b). However, as *Chevron* argued, statutory interpretation and deference to regulations should be based on democratic accountability.<sup>307</sup>

Democratic accountability relies on the idea of intentionality. To have democratic accountability in America, voters must deliberately choose agents, who, in turn, must deliberately make policy choices that their constituencies favor.<sup>308</sup> Often, however, legislators try to minimize the possibility of being attacked for taking the wrong action and try to take ambiguous positions.<sup>309</sup> When Congress leaves its purposes vague, presidents,<sup>310</sup> courts,<sup>311</sup> and unelected bureaucrats will repurpose legislation. Enforcing § 1406(b) would make IDEA regulations more democratically

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307. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984) (“While agencies are not directly accountable to the people, the Chief Executive is . . .”).

308. Cf. D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 694 (2013) (“Elections can help select agents who are likely to have similar interests as principals and provide incentives for agents to act faithfully to increase their chances of reelection.”).

309. Cf. Michael C. Pollack, Note, *Chevron's Regrets: The Persistent Vitality of the Nondelegation Doctrine*, 86 N.Y.U. L. REV. 316, 322 (2011) (“[T]he only disincentive against the passage of ambiguous legislation is the extent to which Congress *wants* to make a definitive policy choice.”).

310. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2312-13 (2001) (describing how President Clinton used “directive authority . . . as an end run around Congress”).

311. See, e.g., *Indus. Union Dep't, AFL-CIO v. Am. Petro. Inst.*, 448 U.S. 607, 613-14, 637-40 (1980) (reading cost-benefit analysis into a statute's purpose).

accountable because it would increase the role of Congress against agencies and judges and would make state decision making more open.

a. *Democratic Accountability Requires Agencies to Listen to Congress.* Although § 1406(b) does not clearly provide a given set of protections, it makes Congress's priorities in the IDEA scheme clear. While parents of special education students may call their congressperson, it is hard to imagine a single voter, other than perhaps the Petits, whose presidential ballot could be swung by a cochlear implant mapping regulation.<sup>312</sup> IDEA regulatory choices are more democratically accountable through Congress.

As discussed in Part I, the purpose of § 1406(b) was to prevent the Department of Education from undermining Congress's intent in the IDEA scheme (as well as the procedural requirements of GEPA). Additionally, enforcing statutes like IDEA would encourage Congress to make its purpose clearer at the time of enactment. Therefore, § 1406(b) enhances IDEA's democratic accountability as against agencies.

b. *Section 1406(b) Is a Check on Judicial Discretion.* Section 1406(b) checks judicial discretion in two broad ways. First, it checks the discretion of the judiciary to defer to administrative decisions. Second, it checks judicial discretion by making clearer which outcomes are in agreement with Congress's intent.

It is a matter of simple democratic and constitutional theory that courts should defer to congressionally imposed limitations on administrative power.<sup>313</sup> It is for that reason that applying *Chevron* in the face of Congress's decision as to what IDEA regulations are legal should be seen as

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312. See Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 52-70 (2013) (describing "the weak link between presidential control and democratic accountability").

313. See Burt Neuborne, *Serving the Syllogism Machine: Reflections on Whether Brandenburg Is Now (or Ever Was) Good Law*, 44 TEX. TECH L. REV. 1, 32 (2011) ("If more than one command exists, the judge applies a democratically derived political hierarchy: a constitutional command trumps a statutory command, which, in turn, trumps an executive regulation, which displaces the judge-made common law.").

discretionary and a violation of *Chevron's* own theory that deference is owed to agencies because Congress so chose.<sup>314</sup> Because "most judges still share a belief that principled decision making is the essence of the judicial function,"<sup>315</sup> such behavior makes more sense as an overreliance of the distillation of the *Chevron* doctrine into an analytical model than as a willful disregard of the statute.

Second, § 1406(b) checks judicial discretion by hinting at Congress's priorities in a choice between increasing or decreasing protection. This is particularly important because violations of IDEA—with its "vague or ambiguous language"—are enforced in the courts, making IDEA "judicially administered" and giving courts "policymaking authority" and "substantial discretion."<sup>316</sup>

Without § 1406(b) setting a floor, courts might make more independent decisions as to the comparative values of, for instance, substantive protections or costs to local school districts. In this sense, the Eleventh Circuit used § 1406(b) correctly in *Jefferson County* as guidance to determine whether Congress would have preferred the status quo or the school district's interpretation, which was more in line with Bell's proposed regulations.

c. *Section 1406(b) Enhances Democratic Accountability Through the States.* Arguably, IDEA as a whole weakens democratic accountability by placing decisions about state and local programs in federal hands.<sup>317</sup> Therefore, to the extent § 1406(b) requires states to provide more services, it may be seen as reducing democratic accountability. However, § 1406(b) increases democratic accountability by making it

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314. See Sunstein, *supra* note 125, at 198; see also Merrill & Hickman, *supra* note 123, at 872.

315. Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 838 (1991).

316. Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 370-72 (2010).

317. *Cf. Va. Dep't of Educ. v. Riley*, 86 F.3d 1337, 1356-58 (4th Cir. 1996) (Luttig, J., dissenting) (decrying IDEA for taking power away from states and thereby harming democracy and removing choices from people), *rev'd en banc*, 106 F.3d 559 (4th Cir. 1997) (per curiam).

clearer what states must do when they receive IDEA funds. This can be seen by analogy to *New York v. United States*.<sup>318</sup>

*New York* explained that influencing state behavior through conditioned spending was likely to be acceptable in part because “[i]f a State’s citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant.”<sup>319</sup> By contrast, compelling state legislatures to regulate was unconstitutional because, among other things, it diminished democratic accountability: “[I]t may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”<sup>320</sup> By reducing uncertainty over IDEA protections, it makes a state’s decision to enter into IDEA a decision that is made “in full view of the public.”<sup>321</sup> But democratic accountability is not the only reason why § 1406(b) should be enforced.

## 2. Experimentation

Kuhn argued that when scientists were not engaged in the rare task of overthrowing and reconstructing paradigms, they were almost always engaged in puzzle solving.<sup>322</sup> So, too, the normal legislature should not be crafting a scheme to reorder American life but to tinker to achieve goals. Two very well-known models of legislative experimentalism—Justice Brandeis’s and Franklin Roosevelt’s—focused on situations in which the goal was identified.

Both Brandeis and Roosevelt promoted experimentalism in the face of known and obvious problems: economic inequality and the Depression.<sup>323</sup> One of the most quoted

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318. 505 U.S. 144, 168 (1992).

319. *Id.* at 168.

320. *Id.* at 168-69.

321. *Id.* at 168.

322. *See* Kuhn, *supra* note 253, at 4-5.

323. *See* IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 34 (2013) (noting that Depression-era leaders were faced with a very specific set of problems, but “[b]ecause they possessed no fixed or sure policy approaches or remedies . . . , they could consider a very wide repertoire of policies”).

passages in all of American jurisprudence is Justice Brandeis's paean to experimentalism in response to economic regulation in Oklahoma: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>324</sup>

While Brandeis's experimentalism was notable for relying on the states, Roosevelt's experimentalism was in support of a larger federal government response to the Depression: "The country needs and, unless I mistake its temper, the country demands bold, persistent experimentation. It is common sense to take a method and try it: If it fails, admit it frankly and try another. But above all, try something."<sup>325</sup>

By contrast with Brandeis's and Roosevelt's experimentalism, the "spirit of 1406" is not about centralizing or decentralizing, nor is it in response to agreed upon problems. Rather, § 1406(b) indicates that, as both political parties become more and more hardened as to ends,<sup>326</sup> the only hope for moving any legislation lies in finding means.

Section 1406(b) was a way in which congressional liberals of both parties and President Reagan could agree to proceed on education regulation. Today, bipartisanship tends to be most likely to break out when the parties try a new means. For instance, conservative Democrats and Republicans tried to work around the stalemate over more

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324. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

325. Franklin D. Roosevelt, Address at Oglethorpe University in Atlanta, Georgia (May 22, 1932), THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=88410> (last visited Jan. 14, 2014); see also Eugene V. Rostow, *Bituminous Coal and the Public Interest*, 50 YALE L.J. 543, 543 (1941) ("One of President Roosevelt's most appealing intellectual claims for the New Deal was that it would experiment with policy, and would discard the experiments which failed to work.").

326. Cf. Thomas E. Mann & Norman J. Ornstein, *The Election and the Future*, DEMOCRACY, Fall 2012, at 40, 41 ("Republicans launched their unending political war against the President from the first day of his Administration, in the midst of an economic crisis, in single-minded pursuit of their goals . . .").

versus fewer guns by calling for background checks.<sup>327</sup> The risk, of course, is that, as the means itself becomes seen as a goal that a party ideologically needs to block, a less aggressive debate over what was formerly considered a means is no longer possible.<sup>328</sup> For instance, when the National Rifle Association weighed in against background checks, it made background checks and an alleged federal gun database the ends rather than the parties' earlier goals of increased or decreased gun ownership.<sup>329</sup> It is this shifting of the window of bipartisanship that made the Republicans' 1993 health care reform bill an acceptable and experimental means to an agreed-upon problem, yet when much of it was later redubbed "Obamacare," it was considered a grave threat to constitutional liberty.<sup>330</sup>

Thus, in order to find grounds for compromise—or better still, collaboration—legislators will have to find new means that put the other side in a defensive posture. Because legislators are not particularly invested in methodologies,<sup>331</sup>

327. See S. Amend. 715 to S. 649, 113th Cong. (2013).

328. See Diana Epstein & John D. Graham, *Polarized Politics and Policy Consequences*, RAND. CORP 9 (2007), available at [http://www.rand.org/content/dam/rand/pubs/occasional\\_papers/2007/RAND\\_OP197.pdf](http://www.rand.org/content/dam/rand/pubs/occasional_papers/2007/RAND_OP197.pdf) (“[P]olarization around moral issues in which parties disagree about the fundamental outcomes to achieve is more potent than polarization around economic issues in which parties agree on economic or other policy goals.” (quoting David W. Brady & Hahrie C. Han, *Polarization Then and Now: A Historical Perspective*, in 1 RED AND BLUE NATION? CHARACTERISTICS AND CAUSES OF AMERICA’S POLARIZED POLITICS 119-51 (Pietro S. Nivola & David W. Brady eds., 2006))).

329. See Susan Page, *Sen. Manchin: Other Tough Issues Complicated Gun Vote*, USA TODAY (Apr. 18, 2013), [http://www.usatoday.com/story/news/politics/2013/04/18/sen-joe-manchin-gun-vote-immigration-gay-marriage/2093161/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+usatoday-NewsTopStories+%28USATODAY+-+News+Top+Stories%29](http://www.usatoday.com/story/news/politics/2013/04/18/sen-joe-manchin-gun-vote-immigration-gay-marriage/2093161/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+usatoday-NewsTopStories+%28USATODAY+-+News+Top+Stories%29) (arguing that the NRA’s opposition caused the background check bill to fail to meet a procedural hurdle).

330. See, e.g., Maggie Mertens, *The Democrats’ 2010 Health Reform Plan Evokes 1993 Republican Bill*, KAISER HEALTH NEWS (Feb. 13, 2010), <http://www.kaiserhealthnews.org/checking-In-With/Durenberger-1993-gop-bill-q-and-a.aspx?p=1>.

331. Cf. Ezra Klein, *Don’t Read the Bill!*, WASH. POST WONKBLOG (Sept. 25, 2009, 6:00 PM), <http://voices.washingtonpost.com/ezra-klein/2009/09/>

procedural innovations like § 1406(b) are where to make the action happen. In a football game where each yard lost is considered a grievous injury and touchdowns are forbidden except by agreement between the teams, the players need to change the rules, such as by widening the field, to prevent the same fruitless goalline dogpiles. If lawyers are unwilling to accept experimental and strange laws that are otherwise unimpeachable, such experimentation quickly loses its allure.

3. Section 1406(b) Better Fulfills the Purpose of IDEA than a *Petit* IDEA

a. *Preventing the Promulgation of a Replication of Reagan's Rejected Regulations.* As Justice Cardozo explained:

Almost always, a statute has only a single point in view. All history demonstrates that legislation intervenes only when a definite abuse has disclosed itself, through the excess of which public feeling has finally been aroused. When the legislator interposes, it is to put an end to such and such facts, very clearly determined, which have provoked his decision.<sup>332</sup>

Thus, Congress has asserted that the Bell regulations were such “a definite abuse,” and few have said otherwise. As judges and litigators are seen to reject the “logical consequences” of the “general ideas and abstract formula[]”<sup>333</sup> presented in § 1406(b), they may be seen as tacitly welcoming the harmful content of Bell’s regulations as well. As emphasized throughout this Article, *Petit* could be the opening wedge of the promulgation of all Bell’s regulations. Although “audiology” services were not expressly limited by Bell’s regulations, the regulations addressed the same concerns as the opponents of mandatory provision of mapping when they limited “medical” services, such as the

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dont\_read\_the\_bill.html (arguing that Senators do not care about the technical details in the text of bills).

332. CARDOZO, *supra* note 17, at 144.

333. *Id.*

expense and expertise required.<sup>334</sup> Thus, except where the pre-1983 regulations are extremely clear, the Department, in the future, could use *Auer* deference to deprive children with disabilities of the services they need to receive a free appropriate public education. While some may argue that the costs of providing these protections outweigh the obvious benefits, they should not be allowed to deprive students of their mandated related services, swooping down silently in the dead of night like a great horned owl.<sup>335</sup>

b. *A Restrained End Run Around Rowley*. Perhaps willfully, Justice Rehnquist announced a false understanding of the IDEA scheme in *Rowley*: that IDEA only required that the children with disabilities be “given access to an adequate, publicly supported education” and that “the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.”<sup>336</sup> That assertion of a limited congressional intent has resulted in reduced services to children with disabilities.<sup>337</sup> There has been extensive disagreement with Rehnquist’s interpretation of what level of education a school must apply.<sup>338</sup> Moreover, other trends have contributed to a narrowing of IDEA.<sup>339</sup> But, both as originally enacted<sup>340</sup> and as further amendments have

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334. See Assistance to States for Education of Handicapped Children, 47 Fed. Reg. 33,836, 33,837-38 (Aug. 4, 1982) (codified at 300 C.F.R. pt. 300); Omang, *supra* note 45, at A1.

335. See Val Cunningham, *Night’s Silent Hunters Are Nearby*, MINN. STARTRIBUNE (Mar. 20, 2012), available at <http://www.startribune.com/lifestyle/homegarden/143512846.html>.

336. Bd. of Educ. v. Rowley, 458 U.S. 176, 176, 193, 200 (1982).

337. See Babin, *supra* note 96, at 226-28.

338. See Noble, *supra* note 94, at 450, 457 & n.181 (collecting sources).

339. See *supra* note 95 (collecting sources).

340. See Weber, *supra* note 73, at 95, 104 (noting that the dissent found more legislative history in support of “‘full educational opportunity,’ ‘equal educational opportunity,’ education tailored to ‘enable the child to “achieve his or her maximum potential,’” and an education ‘equivalent, at least, to the one those children who are not handicapped receive’” (quoting *Rowley*, 458 U.S. at 213-14 (White J., dissenting))).

been tacked on,<sup>341</sup> IDEA and its predecessors have meant to accomplish more.

As a result, applying § 1406(b) to increase educational opportunities for students with disabilities is a way for lower courts to compensate for binding precedent that puts a ceiling on what services participating states must provide.<sup>342</sup> Although this trade does not work as well as the famous decision to incorporate the Bill of Rights through the Due Process Clause rather than the Privileges and Immunities Clause, it is a trade that judges should make to better fulfill Congress's intent in enacting and reenacting IDEA.

For the reasons discussed above, increasing democratic accountability, promoting innovative experimentalism, and enforcing the duly passed and enacted legislative scheme of IDEA, § 1406(b) ought to be raised and enforced more frequently, and experiments like § 1406(b) should be attempted in other substantive areas of law and other levels of government, such as by the states.

#### CONCLUSION

Section 1406(b) was enacted into law by Congress to prevent the Department of Education from diminishing protections for some of our most vulnerable citizens—children with disabilities. Yet in the past thirty years, the law has seemingly stood as mute as Louis the Swan and as much a pariah as the Ugly Duckling. To give § 1406(b) voice, it must be seen as one of the gang. Section 1406(b) has to become a familiar category. Only when § 1406(b) occupies cognitive space that gives it legitimacy will it be consistently applied. Turning § 1406(b) from outcast to category will make Congress's speech intelligible, make IDEA more democratically accountable, encourage legislative experimentation, and help work around *Rowley*. But until § 1406(b) can find its cognitive perch on which to roost, it might as well be for the birds.

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341. See *supra* note 95.

342. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011) ("Squeezing law is often like squeezing a balloon. The contents do not escape, but erupt in another area . . .").