2018

Chevron's Liberty Exception

Michael Kagan
University of Nevada, Las Vegas -- William S. Boyd School of Law

CHEVRON'S LIBERTY EXCEPTION

By Michael Kagan*

FORTHCOMING IN IOWA LAW REVIEW

This Article argues that the Supreme Court's practice in immigration cases reflects an unstated but compelling limitation on *Chevron* deference. Judicial deference to the executive branch is inappropriate when courts review the legality of a government intrusion on physical liberty. This norm is illustrated by the fact that the Court has not meaningfully applied *Chevron* deference in cases concerning deportation, and also has seemed reluctant to do so in cases concerning immigration detention. It is a logical extension of the established rule that Chevron deference does not apply to questions of criminal law. By contrast, the Court applies *Chevron* deference fairly consistently in other kinds of immigration cases, which suggests that the Court is not displaying an inclination toward immigration exceptionalism when it treats deportation cases differently. Instead, the Court's practice is best explained by broadly applicable and deeply rooted constitutional principles regarding separation of powers and the safeguarding of individuals against the government. The Supreme Court should articulate a rule explaining its consistent practice: a physical liberty exception to *Chevron*.

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* Michael Kagan (B.A. Northwestern University, J.D. University of Michigan Law School) is Professor of Law at the University of Nevada, Las Vegas, William S. Boyd School of Law. I am grateful to Gil Kahn for ideas, input, and interest that made this Article possible. My thanks are due to Gabriel "Jack" Chin, Jill E. Family, César Cuauhtémoc García Hernández, and Christopher J. Walker for helpful suggestions. All errors are mine.

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I. Introduction

When the Senate considered Neil Gorsuch's nomination to the Supreme Court in 2017, much of the opposition to him focused on his criticism of *Chevron* deference.[1] Since the late 1980s, *Chevron* has been the central doctrine in administrative law. It calls on courts to defer to executive branch agencies on the interpretation of ambiguous statutes. In the process, it gives agencies more space in which to craft public policy, and seems to minimize the role of the judiciary in saying what the law is.

While the general public probably does not know that "Chevron" is anything but a petroleum company, Judge Gorsuch's criticism of a "titanic administrative state"[2] seemed to fit a growing political narrative. Around the same time when President Trump nominated Judge Gorsuch, presidential advisor Steve Bannon declared that the Trump Administration would be

[1] *See, e.g.,* Steven Davidoff Solomon, *Should Agencies Decide Law? Doctrine May Be Tested at Gorsuch Hearing*, THE NEW YORK TIMES (March 14, 2017); Peter J. Henning, *Gorsuch Nomination Puts Spotlight on Agency Powers,* THE NEW YORK TIMES (Feb. 6, 2017).

[2] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1155 (10th Cir. 2016) (J. Gorsuch concurring).

working toward the "deconstruction of the administrative state."[3] This narrative has been explicitly embraced and applauded in *Breitbart News*, which has become a prominent institution in right wing media.[4] Reflecting an analogous if more critical understanding of Gorsuch's views, Sen. Maria Cantwell, a Democrat, protested that Gorsuch's desire to overturn *Chevron* "could make it easier for courts to overturn important agency decisions protecting public health and the environment."[5]

For anyone who knows *Chevron* as a legal doctrine, there are obvious ironies in this political narrative. For one thing, the original *Chevron* decision upheld a Reagan Administration policy that environmentalists opposed. But perhaps even more poignant given the politics of the Trump Administration, then-Judge Gorsuch issued his broadside against the *Chevron* doctrine in an immigration case, to defend the interests of a Mexican citizen who was trying to adjust his status to become a legal resident.[6] As it turns out, there is a considerable potential for alliance between immigrant rights advocates and conservative critics of *Chevron*.[7]

If anyone wants to find an example of a largely unchecked administrative state imposing itself against the liberty of individuals, it is hard to find a better example than immigration enforcement. In a deportation case, the Department of Homeland Security operates as police, jailer, prosecutor, and deporter, while the Department of Justice plays the role of judge through its Immigration Courts. Both departments answer to the same Chief Executive, and can easily work together in pursuit of a more aggressive enforcement policy.[8] Recently, the Attorney General –

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[3] Philip Rucker, *Bannon: Trump administration is in unending battle for the 'deconstruction of the administrative state,"* THE WASHINGTON POST (Feb. 23, 2017); Matt Ford, *Judge Gorsuch Goes to Washington*, THE ATLANTIC (March 20, 2017); Henry Gass, *Gorsuch hearings: Should agencies – or courts – decide the law?* THE CHRISTIAN SCIENCE MONITOR (March 22, 2017).

[4] *See, e.g.*, Ian Mason, *Neil Gorsuch is Ready to Take on Administrative State*, BREITBART NEWS (Nov. 17, 2017).

[5] Sen. Maria Cantwell, Cantwell Statement on Judge Neil Gorsuch's Nomination to U.S. Supreme Court, https://www.cantwell.senate.gov/news/press-releases/cantwell-statement-on-judge-neil-gorsuchs-nomination-to-us-supreme-court (March 30, 2017).

[6] *See* discussion, *infra*, at Part II.

[7] *See* Jill E. Family, *Immigration Law Allies and Administrative Law Adversaries*, ___ GEO. IMMIGR. L. J. ___ (2018); Sarah Madigan, *Revisiting Deference to Agencies in Criminal Deportation Cases,* THE REGULATORY REVIEW (Nov. 16, 2017) (summarizing arguments for immigration-specific exceptions to *Chevron*); Gabriel J. Chin, Nicholas Starkman, Steven Vong, *Chevron and Citizenship* (unpublished draft) (questioning the application of Chevron in citizenship adjudication).

[8] *See, e.g.*, Attorney General, Memorandum: Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest (Dec. 5, 2017) (calling on Immigration

who supervises the Immigration Courts – has been one of the loudest voices in favor of stricter enforcement of immigration laws.[9] A person detained and subject to deportation through this system only reaches the judicial branch of government late in the adjudication, as a last resort when all administrative appeals have been exhausted. The subjects that can be reviewed in federal court are strictly limited by statute, but Congress explicitly preserved judicial review on "constitutional claims or questions of law."[10] It is here that *Chevron* deference comes in. If *Chevron* deference applies, it means that the federal courts will defer back to the Attorney General on difficult questions of law, further minimizing the degree to which meaningful judicial review is available, and strengthening to a corresponding degree the power of the executive branch over people.

At a surface level, the Supreme Court has sent mixed messages about whether deference would be appropriate in these cases. On the one hand, the Court has repeatedly said, clearly and strongly, that courts should defer to the Attorney General's interpretation of immigration laws, as the *Chevron* doctrine prescribes.[11] On the other hand, the Court seems to honor this prescription in the breach. This kind of inconsistency with *Chevron* is typical for the Supreme Court, and is not unique to immigration, but it has particular consequences for lower courts, which tend to make more consistent efforts to follow deference doctrines in administrative law cases.[12] In the specific context of deportation cases, one can certainly see the Court's failure to adhere to a central doctrine of administrative law as one of many examples of immigration law's tendency toward exceptionalism.[13] It has led to the descriptive observation that "deportation is different" for the

Judges to work toward "an end to unlawfulness in our immigration system" and stating that the manner in which immigration cases are adjudicated directly impacts sovereign interests.).

[9] *See, e.g.*, Attorney General Remarks to the Executive Office on Immigration Review (Oct. 12, 2017) (criticizing liberal interpretations of asylum law and "dirty immigration lawyers"); Attorney General Remarks on Violent Crime to Federal, State and Local Law Enforcement (April 28, 2017); Attorney General Remarks Before Media Availability in El Paso, Texas (April 20, 2017); Attorney General Remarks Announcing the Department of Justice's Renewed Commitment to Immigration Enforcement (April 11, 2017).

[10] 8 U.S.C. § 1252

[11] *See* discussion, *infra*, at Part III.C.

[12] *See* Kent H. Barnett and Christopher J. Walker, *Chevron in the Circuit Courts*, 115 MICH. L. REV. ___ (2017).

[13] *See generally* David S. Rubenstein and Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583 (2017).

Supreme Court, although the Court itself has never quite said so explicitly.[14] Moreover, the description raises a deeper question: Why is deportation different?

This Article intervenes in this confusing situation with two main points.

First, the Supreme Court's practice with regard to *Chevron* in immigration cases follows a discernable pattern. The Court does not meaningfully apply *Chevron* in cases concerning deportation, and also seems reluctant to do so in cases concerning immigration detention.[15] But the Court does apply *Chevron* deference in other kinds of immigration cases. This pattern suggests not all immigration cases are the same. Any statement of a rule that claims that *Chevron* does (or does not) apply in immigration cases is likely to be overbroad. It is important to differentiate the specific issues raised in different types of immigration cases.

Second, this pattern of avoiding deference in deportation and detention cases makes normative sense. *Chevron* deference is inappropriate when courts review the legality of a government intrusion on physical liberty. This is not an example of immigration exceptionalism, but rather an application of deeply rooted constitutional principles. It just happens that immigration is the rare field of administrative law in which an executive branch agency can arrest, detain and force someone to go some place against their will. But there may be other arenas where courts consider government requests for deference on legal interpretations that lead directly to incarceration, and there are indications that courts have similarly avoided deferring without setting out a clear rule about why.[16] Court should be willing to state clearly that deference on questions of law is inappropriate in this context for the same reasons why it is inappropriate in questions of criminal law. Ambiguity from the Supreme Court on

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[14] *See generally* Chris Walker, *The "Scant Sense" Exception to Chevron Deference in Mellouli v. Lynch*, YALE J. ON REG.: NOTICE & COMMENT (June 2, 2015) (discussion the possibility that the Roberts Court may be reluctant to give deference in certain deportation cases); Patrick Glen, *Response to Walker on Chevron Deference and* Mellouli v. Lynch, YALE J. ON REG.: NOTICE & COMMENT (June 20, 2015) (discussing the possibility of a "deportation-is-different" explanation for the Court's reluctance with regard to *Chevron*); Michael Kagan, *Chevron's Immigration Exception, Revisited*, YALE J. ON REG.: NOTICE & COMMENT (June 10, 2016).

[15] *See* discussion, *infra*, in Part IV.A.

[16] This appears to be the case with Bureau of Prisons sentencing cases. *See* Barber v. Thomas, 560 U.S. 474, 502 (2010) ("There is no indication that BOP has exercised the sort of interpretive authority that would merit deference under *Chevron*."). *See also* Lopez v. Terrell, 654 F.3d 176, 181 (2d Cir. 2011).

this question is a serious problem, given that most immigration cases will be decided by lower courts. Rather than state, falsely, that *Chevron* deference applies in all immigration cases, the Supreme Court should articulate a rule explaining its actual practice: There is a physical liberty exception to *Chevron*.

There are three main parts to this Article. Part II describes the current unsteady status of the *Chevron* doctrine, and argues that there is considerable value in looking for patterns in what seems like inconsistency by the Supreme Court. Part III examines the role of *Chevron* in the Court's immigration decisions, and demonstrates the existence of a pattern and practice that is best explained by a reluctance to defer to the executive branch when physical liberty is at stake. Part IV highlights some of the implications of this normative theory, including its application beyond deportation cases, the question of whether *Chevron* should apply in relief from removal cases like asylum eligibility, and the claim that the rule of lenity should govern interpretation of certain immigration statutes.

II. *Chevron's* Unsteady Status

A. Inconsistent, Criticized, and Canonical

In a broad sense, my purpose in this Article is to make sense of an area of law in which the Supreme Court has not practiced what it has preached, but has nevertheless followed consistent doctrinal patterns. In order to understand why the Court has behaved this way, we need to begin with an overview of how the *Chevron* doctrine developed up to this moment. *Chevron* has become indispensible to administrative law. And yet, neither its doctrinal justifications nor its practical importance have ever been completely secure. As Kent Barnett and Christopher Walker wrote recently, *Chevron* deference is "both an untouchable doctrine and yet always under attack."[17]

The basic rule of *Chevron* requires a two-step analysis when an administrative agency interprets an ambiguous congressional

[17] Barnett and Walker, *supra* n. 12, at ___.

statute.[18] The first is whether the intent of congress is clear.[19] Second, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[20] To make this determination, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[21]

Although the essential rule is spelled out fairly clearly in the original Supreme Court decision, this doctrine has a somewhat peculiar pedigree. *Chevron* is a paradigmatic canonical case, in that it has taken on a meaning quite different, or at least quite a bit more important, than someone who had only read the decision itself might understand.[22] The *Chevron* doctrine as we know it emerged through subsequent interpretation by lower courts, helped along by energetic promotion by Justice Antonin Scalia when he joined the Court two years after the actual *Chevron* decision.[23] There is a plausible case that we should really be talking about the *General Motors* Doctrine, in honor of the 1984 D.C. Circuit *en banc* decision that seems have been the first to cite and explain *Chevron* as a major change in administrative law.[24] Gary Lawson and Stephen Kam, the authors of an authoritative history of how the *Chevron* case became the *Chevron* Doctrine, explain that

> the process by which *Chevron* became law—a series of lower court decisions and then default acceptance in the Supreme Court—prevented … ambiguities from being vented and resolved in an authoritative forum; instead, they remain to this day largely submerged and unaddressed.[25]

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[18] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions.").

[19] *Id.*

[20] *Id.* at 843.

[21] *Id.*

[22] *See* Ian Bartrum, *The Constitutional Canon as Argumentative Metonymy,* 18 WM. & MARY BILL RTS. J. 327, 329 (2009-2010) ("a canonical text takes on its own metonymic meanings-sometimes quite apart from its literal textual meaning-within the practice of constitutional law.").

[23] *See* Gary Lawson and Stephen Kam, *Making Law Out of Nothing At All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1 (2013).

[24] *Id.* at 39-41.

[25] *Id.* at 6.

In other words, the Supreme Court did not necessarily intend to launch a new doctrine at the beginning. Instead, the doctrine emerged somewhat incrementally.

Despite its odd birth, for roughly the first two decades of its existence, *Chevron* seemed to have unanimous support on the Supreme Court. This is somewhat remarkable, if one considers the political implications of courts deferring to administrative agencies.[26] If we assume that the political left favors more robust government programs and the political right favors smaller government, then the idea that courts should defer to (rather than be a check against) government agencies seems to favor the left. Despite this, Justice Antonin Scalia became (at least until the end of his career) the foremost promoter and defender of *Chevron*. For him, *Chevron* was more about judicial restraint, in that it offered a means of recognizing the superior role of the elected branches of government in making policy choices, as we will see in more detail in Part II.B. But the superficial consensus should perhaps have always been treated with some skepticism.

The *Chevron* doctrine is classically expressed as a rigid algorithm (the famous two steps) which makes any deviation by the Court quite noticeable. On the surface, this algorithmic approach makes Chevron appear different from *Skidmore* deference, one of its primary alternatives in the administrative law canon. *Skidmore* dictates that informal interpretations by agencies will be given weight by courts in light of "all those factors which give it power to persuade, if lacking power to control."[27] This is an inherently amorphous standard, especially when compared to the apparent rigidity of the textbook version of the *Chevron* doctrine. Nevertheless, it is common for questions to arise about how strictly *Chevron* should be applied as a precedent in different types of cases.[28] Despite all the fanfare, it is now well known that the

[26] *See generally* Connor N. Raso and William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1732-33 (2010) ("a simple ideological account does not explain why arch-conservative Justice Scalia followed Chevron to allow the agency discretion to adopt a very liberal rule for the ADEA. But it is possible that his willingness to go along with a liberal result in this case might be part of a larger conservative strategy in the general run of cases.").

[27] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[28] *See* Raso and Eskridge, *supra* n. 26 (finding that justices apply *Chevron* differently in different contexts).

Supreme Court itself applies *Chevron* inconsistently at best.[29] Once this inconsistency became apparent, leading scholars sought to reframe *Chevron* as a looser set of jurisprudential principles rather than a rigid formula.[30] The most influential of these efforts is probably Peter Strauss' concept of "*Chevron* space" as contrasted with "*Skidmore* weight."[31] But inconsistency has also led to doubts about how much *Chevron* matters. As Michael Herz summarizes the situation:

> Despite all the attention … the "Chevron revolution" never quite happens. This decision, though seen as transformatively important, is honored in the breach, in constant danger of being abandoned, and the subject of perpetual confusion and uncertainty.[32]

Given this background, it should come as little surprise that there is now open criticism of *Chevron* and its progeny on the Supreme Court, and that the criticism has emerged mostly from justices on the conservative side of the Court, albeit in different flavors. Justice Thomas has directly questioned the constitutionality of *Chevron*.[33] Justice Scalia, Alito, and Thomas questioned *Auer* deference, an offshoot of *Chevron* under which a court defers to an agency's interpretation of its own regulation.[34] There is a school of thought that Justice Scalia was beginning to re-consider *Chevron* itself toward the end of his life, which would have been remarkable given that he was *Chevron's* biggest booster during his early years on the Court.[35] Regardless of whether that is true, Scalia was replaced by a justice who had very recently

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[29] *See* William N. Eskridge, Jr. and Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1124–25 (2008); Barnett and Walker, *supra* n. 17, at ___; Michael Herz, Chevron *is Dead, Long Live* Chevron, 115 COLUM. L. REV. 1867, 1870 (2015).

[30] *Id.* at 1766 ("*Chevron* and the other formal deference regimes have the following characteristics in practice: They are flexible rules of thumb or presumptions deployed by the Justices episodically and not entirely predictably, rather than binding rules that the Justices apply more systematically.").

[31] Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight,"* 112 COLUM. L. REV. 1143 (2012).

[32] Herz, *supra* n. 29, at 1867.

[33] Michigan v. E.P.A., 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).

[34] Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1213 (2015) (J. Scalia, concurring).

[35] *See* Aaron L. Nielson, *Cf.* Auer v. Robbins, ___ TEX. REV. L. & POL. ___ (2017); Adam J. White, *Scalia and* Chevron*: Not Drawing Lines, But Resolving Tensions*, YALE J. ON REG: NOTICE & COMMENT (Feb. 23, 2016).

criticized *Chevron* in terms arguably stronger than those used by Thomas.[36]

Christopher Walker has suggested that it is possible that Chief Justice Roberts has his own, albeit different, issues with *Chevron*.[37] Walker noted that in 2013 Roberts had disagreed with Justice Scalia about whether an administrative agency should get deference when it is interpreting the boundaries of its own authority.[38] Sounding much like a critique of *Chevron*, the Chief Justice worried about the "vast power" of the administrative state over everyday life.[39] He was joined in this critique by Justices Kennedy and Alito. Discussing the ambiguous "major questions" exception to *Chevron* that the Chief Justice announced in *King v. Burwell*, Walker writes:

> Perhaps the narrowing of *Chevron* deference in *King v. Burwell* was not really about major questions. Instead, it could have been the start of a much more systemic narrowing of *Chevron*'s domain and the Chief Justice's attempt to relitigate the battle he previously lost to Justice Scalia.[40]

Walker is not alone in thinking that Chief Justice has been quietly moving the Court away from *Chevron* deference and toward judicial empowerment vis-à-vis the administrative state.[41]

If you've been keeping score, you will note that in a very short period of time the *Chevron* doctrine went from having no open opponents on the Supreme Court to having five justices who are willing to either limit its reach or destroy it altogether. This tally does not count Justice Breyer, who has at times urged a flexible context-specific approach to *Chevron*, which may be partially compatible with some of the conservative justices' desire

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[36] Gutierrez-Brizuela, 834 F.3d at 1152 (J. Gorsuch concurring) ("*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty.").

[37] Christopher J. Walker, *Toward a Context-Specific* Chevron *Deference*, 81 MO. L. REV. ___ (2016).

[38] *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1881 (2013) (Roberts, C.J., dissenting).

[39] *Id.* at 1878.

[40] Walker, *supra* n. 37, at ___.

[41] *See* Note, *The Rise of Purposivism and the Fall of* Chevron*: Major Statutory Cases in the Supreme Court*, __ HARV. L. REV. 1227 (2017) [hereafter Harvard]; Nicholas R. Bednar and Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392, 1439-41 (2017).

to limit deference in specific ways.[42] To be clear, this does not mean *Chevron* is dead. Indeed, there are good reasons to think that something like *Chevron* deference is unavoidable given the tendency by legislators to deflect difficult policy questions to executive agencies.[43] There are still only two justices (Thomas and Gorsuch) on record supporting its reversal. But it does mean that *Chevron's* vitality and its reach are suddenly in doubt.

The new doubts about *Chevron* at the Supreme Court arguably do not matter as much as one might think, given that the Supreme Court was never very consistent about applying *Chevron* deference anyway. But it is important to remember that the Supreme Court is not the only court in the land. The doctrine has had far more impact in the far larger number of administrative law cases that are resolved in the circuit courts of appeals.[44] Unlike at the High Court, in the circuit courts the choice of deference level (*Chevron*, *Skidmore* or *de novo*) is far more predictive of case outcomes.[45] These courts pay close attention to the marching orders they receive from the Supreme Court, and thus it matters a great deal if Supreme Court justices change what they say about when, if and how this doctrine should apply.

B. Theoretical Foundations, Tensions and Critiques

In 1989, Justice Scalia delivered an influential lecture that both trumpeted and re-explained the *Chevron* decision.[46] That lecture is remembered and often cited as a key moment in the solidification of the doctrine. Its greatest influence was the way Scalia justified judicial deference in terms of congressional intent and separation of powers – a rationale that the Court eventually adopted in *United States v. Mead*.[47] Yet, in a less cited passage of his lecture, Scalia frankly acknowledged that there were reasons for constitutional doubt about *Chevron*:

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[42] *See* discussion, *infra*, at Part II.B.
[43] *See* Bednar and Hickman, *supra* n. 41, at 1446 et seq.
[44] *See* Barnett and Walker, *supra* n. 17, at ___.
[45] *See* Barnett and Walker, *supra* n. 17, at ___.
[46] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989)
[47] United States v. Mead Corp., 533 U.S. 218, 226-227, 229 (2001).

> It is not immediately apparent why a court should ever accept the judgment of an executive agency on a question of law. Indeed, on its face the suggestion seems quite incompatible with Marshall's aphorism that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Surely the law, that immutable product of Congress, is what it is, and its content-ultimately to be decided by the courts-cannot be altered or affected by what the Executive thinks about it.[48]

The important thing about this passage is that it recognizes a baseline in which deference is not the norm. Because *Chevron* has become so widely accepted over the past quarter century, it may seem that deference to agencies is assumed, and anyone who wants to avoid deference is swimming upstream. But in these earlier days, Justice Scalia acknowledged that non-deference should actually be the starting point. Put another way, courts should give the authoritative interpretation of the law, unless there is good reason to do otherwise. There are three main justifications that have been given for why the judicial branch should defer to executive agencies on the interpretation of ambiguous statutes: Technical expertise, political accountability and congressional intent.

Expertise is the one with the oldest pedigree, and the rationale that most clearly anchors *Chevron* in a longer administrative law heritage. Appellate review of administrative agencies evolved with regulation of the railroad rates more than a century ago.[49] After considerable struggle, the Court eventually realized that the Interstate Commerce Commission was better suited to set railroad rates.[50] Despite having sometimes derided technical expertise as a reason for deference, Justice Scalia himself sometimes fell back on it.[51] However, as Lawson and Kam have

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[48] Scalia, *supra* n. 46, at 513 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))

[49] *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Re-view Model of Administrative Law*, 111 COLUM. L. REV. 939, 950–51 (2011).

[50] *Id.*

[51] *Compare* K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 322 (1988) (Scalia, J., concurring in part and dissenting in part) ("[O]ne of the most important reasons we defer to an agency's construction of a statute

explained, "Epistemological deference . . . does not require any specific doctrine for implementation."[52] If a doctrine is needed, *Skidmore* deference would seem to be enough; a judge should defer to the technical experts because they are persuasive (and only if they are persuasive). It should be noted that many scholars argue that expertise may consist of an agency's intricate knowledge of a statute's technical background, which I explore in more detail in Part III.B. For present purposes it is enough to note that rigid deference to technical expertise seems to undermine the judiciary in favor of technocrats, since it is ultimately the job of judges to make decisions about the law, even when someone else has a better chance of getting the technicalities right.[53]

The *Chevron* decision itself emphasizes political accountability as at least as important as technical expertise as a justification for deference:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. 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—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[54]

This rationale has become a prominent argument in defense of the administrative state, advocated prominently by Elena Kagan

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[is] its expert knowledge of the interpretations' practical consequences.") *with* Scalia, *supra* n. 46, at ___ (criticizing technical expertize as a insufficient to justify judicial deference).

[52] Lawson and Kam, *supra* n. 23, at 11.

[53] Scalia, *supra* n. 46, at 514.

[54] 467 U.S. at 865-866.

(during her days as a law professor), among others.[55] Agencies can change their minds, and voters can change the agencies by voting for a new president. The political accountability rationale for congressional delegation is rooted in foundational constitutional principles governing separation of powers. Courts say what the law is, but the political branches get to make the policy choices. When a statutory ambiguity left by Congress leaves a policy choice open, better for the courts to defer to the other political branch to make it.

The political accountability rationale for *Chevron* may have been given a recent re-boost by the D.C. Circuit. In June 2017, the court of appeals held that when an agency no longer asks a court to give its rule deference, "it would make no sense for this court to determine whether the disputed agency positions advanced in the Order warrant *Chevron* deference when the agency has abandoned those positions."[56] The import of this is that it gives an agency a way to change course without actually going through the full process necessary to promulgate a new rule. It can simply tell a reviewing court that it does not want judicial deference. Such a change is especially likely to occur (and in this case, did occur) when a new presidential administration takes office, and thus is empowering to voters.

The rationale that the Supreme Court has leaned towards in recent years is congressional intent, especially since its 2001 decision in *United States v. Mead*.[57] The theory here is that when a statute gives an agency responsibility for a particular area of public policy and then leaves a particular policy question ambiguous, it means that Congress is implicitly, but nevertheless, intentionally, delegating to the agency the authority to decide what to do. *Mead's* emphasis on congressional intent gave rise to the recognition that

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[55] *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2326–31, 2369 (2001) (presidents should use the power of regulatory agencies to achieve policy goals because they can be subject to political accountability through elections).

[56] Global Tel*Link v. F.C.C., ___ F.3d ___ (D.C. Cir. 2017). *See also* Aaron Nielson, *A New Step for Chevron?* YALE J. ON REG: NOTICE & COMMENT (June 16, 2017).

[57] Mead Corp., 533 U.S. at 226-7, 229 (2001) ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law … Congress [ ] may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap."); *see also* Thomas W. Merrill and Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L. J. 833, 863-864 (2001) (noting that congressional intent theory is the primary foundation for *Chevron*).

in addition to *Chevron's* two steps, there is a Step Zero.[58] After all, if congressional intent to delegate is the foundation for deference, then judges must start their analysis by asking if Congress actually intended to delegate the relevant authority in the first place. This necessary preliminary step addresses a tension between *Chevron's* presumption that all ambiguous statutes imply a delegation of power by Congress, while the *Mead* decision seemed to insist on more explicit terms of delegation.[59]

The three rationales for deference do not exist in isolation from each other. For example, Congress might delegate a policy choice to an agency because of its technical expertise. Congress might delegate because it thinks that the public will have more confidence in a policy if it is administered by a trusted agency.[60] Probably even more important, courts should generally respect the political branches because political accountability is valuable in democracy and is an attribute that the judiciary lacks. This is how Scalia explained the delegation rationale for *Chevron* in his 1989 lecture.[61] He argued that when a statute is ambiguous, the interpretation may involve a policy choice.[62] He said, "Under our democratic system, policy judgments are not for the courts but for the political branches."[63] In this way, *Chevron* is really about judicial modesty and restraint.

A focus on the justifications for deference has become important as it has become more and more clear that the Court does not apply deference consistently. The famous two steps of the *Chevron* doctrine (plus the newer Step Zero) imply a rigid formula, but that may never have been realistic. Moreover, the steps are not created equal. We know from empirical research that when *Chevron* applies, its first step (is the statute ambiguous?) is nearly always decisive.[64] But a lot goes into whether judges are actually willing to apply *Chevron*, and whether they consider statutes to be ambiguous. This is why recent scholarship has

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[58] *See* Merrill and Hickman, *supra* n. 57, at 873, 912; Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006).

[59] *See* Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 146 (2006).

[60] *See* Edward H. Stiglitz, *Delegating for Trust*, ___ U. PENN. L. REV. ___ (2017).

[61] *See* Scalia, *supra* n. 46, at 515.

[62] *Id.*

[63] *Id.*

[64] *See* Barnett and Walker, *supra* n. 17, at ___.

leaned toward looser approaches to *Chevron*, such as Strauss' notion of "Chevron space."[65] As Strauss describes it, despite apparent inconsistency, *Chevron* embodies a coherent approach to allocating authority to agencies.[66] To some extent this is simply a change in terminology that reduces expectations for perfect consistency. But it also emphasizes the need for judges to think carefully in each case about how much "space" a particular agency should be allotted. Put another way, *Chevron* is a doctrine embodying important values of judicial restraint, much as Scalia advocated back in 1989, but not a rigid rule.

Even for some justices who ostensibly are committed to *Chevron*, the desire to respect Congressional intent co-exists with an increasingly evident "inclination toward judicial empowerment."[67] This certainly can be ascribed to simple self-interest; judges may only willing to restrain the powers of their branch so much. It also has links to growing interest on the Court in how judges can interpret statutory texts, either through textualism or purposivism.[68] These methodological approaches allow judges to determine meaning from language in statutes that might easily be considered ambiguous under *Chevron's* first prong. But there is also a core separation of powers argument that the judiciary should not be too restrained, because it is needed as an independent judicial check on the power of the administrative state.[69]

C. An Increasing Context-Specific Orientation?

Justice Breyer has advocated a "context-specific" approach to deference, in which the Court should not always presume that statutory ambiguity warrants deference to an agency.[70] Breyer would assess a number of broad factors, including the nature and importance of the legal question, the nature of the agency's expertise, the complexity of the policy in question, and the process

[65] *See* Strauss, *supra* n. 31.
[66] *Id.* at 1144.
[67] *See* Harvard, *supra* n. 41, at ___.
[68] *Id.*
[69] *See* City of Arlington, ___ U.S. at ___ (Roberts, C.J., dissenting).
[70] City of Arlington, ___ U.S. at ___ (Breyer, J., concurring)

by which the agency reached its interpretation.[71] Walker surmises that Breyer's context-specific approach might often be roughly compatible with the inclinations of the Chief Justice.[72] This raises the possibility that the Court may be moving toward a context-specific *Chevron*, and lends credence to those who have called for a "tailored" approach in which norms of administrative law may be adjusted to different policy and agency contexts, including immigration.[73]

One of the conceits of *Chevron* as it is classically presented is that a single set of analytical steps will be able to cope with the myriad legal problems presented by our sprawling administrative state. An approach used by judges in an environmental case involving air pollution by an energy company (*Chevron*) gets extended in a case concerning net neutrality and an internet service provider (*Brand X*) and extended again in a labor law case (*Auer*). This one-size-fits-all understanding may obscure the degree to which the legitimacy of administrative state is build on several competing theories about accountability, each of which competes somewhat with the others.[74] If our constitutional baseline is actually non-deference as Scalia suggested in his 1989 lecture, it stands to reason that the arguments to depart from that norm – expertise, political accountability, and congressional intent – will be more persuasive in some contexts than in others. Moreover, some areas of agency action may present additional compelling reasons for court to not defer.

Inherent in a context-specific approach (and in the existence of a Step Zero) is that deference has limits. For an illustration of a situation where there is a constitutional reason to not defer to an agency despite a congressional delegation, consider *United States v. Booker*, where the Court found that sentencing guidelines issued by the Federal Sentencing Commission could be advisory only.[75] The reason the Court gave for this is that, if the guidelines were

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[71] *Id.*

[72] Walker, *supra* n. 37, at ___.

[73] *See* David S. Rubenstein, *"Relative Checks": Towards Optimal Control of Administrative Power*, 51 WM. & MARY L. REV. 2169, 2219-21 (2010)

[74] *See* Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463 (2017) (arguing that there are plural, conflicting justifications for the administrative state which cannot be fully reconciled with each other).

[75] U.S. v. Booker, 543 U.S. 220 (2005).

mandatory, they would violate the Sixth Amendment right to have factual allegations determined by a jury.[76] The Government tried to defend the sentencing guidelines because they were issued by a special commission, rather than by Congress itself, but the Court held that this delegation "lacks constitutional significance."[77] In other words, a role assigned to a jury by the Constitution could not be delegated by Congress to anyone else.

Since *Booker* was about criminal sentencing, it would be reasonable to ask what it has to do with *Chevron*. As we will see later in Part III.C, criminal law and immigration cases are not particularly easy to separate. But for present purposes, the point is simply to illustrate that the congressional delegation theory has limits. In the context of *Booker*, the Sentencing Commission was established and acted much the way a congressionally-authorized agency would act in administrative law. Other scholars have critiqued *Booker* by invoking broader administrative law principles, arguing that the courts should not re-delegate to themselves a role that Congress delegated to a specialized commission or agency.[78] They may very well be right – but only if it is a role that Congress has the authority to delegate in the first place.

The connection to criminal law brings us to Justice Gorsuch and the critique he levied against *Chevron* when he was a Court of Appeals judge, just a few months before his nomination to the Supreme Court.[79] In the Tenth Circuit case of *Gutierrez-Brizuela v. Lynch*, then-Judge Gorsuch returned to the baseline rule that Scalia articulated in 1989, emphasizing the primary role of the judiciary to say what the law is.[80] But Gorsuch expressed considerable suspicion about rationales for deference that Sclaia had once found persuasive. For instance, Gorsuch expressed concern citizens would be unable to influence agencies without "an army of perfumed lawyers and lobbyists."[81] In other words, Gorsuch suggested that political accountability – which is what makes the political branches open to lobbyists – might be an institutional

[76] *Id.* at 239.
[77] *Id.* at 237.
[78] *See* F. Andrew Hessick and Carissa Byrne Hessick, *The Non-Redelegation Doctrine*, 55 WM. & MARY L. REV. ___ (2013).
[79] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 *et seq.* (10th Cir. 2016) (J. Gorsuch, concurring).
[80] *Id.* at 1152.
[81] *Id.* at 1152.

weakness in some situations. He endorsed the critique, well-developed in legal scholarship, that *Chevron* may conflict with the Administrative Procedure Act.[82] He indicated that he shares Justice Thomas' skepticism about whether Congress can actually delegate its lawmaking functions to the executive branch.[83]

At the center of his critique of *Chevron*, Gorsuch focused on the dangers to liberty posed by too much judicial deference. For this, he referenced the rule that *Chevron* does not apply to criminal law.[84] Rather than treat this as a formalistic and mechanical line between the civil and criminal contexts, Judge Gorsuch looked at the reasons for the rule, primarily the fear that criminal sanctions carry a special danger of abuse.[85] He saw no reason why this rationale would be limited strictly to criminal prosecutions, given that civil, administrative actions can also "penalize persons in ways that can destroy their livelihoods and intrude on their liberty."[86] Judge Gorsuch wrote:

> Under any conception of our separation of powers, I would have thought powerful and centralized authorities like today's administrative agencies would have warranted less deference from other branches, not more.[87]

I would point out that, just as the arguments for *Chevron* may be more persuasive in some contexts than in others, the arguments against it may be context-specific as well.[88] In short, the more power an agency acquires and perhaps the less capable its subjects are of being heard through the political process, the more important it is for the judiciary to be a robust check and balance. In this light, it is not irrelevant that Gorsuch raised concerns about the power of the administrative state in the context of an immigration case.

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[82] *Id.* at 1151. *See also* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 193–99 (1998); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L. J. 908, 985, 1000 (2017).

[83] *Id.* at 1154 (*citing* Michigan v. EPA, —— U.S. ——, (2015) (Thomas, J., concurring)).

[84] *Id.* at 1154-1155.

[85] *Id.* at 1156-1157.

[86] *Id.* at 1156.

[87] *Id.* at 1155.

[88] *See* Raso and Eskridge, *supra* n. 28, at 1735 ("The better path for reform is to simplify the deference regimes and tie them more tightly to their policy rationales, in the manner that the Court has done for substantive canons of statutory construction.").

D. Loud and Soft Approaches

At the Supreme Court, *Chevron* has long been dogged by a gap between what the Supreme Court said, and what the Court was actually doing. This inconsistency can certainly be explained, and to some extent probably should be explained, by simple human nature. It is easier to state a norm of judicial restraint than it is to practice restraint consistently. *Chevron's* two steps ask judges to recognize that the law is often not clear and that there is more than one reasonable interpretation. But these are justices used to doing their jobs by saying definitively what the law is, and explaining their conclusions (and sometimes arguing with each other) with high levels of apparent self-confidence. It short, perhaps the Supreme Court will not consistently defer to anyone.[89]

It is also possible that the Court's inconsistency reflects an underlying ambivalence. The justices may be wrestling with some challenging problems, they may be sometimes unsure of their footing, and they may change their mind as they see the doctrine's potential application in different situations. This possibility is consistent with the fact that over time individual justices have been on both sides of the issue and over time seem to be arguing with themselves. This is perhaps most evident with Justice Thomas, who wrote perhaps the strongest rendition of the *Chevron* doctrine in his *Brand X* decision for the Court:

> If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.[90]

The *Brand X* articulation of *Chevron* is especially strong because it states bluntly that judges should permit legal interpretations that they sincerely do not think are the best. And yet, ten years later,

[89] *Cf.* Raso and Eskridge, *supra* n. 28, at 1735 ("We argue that scholars are being unrealistic when they demand that the Supreme Court adopt and consistently apply formal deference regimes that will 'constrain' the Justices in future cases. The Justices will not follow such regimes--and sooner or later lower court judges will not either.").

[90] National Cable & Telecomm'ns Ass'n v. Brand X Internet Services, 545 U.S. 967, 980 (2005).

Justice Thomas wrote this, derisively quoting back his own majority opinion:

> Interpreting federal statutes — including ambiguous ones administered by an agency — calls for that exercise of independent judgment. *Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what they believe is the "the best reading of an ambiguous statute" *Brand X*, favor of an agency's construction. It thus wrests from Courts the ultimate interpretative authority to "say what the law is," *Marbury v. Madison*, and hands it over to the Executive.[91]

Given the organic manner in which the *Chevron* grew from an air pollution case into the primary organizing canon of administrative law, it seems reasonable to conclude that the justices have been working through the dynamics of the doctrine case by case. While sometimes they probably been inconsistent because they are human, the justices have probably been re-thinking things, or discovering that *Chevron* didn't seem as appropriate in a particular case as they might have previously thought. It seems to be that the Court's articulation of the *Chevron* doctrine may have gotten ahead of the justices' actual thinking on the issue. Whereas the justices might have once been enamored of *Chevron's* apparently broad usefulness, "the Court's recent treatment of *Chevron* [has been] as a doctrine to ignore, disparage, or distinguish."[92]

Despite this recent trend, for most of the justices, the current situation may be more about discovering *Chevron's* limits, rather than dismantling it entirely. But this makes for a somewhat difficult interpretive moment, because we still have sweeping articulations of the doctrine on the books in cases like *Brand X*. Therefore, methodologically one might consider paying attention to two different indicators of the state of the law, what I will call

[91] Michigan v. E.P.A., 135 S. Ct. 2699, 2712 (2015) (J. Thomas, concurring) (some internal citations and quotations omitted).

[92] Barnett and Walker, *supra* n. 17, at ___ (citing Herz, *supra* n. 29).

loud approaches to *Chevron* and soft ones.[93]

Loud approaches include cases where the Court (or an individual justice) directly articulates a particular understanding of *Chevron's* reach or limitations. The majority opinions in *Mead*, *Brand X* or *City of Arlington* would be paradigmatic loud, pro-*Chevron* decisions. Justice Thomas' opinion in *Michigan v. E.P.A.* or then-Judge Gorsuch's in *Gutierrez-Brizuela* would be loud anti-*Chevron* opinions. They leave no real ambiguity about where those judges stand at the moment they issued them. We should also include here Chief Justice Roberts' majority decision in *King v. Burwell*, because it openly articulates a significant limitation on *Chevron's* application through the major cases exception. For reasons explained elsewhere, this exception is not well defined, nor is it entirely clear where all of the justices who signed that majority opinion really stand.[94] But it is "loud" in the sense that it is openly articulated. Anytime a court seems to explicitly add (or take away) something in the realm of *Chevron's* new "Step Zero," it is issuing a loud decision about *Chevron*'s reach. The D.C. Circuit's recent decision to not apply *Chevron* when a new Administration does not ask for it would be another example.[95]

Soft approaches to *Chevron* (or, more likely of late, against *Chevron*) can be harder to interpret but are quite common. Other scholars have noted that there are glaring and fairly obvious cases where the Court should have applied *Chevron*, according to the way it has been articulated, but simply failed to do it.[96] "Failure to apply *Chevron* where it would seem to apply" could be a way for justices to indicate their concern with a "full-throated *Chevron* doctrine."[97] These instances come in two varieties, as we will see in our discussion of recent criminal removal cases. In one type, call it Type I, the Court simply decides the case without even mentioning *Chevron*. As we will see, this does not mean that the

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[93] I have explained the logic this methodology elsewhere: Michael Kagan, *Loud and Soft Anti-Chevron Decisions*, 53 WAKE FOREST L. REV ___ (forthcoming), available at SSRN: https://ssrn.com/abstract=3038319.

[94] *See* Walker, *supra* n. 37, at ___.

[95] *See* discussion, *supra*, at text accompanying note 56.

[96] *See* Kent Barnett, *Administrative Partiality at the Structural Frontier,* 81 MO. L. REV. __ (2017) (noting Court's ignoring of Chevron when it would have appeared to apply in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).).

[97] *Id.*

agency always loses. But it means that the Court acted as if *Chevron* deference didn't exist. The silence on *Chevron* in these cases is especially noticeable because the Solicitor General typically asks for deference to the agency's interpretation.

A different variety of soft anti-*Chevron* cases, call them Type II, are those in which the Court mentions *Chevron*, but renders it irrelevant, but without articulating a new formal exception or limitation on the doctrine. This is typically done through application of *Chevron's* Step One, when the Court concludes that statutory text is actually clear. If the statute is actually clear, then this result is what we would expect. However, the cases that I am including in Type II are those where the statute is honestly ambiguous, if ambiguity is to have any real meaning. The language is oblique or open-ended. Often, there will be a circuit split, or at least a division between the agency and a circuit, which is likely why the case was taken up by the Supreme Court to begin with. Of course, it is the Supreme Court's job to resolve such disputes about what a statute means. But such disputes makes it hard to accept that the statute is not really ambiguous, if ambiguity is to have any concrete meaning.

An example of Type II can be seen from this past Supreme Court term in *Esquivel-Quintana v. Sessions*, in which the Court dealt with the statutory meaning of "sexual abuse of a minor."[98] The case presented the question of whether the rule of lenity should impact the application of Chevron's Step Two, a question that also arose at the Court a year earlier in *Torres v. Lynch*.[99] In *Torres*, the Court simply ignored the issue and never even mentioned *Chevron*, rendering a Type I soft anti-*Chevron* decision. A year later, in *Esquivel-Quintana*, the Court dispensed with *Chevron* as follows:

> [P]etitioner and the Government debate whether the Board's interpretation … is entitled to deference under *Chevron*. … We have no need to resolve whether the rule of lenity or *Chevron* receives priority in this case because the statute, read in context, unambiguously forecloses the

[98] Esquivel-Quintana v. Sessions, ___ S. Ct. ___ (2017).
[99] *See* discussion, *infra*, at Part III.C.

> Board's interpretation. Therefore, neither the rule of lenity nor *Chevron* applies.[100]

This is a quintessential Type II soft decision.

Type II cases are interesting in that they highlight a longstanding and well-known reality of *Chevron*: The action is usually at *Chevron's* Step One. Moreover, increasing interest in the meaning of statutory texts can work to reinforce a trend toward a stronger judicial role, and thus less deference.[101] Armed with strong enough tools of statutory interpretation, a judge (or a group of nine judges) can always arrive at a conclusion about what a statute means, after which the statute will no longer be ambiguous.[102] But then, what is *Chevron* for? What happened the to the range of acceptable policy choices that should be left to the political branches? In *Esquivel-Quintana*, the Court did not even revolve all of the questions that have arisen about the statute and that have caused division.[103]

Such soft approaches to *Chevron* are nothing new.[104] During *Chevron's* first formative decade, Thomas Merrill wrote that the Court's inconsistency was as an indicator that there were problems with "the draconian implications of the doctrine for the balance of power among the branches, and to practical problems generated by its all-or-nothing approach to the deference question."[105] Of course, for quite awhile the Supreme Court justices were ostensibly all committed to the *Chevron* doctrine. Later studies finding continued inconsistency concluded that they called for "caution about the Court's collective ability to follow any doctrinal framework consistently."[106] We thus had a system in which lower

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[100] *Id.* at ___.

[101] *See* Harvard, *supra* n. 41, at ___.

[102] *Cf.* Judge Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC ___ (forthcoming) ("That a statute is complicated does not mean it is ambiguous. It just means that the judge needs to work harder to determine—in the sense of ascertain—the statute's meaning. … In my own opinions as a judge, I have never yet had occasion to find a statute ambiguous. In my view, statutory ambiguities are less like dandelions on an unmowed lawn than they are like manufacturing defects in a modern automobile: they happen, but they are pretty rare, given the number of parts involved.").

[103] *See* discussion, *infra*, at Part III.C.

[104] *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 970 (1992) ("the *Chevron* framework is used in only about half the cases that the Court perceives as presenting a deference question.").

[105] *Id.*

[106] Eskridge and Baer, *supra* n. 29, at 1091.

courts tried to follow *Chevron* fairly energetically because the Supreme Court had told them to,[107] while the Supreme Court itself often "honored *Chevron* in the breach."[108] This was perhaps not a good look for the Court, but neither was it necessarily fatal to the doctrine. The Supreme Court is always going to be special and different.[109]

But now we have a situation in which some justices have openly called *Chevron* an abdication of judicial duty, while several others have indicated interest in carving out clearer limits to the doctrine. This puts the Court's longstanding inconsistency in the actual application of the doctrine in a new light, suggesting that Merrill got it right early on. When the Court does not apply *Chevron* when it seems it should – a soft anti-Chevron decision – we should understand it as a possible sign that the justices might have found that the doctrine less than useful in those cases. Seen this way, these soft anti-*Chevron* decisions can play a useful purpose in the refinement of the doctrine. If it is correct that *Chevron's* most fatal flaw is its rigidity and one-size-fits-all orientation, this process of quiet testing across the wide variety of administrative law cases is potentially quite healthy. But it needs to be followed up in two ways. First, lawyers need to look for patterns in the inconsistency, so that we learn where *Chevron* seems to be working and where it is not.[110] Second, eventually the Court needs to explain what it is doing, so that lower courts know their marching orders, and so that the Supreme Court does not appear permanently confused or arbitrary.

III. *Chevron* in Immigration Cases

A. The Wide Variety of "Immigration Law"

There are reasons to think that immigration could be a context in which there would be very strong arguments for judicial

[107] *See* Barnett and Walker, *supra* n. 17, at ___.

[108] Herz, *supra* n. 29, at ___.

[109] *Cf.* Michael Coenen and Seth Davis, *Minor Courts, Major Questions,* 70 VAND. L. REV. 777 (2017) (arguing that the major cases exception should be used only at the Supreme Court level).

[110] *See, e.g.,* Eskridge and Baer, *supra* n. 29, at 1097 *et seq.* (reporting different empirical patterns in *Chevron's* application in different areas of law); Raso and Eskridge, *supra* n. 28, at 1776.

deference. The two most obvious are that immigration touches on foreign policy concerns, and that it is an immensely complicated area of law and policy. And yet, not all immigration cases are the same. Although often cited as a rationale for federal power, the impact on foreign policy is not really clear in all immigration cases.[111] There has been doubt in scholarship whether foreign policy remains as important a rationale for immigration jurisprudence as it once was.[112] If it is convincing in any situations, the foreign policy rationale would seem to be most convincing in cases that involve requests for visas for foreigners who are actually abroad.[113] Immigration law has long recognized a significant constitutional difference for non-citizens who are already in the United States and who are facing deportation.[114]

These distinctions are just the beginning of a complicated taxonomy of issues in immigration cases. Some questions are explicitly committed by Congress to the discretion of the Department of Homeland Security or the Attorney General; these matters are typically beyond the jurisdiction of the courts to begin with. Other questions involve applications for relief by people who are otherwise legally removable from the United States. Central to this Article's argument is that some questions of immigration law determine whether a person who would otherwise be free in the United States may be arrested, incarcerated (for months or years) and removed.[115] Others do not. Finally, some matters of immigration law are grounds for criminal prosecution.[116] As Matthew J. Lindsay has written, the presumption that all laws regulating non-citizens form a single, coherent body of law may itself be the source of doctrinal confusion.[117] The diversity of contexts within the field of immigration law is extremely important if the *Chevron* doctrine is

[111] *See* Matthew J. Lindsay, *Disaggregating "Immigration Law,"* 67 FLA. L. REV. 1 (2016).

[112] *See Id.* at 185 n. 23.

[113] The pending litigation involving President Trump's various bans on entry for nationals of certain countries may be such an example.

[114] *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982).

[115] *See* discussion, *infra*, at Parts III.C and IV.A.

[116] *See* discussion, *infra*, at Parts III.C and IV.A.

[117] Lindsay, *supra* n. 111, at 185. *See also* Michael Kagan, *Shrinking the Post-Plenary Power Problem*, 68 FLA. L. REV. FORUM 59, 61-62 (2016) ("immigration law" may really be many different bodies of law that share an impact on non-citizens).

moving toward a context-specific orientation, and away from a rigid one-size-fits-all paradigm, as discussed in Part II.C.

B. Immigration-Specific Problems With Deference

Before going into different concerns raised by these different types of immigration cases, it is important to recognize that there are procedural issues that may weaken the justifications for judicial deference in many immigration cases. A typical removal case (or in more plain language, a deportation case), begins in Immigration Court, which is part of the Executive Office of Immigration Review (EOIR) within the Department of Justice.[118] The Immigration Judge can issue an order of removal that can be appealed to the Board of Immigration Appeals (BIA), which is also part of EOIR.[119] Once the BIA resolves an appeal, any order of removal becomes final.[120] A final order of removal may be appealed by filing a petition for review with the U.S. Court of Appeals that has jurisdiction over the state where the immigration court was located.[121]

In practical terms in these cases, the BIA is the agency whose decision is normally under review by the court; *Chevron* deference would normally mean a federal court of appeals deferring to the BIA on an interpretation of the law. This raises questions about the justifications for deference. Technical expertise is certainly a potential rationale for the BIA's role, but it is not necessarily compelling. The immigration laws are certainly complicated, but they are not technical in a scientific sense like the subjects of other areas of administrative regulation. To be clear, there is important scholarly literature arguing that expertise need not be limited to scientific knowledge. Instead, because agencies often have unique knowledge of the legislative history and policy context for legislation, it may be justifiable to defer to their interpretation of that legislation.[122] However, because the BIA is

[118] 8 C.F.R. § 239.1.
[119] 8 C.F.R. § 1003.1(b).
[120] 8 C.F.R. § 1241.1.
[121] 8 U.S.C. § 1252(a).
[122] *See* Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 347 (1990).

not involved in crafting immigration legislation, and because it interprets that statute through case-by-case adjudication, it is not clear why it should be thought to have a comparative advantage over courts in terms of policy expertise.

The federal courts of appeals are experts in statutory interpretation, so it is harder to argue that the BIA has an advantage in technical expertise about interpreting immigration law.[123] Meanwhile, in 2002 the George W. Bush Administration streamlined the BIA so that it devotes far fewer resources to deciding each case.[124] Since then federal judges have issued scathing decisions about the quality of BIA decision-making.[125] In 2005, the Seventh Circuit's Judge Richard Posner wrote: "[T]he adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice." [126]

We should not be particularly surprised that some judges who review many BIA decisions become less willing defer to the BIA. According to a study by David Zaring on the Court of Appeals for the D.C. Circuit, judges may become less likely to affirm decisions by agencies that appear before them more frequently.[127] After the 2002 reforms to the BIA, petitions to the federal courts surged.[128] Immigration cases came to represent nearly a fifth of the dockets of the Second and Ninth Circuits.[129] One result of this is that any judge on those courts is likely to become fairly well versed on immigration law issues. Of course, judges on circuits that see fewer immigration matters might not

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[123] *See* Shruti Rana, *Chevron Without the Courts?: The Supreme Court's Recent Chevron Jurisprudence Through an Immigration Lens*, 26 GEO. IMMIGR. L. J. 313 (2012) (questioning whether immigration agencies have a legitimate claim to special expertise).

[124] *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 3).

[125] *See* Eric M. Fink, *Liars and Terrorists and Judges, Oh My: Moral Panic and the Symbolic Politics of Appellate Review in Asylum Cases,* 83 NOTRE DAME L. REV. 2019, 2020-21 (2008). *See, e.g.*, Benslimane v. Gonzales, 430 F.3d 828, 829-30 (7th Cir. 2005) ("This tension between judicial and administrative adjudicators . . . is due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice. Whether this is due to resource constraints or to other circumstances beyond the Board's and the Immigration Court's control, we do not know, though we note that the problem is not of recent origin.").

[126] *Benslimane v. Gonzales,* 430 F.3d 828, 830 (7th Cir. 2005). (citations omitted).

[127] David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 183–84 (2010) (agencies appearing before the D.C. Circuit fewer than ten times from 2000 to 2004 prevailed 80% of the time, compared to 68% for agencies appearing before that court more than ten times).

[128] *See* Michael M. Hethmon, *Tsunami Watch on the Coast of Bohemia: The BIA Streamlining Reforms and Judicial Review of Expulsion Orders*, 55 CATH. U. L. REV. 999, 1008 (2006).

[129] *See* Adam Cox, *Deference, Delegation and Immigration Law*, 74. U. CHI. L. REV. 1671, 1683-84 nn. 41-42.(2007);.

develop the same familiarity. But they could just as easily rely on the precedent rulings of their sister circuits, rather than to the executive branch.

At the same time, the Immigration Courts are famously backlogged and under-resourced.[130] Some courts have raised these resource concerns as reasons to doubt the utility of deferring to the BIA.[131] Moreover, there is substantial empirical evidence that the Department of Justice's decision-making may be highly inconsistent from one immigration judge to the next, suggesting that "the most important moment in an asylum case is the instant in which a clerk randomly assigns an application to a particular asylum officer or immigration judge."[132] There is also a cogent argument that the BIA has no particular expertise on state criminal law, which weakens the argument for deference when a removal case focuses on a state criminal conviction.[133] The bottom line from all this is that, while immigration law is complicated, it is not self-evident that it is beyond the capacities of federal judges to master, nor that the BIA brings anything to the table beyond what a federal court could provide.

It was noted early in *Chevron's* history that the political accountability theory does not work well with agencies that are independent and thus insulated from legislative or presidential influence.[134] According to its governing regulation, the BIA should *not* consider politics in deciding how to interpret immigration law: "Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board."[135] BIA members are career appointees, meaning that federal law prohibits considering political affiliation in hiring.[136] Of the fourteen current members of the Board, only four were

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[130] *See* TRAC Immigration, *Immigration Court Filings Take Nose Dive, While Court Backlog Increases*, http://trac.syr.edu/immigration/reports/487/ (Oct. 30, 2017); Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 552, 564 (2011) (describing growth of the immigration adjudication backlog and the resulting "immigration adjudication crisis.")

[131] *See, e.g.*, Abulashvili v. Attorney Gen. of U.S., 663 F.3d 197, 208 – 09 (3d Cir. 2011); Dia v. Ashcroft, 353 F.3d 228, 250 – 51 (3d Cir. 2003).

[132] Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 296 (2007).

[133] *See, e.g.,* Fregozo v. Holder, 576 F.3d 1030, 1034, 1036 (9th Cir. 2009).

[134] *See* Merrill, *supra* n. 104, at 996.

[135] 8 C.F.R. § 1003.1 (d)(ii)

[136] *See* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1665 (2010).

appointed during President Obama or Trump's administrations. An equal number have been on the board since before 2000. Electing a new president thus would do little to change the BIA. It is also relevant that the BIA has nothing to do with foreign policy decisions, which makes reference to the Executive Branch's supremacy in international relations a less convincing rationale for deference to the BIA.

These objections to the Board of Immigration Appeals require an important caveat: the Attorney General can overrule the BIA.[137] While relatively rarely exercised, the Attorney General retains the authority "to exercise full decision-making (sic) upon review."[138] This includes the power to make independent findings of facts and law.[139] There have been calls to use this power more aggressively.[140] During the first year of the Trump Administration, Department of Justice leadership took several steps to assert stronger control over the Immigration Courts, which led to protests that he was endangering their independence.[141]

During the George W. Bush Administration the Department of Justice emphasized the fact that members of the Board are mere "employees … who [are] appointed by, and may be removed or reassigned by, the Attorney General."[142] Indeed, there have long been arguments that the BIA was never as independent from political interference as it should have been.[143] This way of thinking of the BIA raises an interesting thought experiment about the various explanations for deference. The personal involvement of the Attorney General would not seem to add technical expertise

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[137] *See In re J-F-F-*, 23 I&N Dec. 912, 913 (A.G. 2006) ("The Executive Office for Immigration Review, which includes the Board and Immigration Judges, is subject to the direction and regulation of the Attorney General.").

[138] *In re J-F-F-*, 23 I&N Dec. 912, 913 (A.G. 2006).

[139] *Id. See also* Matter of D-J-, 23 I&N Dec. 572, 575 (A.G. 2003).

[140] *See* Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841 (2016). *But See* Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. 129 (2017) (arguing that the Attorney General's unique role in adjudication would make expansive use of political decision-making problematic).

[141] *See* Matter of Castro-Tum, 27 I&N Dec. 187 (A.G. 2018) (AG referring to himself the question of whether Immigration Judges or the BIA have authority to administratively close cases); James R. McHenry, Memorandum: Case Priorities and Immigration Court Performance Measures (Jan. 17, 2018) (setting case completion targets for immigration court docket management).

[142] Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,893 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 3). *See also* Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L REV. 369, 372-376 (2006) (describing reforms of the BIA and problems posed for independent immigration adjudication).

[143] *See generally*, Legomsky, *supra* n. 136

relative to the more specialized Board of Immigration Appeals, but it would add political accountability. Unlike BIA members, voters have the ability to change the Attorney General by electing a new president, and by electing senators who must consent to the appointment. But does this mean that courts should defer more to decisions actually made by the Attorney General, and less to those more common decisions made by the BIA? Or does the mere potential for the Attorney General to intervene create a presumption that the BIA decision belongs to the cabinet-level appointee? For what it is worth, the courts imply this is the case in the naming of the cases. In the federal courts, immigration petitions for review are captioned "[NAME OF PETITIONER] v. [NAME OF CURRENT ATTORNEY GENERAL]."

The key point is that on close examination the standard rationales for *Chevron* deference do not apply with equal persuasive force to all agencies and to all decisions. In particular, the technical expertise rationale is less persuasive in immigration cases than it might be in a regulatory arena requiring more scientific or technical knowledge beyond the training of federal judges. The political accountability rationale might be coherent in immigration case, but only if we rely on the theoretical involvement of the Attorney General. But these questions are not always decisive in any case. In terms of the interpretation of immigration law, congressional intent to delegate is clear and explicit. Congress has explicitly entrusted "questions of law" under the Immigration and Nationality Act to the Attorney General.[144]

C. Non-Removal Immigration

Immigration cases have been a challenge for the *Chevron* doctrine essentially from the beginning. In 1987, the Court decided *INS v. Cardoza-Fonseca*, which remains today one of the seminal cases in U.S. asylum law.[145] The Court overruled an interpretation by the Board of Immigration Appeals, but in a majority decision by Justice Stevens, the Court gave two

[144] 8 U.S.C. § 1103(a)(1).
[145] INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

explanations for this holding. First, the Court concluded that the question at hand could be decided based on the language of the statute, and thus "there is simply no need and thus no justification for a discussion of whether the interpretation is entitled to deference."[146] This appears to be a clear application of *Chevron* Step One. But the decision also said that *Chevron* was not applicable to "a pure question of statutory construction."[147] *Chevron*, Justice Stevens suggested, was more appropriate when an agency applies laws to particular facts.[148] This was an early expression of doubt, from no less than the author of *Chevron* itself.[149] Had the Court stuck with this approach, we might have had an early Step Zero limitation on the doctrine. But the Court seemed to abandon it quickly.[150]

Although *Chevron* deference was not applied in *Cardoza-Fonseca*, it was cited and discussed extensively by the Court, suggesting that it was potentially applicable to immigration cases. Yet, in a 1992 case concerning eligibility for asylum, the government asked for application of *Chevron* deference,[151] but the Court made no reference to *Chevron* in its decision.[152] The Court clarified matters in *INS v. Aguirre-Aguirre*, another case concerning eligibility for asylum.[153] The Court affirmed that "[i]t is clear that principles of *Chevron* deference are applicable to this statutory scheme."[154] The Court explained that Congress has explicitly delegated to the Attorney General authority to decide questions of law under the Immigration and Nationality Act.[155] Deference did not seem determinative of the result, since the Court thought the BIA's interpretation of the statute was the best reading of the text

[146] *Id.* at 453.

[147] *Id.* at 446.

[148] *Id.*

[149] *See* Merrill, *supra* n. 104, at 987 ("By the end of the next Term, however, the Court was again applying the Chevron doctrine (irregularly, as ever) to questions of law, and Cardoza-Fonseca quietly dropped from sight.").

[150] *See id.* at 987 ("By the end of the next Term, however, the Court was again applying the Chevron doctrine (irregularly, as ever) to questions of law, and Cardoza-Fonseca quietly dropped from sight.").

[151] I.N.S. v. Elias-Zacarias, Brief for the Petitioner at 23, 1991 WL 11003946 (1991)

[152] I.N.S. v. Elias-Zacarias, 502 U.S. 478 (1992) (no mentions of *Chevron* or of deference).

[153] 526 U.S. 415 (1999)

[154] *Id.* at 424.

[155] *Id.* (citing 8 U.S.C. § 1103(a)(1)).

anyway,[156] but *Aguirre-Aguirre* nevertheless seemed to firmly establish that *Chevron* applies in immigration cases.

Since *Aguirre-Aguirre* the Court has more consistently deferred to the Attorney General in cases concerning eligibility for asylum. Even in cases where the government lost, the Court sometimes applied the ordinary remand rule to send the case back for administrative interpretation in the first instance. The ordinary remand rule is a means by which a court can vacate an agency decision, but still respect deference by asking the agency to give an interpretation of an ambiguous stature, rather than have the court impose one.[157] The Court has used it in three asylum cases, *Negusie v. Holder* and two other per curiam decisions.[158] I should also note that I am not including the 1988 case of *I.N.S. v. Abudu*, which concerned the standard of review on a procedural motion to re-open an asylum application.[159] Because there was no statutory question involved, it would not call for *Chevron*, and thus may not be relevant. But to the degree that it matters, the Court ruled for the government and applied the deferential abuse-of-discretion standard of review, and so it broadly fits the same general pattern.[160]

The Supreme Court's most recent explicit embrace of *Chevron* in an immigration case came in its 2014 decision in *Scialabba v. Cuellar de Osario*, which concerned eligibility for a visa based on family sponsorship.[161] This decision includes the Court's most robust articulation of a general rule requiring deference in immigration cases:

> Principles of *Chevron* deference apply when the BIA interprets the immigration laws. Indeed, judicial deference to the Executive Branch is especially appropriate in the immigration context, where decisions about a complex statutory scheme often implicate foreign relations.[162]

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[156] *Id.* at 425-426.

[157] *See generally* Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553 (2014).

[158] Gonzalez v. Thomas, 126 S. Ct. 1613 (2006); I.N.S. v. Ventura, 537 U.S. 12 (2002).

[159] 485 U.S. 94 (1988).

[160] *See id.* at 96.

[161] 134 S. Ct. 2191 (2014).

[162] *Id.* at 2203 (J. Kagan).

In addition to this broad statement, deference appears to have been important to the result in *Cuellar de Osorio*, at least for the plurality. The BIA had adopted an interpretation of the statute that essentially made some immigrant families wait years longer to be reunified in the United States. Justice Kagan wrote that the statute "makes possible alternative reasonable constructions."[163] She emphasized that the BIA did not have to decide the matter as it did. In a clear statement of deference, Justice Kagan wrote: "[W]e hold only that § 1153(h)(3) permits —not that it requires— the Board's decision."[164] The Chief Justice, joined by Justice Scalia, concurred in the judgment, disputing to some extent whether the statute was ambiguous, but agreeing that *Chevron* deference applied.[165]

It would go too far to say that the Court has been completely consistent in these cases, since the Court failed to address *Chevron* in an early case where it would seem applicable.[166] But after an early false start, and especially since *Aguirre-Aguirre*, the Court has re-affirmed the applicability of *Chevron* deference in immigration cases. Moreover, in several of these cases the deference seemed to matter to the result. But there is a very large caveat. None of these cases concerned grounds of deportation, nor detention of immigrants. Rather, they concerned eligibility for immigration benefits, or (in the case of asylum) relief from removal for immigrants who were deportable for some other reason. If we look only at the non-removal cases, we see the Court being clear in words and (mostly) in deed. These cases are summarized in Table 1. But as we will see in Part III.D, the Court behaves very differently in terms of Chevron in immigration cases that are directly about deportation.

TABLE 1:

[163] *Id.*

[164] *Id.* at 2207.

[165] *Id.* at 2214 (C.J. Roberts, concurring).

[166] The Court also ignored *Chevron* when an immigration case focused on constitutional questions, but this does not seem to deviate from the normal understanding of the doctrine. *See* Kerry v. Din, 135 S. Ct. 2128 (2015).

Immigration Cases Not Concerning Grounds of Deportation

Case	**Issue**	**Deference requested?**	***Chevron* mentioned by SCOTUS?**	**Deference applied by SCOTUS?**
INS v. Cardoza-Fonseca (1987)[167]	**Eligibility for Asylum** (definition of "well-founded fear")	Yes[168]	Yes[169]	**No**[170] (immigrant prevailed)
INS v. Elias-Zacarias (1991)[171]	**Eligibility for Asylum** (meaning of "on account of political opinion")	Yes	No	No (government prevailed)
INS v. Aguirre-Aguirre (1999)[172]	**Eligibility for Withholding of Removal** (exclusion for "serious nonpolitical crime)	Yes	Yes	**Yes**[173] (government prevailed)

[167] 480 U.S. 421 (1987).
[168] I.N.S. v. Cardoza-Fonseca, Brief for the Petitioner, 1986 WL 727528, at 9, (1986)
[169] 480 U.S. at 447.
[170] *See* discussion, *supra* at FN 145.
[171] 502 U.S. 478 (1992).
[172] 526 U.S. 415 (1999).
[173] 526 U.S. at 424 ("Because the Court of Appeals confronted questions implicating "an agency's construction of the statute which it administers," the court should have applied the principles of deference described in *Chevron*.").

Negusie v. Holder (2009)[174]	**Eligibility for Asylum** (persecution of others exclusion)	Yes[175]	Yes	**Ordinary remand rule applied**[176] (immigrant prevailed)
Judulang v. Holder (2011)[177]	**Discretionary relief from deportation** (criminal grounds of inadmissibility, not removal)	Yes[178]	Yes (in a footnote only)	**Yes** (arbitrary and capricious review, not *Chevron*)[179] (immigrant prevailed)
Holder v. Martinez-Gutierrez (2012)[180]	**Discretionary relief from deportation** (cancellation of removal/duration of residence)	Yes[181]	Yes	**Yes**[182] (government prevailed)
Scialabba v. Cuellar do Osorio	**Eligibility for Family-Based Visa**	Yes	Yes	**Yes**[184] (government prevailed)

[174] 555 U.S. 511 (2009).

[175] Negusie v. Mukasey, Brief for the Respondent, 2008 WL 3851621, at 10-11 (2008).

[176] 555 U.S. at 517 ("When the BIA has not spoken on a matter that statutes place primarily in agency hands, our ordinary rule is to remand to give the BIA the opportunity to address the matter in the first instance in light of its own expertise.") (internal quotation omitted).

[177] 565 U.S. 42 (2011).

[178] *Id.* at 53 Fn 7.

[179] *Id.* at 52.

[180] 566 U.S. 583 (2012).

[181] Holder v. Gutierrez, Brief for the Petitioner, 2011 WL 5544816, at 33, (2011).

[182] 566 U.S. at ___.

(2014)[183]				

D. Criminal Grounds of Removal Cases

Many of the Supreme Court's recent encounters with immigration law concern the intersection of immigration and criminal law, a field sometimes known as "crimmigration,"[185] and often focusing on analysis of state criminal codes. For our purposes in this Article, the main legal problem, and the primary dilemma concerning the appropriateness of *Chevron*, concerns the categorical approach to analyzing criminal convictions. Immigration law shares an interpretative problem with federal sentencing law. In both areas of law, heightened federal action against a person (e.g. deportation or enhanced prison terms) may be triggered by convictions for certain offenses under state law. The difficulty is that state criminal codes do not define crimes the same way federal law does. That is where the categorical approach comes in.

For example, the Armed Career Criminal Act severely enhances the sentence for someone convicted of unlawful possession of a firearm and who has also been previously convicted of "burglary."[186] Similarly, the Immigration and Nationality Act lists "burglary offense" as an aggravated felony that would trigger both removal and mandatory detention.[187] The problem is that there are many different definitions of what constitutes a burglary.[188] The Model Penal Code defined it as breaking into any occupied structure, unless the building was open to the public or the perpetrator had permission to enter.[189] But

[184] *Id.* at 2203 ("Principles of Chevron deference apply when the BIA interprets the immigration laws.").

[183] 134 S.Ct. 2191 (2014).

[185] *See* Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AMER. U. L. REV. 367 (2006).

[186] While this offense normally carries a ten-year *maximum* sentence, the Act enhances the penalty to a fifteen-year *minimum* sentence. 18 U.S.C. § 922(g); *id.* § 924(b), (e)(1), (e)(2)(B)(ii).

[187] 8 U.S.C. § 1101(a)(43)(G) (aggravated felony definition); 8 U.S.C. § 1227(a)(2)(A) (removal of aggravated felons); 8 U.S.C. § 1226(c) (prohibiting release on bond for non-citizens with aggravated felony convictions).

[188] *See* Taylor v. United States, 495 U.S. 575, 580 (1990).

[189] American Law Institute, Model Penal Code § 221.1 (1980).

some states define burglary more broadly so as to include entry to any building, even one that is open to the public, so long as the entry is made with an intent to commit another crime.[190] These differences make it difficult to decide whether a state burglary conviction should count as a burglary conviction for the purposes of federal sentencing and immigration law.

The Court began to address this problem in 1990 with *Taylor v. United States*, giving birth to the categorical approach.[191] The categorical approach requires a court to define the elements of a particular crime under federal law, and then compare this to the elements required for conviction under the state law.[192] If the state definition of the crime is broader—meaning it criminalizes more conduct than the federal definition—then there would be no categorical match.[193] Initially, federal authorities were able to overcome this problem through the "modified categorical approach," through which they could submit evidence that the person had engaged in conduct violating the more narrow federal definition.[194] But in 2013 and 2014, the Court decided several cases that reinforced the categorical approach and imposed strict limits on when the "modified" approach could be used.[195] This generally benefits immigrants, because it means that grounds of removal must be interpreted quite strictly and that fewer state convictions should lead to detention and deportation by the Department of Homeland Security. But first the Court had to make clear whether this approach applies in immigration cases.

In 2013, the Court returned to the burglary question in *Descamps v. United States*, a case that – just like *Taylor* – did not concern an immigrant. In *Descamps*, the Court found that when a state burglary statute does not require that a defendant have entered a building unlawfully, it is categorically not a generic burglary under federal law.[196] The state burglary conviction at issue was "missing an element" from the generic definition of the

[190] *See, e.g.,* N.R.S. § 205.060 (Nev.); Cal. Pen. Code § 459 (Cal.).
[191] Taylor, 495 U.S. at 598-602.
[192] *Id.* at 599.
[193] *Id.* at 601-602.
[194] *See generally* Descamps, 133 S.Ct. 2276, 2281 (2013).
[195] *See id.* at 2285-86; Moncrieffe, 133 S.Ct. at 1684; Mellouli, 135 S. Ct. at 1987.
[196] *Id.* at 2282.

crime.[197] In *Descamps*, this meant that a federal sentencing enhancement did not apply. This was a criminal case, and the word "Chevron" appears nowhere in the decision.

However, less than two months before *Descamps*, the Court had decided an immigration case, *Moncrieffe v. Holder*.[198] *Moncrieffe* concerned a legal resident of the United States who was arrested for marijuana possession.[199] He was convicted under a Georgia statute that punished both simple possession and distribution and sale of marijuana.[200] The Department of Homeland Security sought to deport Mr. Moncrieffe as an aggravated felon, because the Immigration and Nationality Act's definition of aggravated felon includes convictions for "illicit trafficking in a controlled substance."[201] However, the federal law contained an exception for "distributing a small amount of marihuana for no remuneration."[202] Because the Georgia statute was broader – it swept in simple possession and distribution without remuneration, as well as actual sale – it was not a "categorical match."[203] Justice Sotomayor's opinion for the Court stated:

> Under this approach we look not to the facts of the particular prior case, but instead to whether the state statute defining the crime of conviction categorically fits within the "generic" federal definition of a corresponding aggravated felony. … Whether the noncitizen's actual conduct involved such facts is quite irrelevant.[204]

The import of this was that there was no room for the Board of Immigration Appeals to consider any other evidence once it was clear that the statutory elements of the conviction were overbroad.

In *Moncrieffe*, just as in *Descamps*, the word "Chevron" does not appear. This absence is more noteworthy in *Moncrieffe* because

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[197] *Id.* at 2292
[198] Moncrieffe, 133 S.Ct. 1678 (2013).
[199] *Id.* at 1683.
[200] *Id.* at 1685.
[201] *Id.* at 1683; 8 U.S.C. § 1101(a)(43)
[202] *Id.* at 1686; 21 U.S.C. § 844
[203] Id at 1680.
[204] *Id.* at 1684 (internal quotations omitted).

this was a petition to review an administrative order of removal, and as we have seen Congress has nominally entrusted questions of law in this arena to the Attorney General. Following these two decisions, the Board of Immigration Appeals decided that it was bound to follow *Descamps* in immigration cases.[205] The Department of Homeland Security argued that *Descamps* should not apply outside the criminal context, but the Board concluded that "*Descamps* itself makes no distinction between the criminal and immigration contexts."[206] This could have turned out quite differently, if the civil-criminal distinction had determined the reach of *Descamps*, or if the Board had concluded that it was free under *Brand X* to reach a different answer to an ambiguous question than that prescribed by the Court. *Moncrieffe* is thus a prototypical example of a soft anti-*Chevron* decision, and a fairly potent one at that.

This is a pattern. In at least seven decisions (including *Moncrieffe*) concerning the BIA's interpretation of criminal grounds of removal the Supreme Court has simply failed to even mention the existence of *Chevron*.[207] To be clear, these cases are not all alike, and several of them on their own might not raise doubts about *Chevron*. This is because in some cases the Department of Justice did not ask for deference, usually because there was no published BIA decision at issue.[208] In another case, the government asked for deference, but only in a footnote to its brief, and did not appear to demand *Chevron* deference specifically.[209] But those factors cannot explain the pattern. In two cases, *Nijhawan v. Holder* and *Torres v. Lynch*, when there was a published Board decision and

[205] *Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 354 (BIA 2014).

[206] *Id.* at 354.

[207] *See* Table 2, *infra*, at FNs 209-243.

[208] *See, e.g.,* Moncrieffe v. Holder, Brief for the Respondent, 2012 WL 3803440 (2012); Gonzales v. Duenas-Alvarez, Brief for the Petitioner, 2006 WL 3064108, at 19 Fn 12 (noting that the BIA had not issued a published decision on the issue at hand). *But see* Carachuri-Rosendo v. Holder, Brief for Respondent, 2010 WL 723015 (2010) (not asking for deference, despite a published en banc BIA decision).

[209] Lopez v. Gonzales, Brief for the Respondent at 32 FN 26, 2006 WL 2474082 (2006) ("While the Board is not entitled to deference in its construction of [ ] a criminal statute that it has not been charged with administering, the Board's construction of 8 U.S.C. 1101(a)(43), and particularly its judgment, borne of hands on experience, about the inadministrability of imposing the hypothetical-federal-felony approach on the INA's aggravated felony provision, merit deference.").

the government asked strenuously and at length for *Chevron* deference, the Court still ignored *Chevron* entirely in its decision.[210]

In addition to these six cases, there are two other criminal grounds of removal cases in which the Court mentioned *Chevron*, but did not actually defer. Most recently, in *Esquivel-Quintana v. Sessions*, the Court again dealt with the statutory definition of an aggravated felony, specifically whether certain state statutory rape offenses qualified as "sexual abuse of a minor."[211] The government sought to deport an immigrant on the basis of a California statutory rape crime that required only a three-year age difference when purported victim was under 18 years old, thus criminalizing sex between a 21-year-old and a 17-year-old.[212] There was a published agency decision, and a circuit split on the question.[213] A divided Sixth Circuit panel upheld the Board of Immigration Appeals.[214] The Supreme Court dispensed with *Chevron* in one sentence, stating: "the statute, read in context, unambiguously forecloses the Board's interpretation."[215] Superficially, this is a *Chevron* Step One decision, finding that the statute was not ambiguous. Yet, the statute contains no definition of "sexual abuse of a minor," and the phrase hardly offers a self-evident meaning on its face. While it seems safe to assume that rape of an elementary school child would qualify, marginal cases that involve older teenagers and lesser forms of assault had long troubled the lower courts.[216] If this statute is not ambiguous, it is difficult to imagine exactly what kind of statute would be considered ambiguous.[217]

The other case, *Mellouli v. Lynch*, concerned whether a Kansas misdemeanor conviction for possession of drug paraphernalia

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[210] *Compare Nijhawan v. Holder*, Brief for the Respondent, 2009 WL 815242, at 14-15, 45-50 (2009) (arguing Chevron deference should be applied) *with* Nijhawan v. Holder, 557 U.S. 29 (2009) (making no mention of *Chevron* or deference of any kind); Torres v. Lynch, 136 S.Ct. 1619 (2016) (same).

[211] Esquivel-Quintana v. Sessions, ___ S. Ct. ___ (2017)

[212] *Id.* at ___.

[213] *See id.* at ___.

[214] *Id.* at ___.

[215] Esquivel-Quintana, ___ S. Ct. at ___.

[216] *Compare* Pelayo-Garcia v. Holder, 589 F.3d 1010 (9th Cir. 2009) (a statute criminalizing sex between a 21-year-old and a person under 15 is not categorically sexual abuse of a minor) *with* United States v. Alvarez-Gutierrez, 394 F.3d 1241 (9th Cir 2005) (finding that a Nevada statute criminalizing sex between an 18-year-old and a person under 16 does constitute sexual abuse of a minor).

[217] *Cf.* Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1027 (6th Cir. 2016) (J. Sutton concurring in part and dissenting in part), *reversed on other grounds* Esquivel-Quintana v. Sessions, ___ S.Ct. ___ (2017). ("Either reading has much to commend it.").

counted as a ground of removal for a "controlled substance violation" (but not an aggravated felony).[218] There was a published Board decision on point.[219] But the Board's approach differed from the categorical approach that the Court had required in *Moncrieffe*.[220] *Moncrieffe* involved an aggravated felony of drug trafficking, which is more serious than simple possession. The Supreme Court said that this would mean that an immigrant might be deportable for a low level paraphernalia conviction, but not for higher level drug trafficking.[221] The Court thus dispensed with the government's request for deference by briefly stating that "[b]ecause it makes scant sense, the BIA's interpretation, we hold, is owed no deference under the doctrine described in *Chevron*."[222] This seems like an emphatic Step One decision, except that the reason why the BIA's interpretation made "scant sense" is because of the Supreme Court's own decision in *Moncrieffe*, where the Court insisted on the categorical approach.

These two groups of cases are summarized below in Table II. They illustrate the two types of soft anti-*Chevron* decisions, those where *Chevron* is entirely ignored in the decision, and those where it is mentioned but seems irrelevant to the result. The pattern here is quite strong, especially when compared with the immigration cases that did not involve criminal grounds of removal, which I discussed in Part III.C. Consistently, in case after case in this category, the Court does not defer to the Attorney General (or the Board of Immigration Appeals). It would always be possible to quibble about *Chevron's* non-application in an individual instance. For instance, perhaps sometimes the statute really is clear. The "without remuneration" exception for marijuana distribution *Moncrieffe* might be such an example. But if the Court cared about *Chevron* in these cases, it could easily simply say that this is a Step One decision. In other cases the statutory language is definitely ambiguous, if the concept of ambiguity is to have any coherency.

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[218] 135 S.Ct. 1980, 1984 (2015). *See also* 8 U.S.C. § 1227(a)(2)(B)(i) (defining removable an immigrant who is "convicted of a violation of ... any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana.").

[219] 135 S.Ct. at 1988-1989.

[220] *Id.* at 1989.

[221] *Id.*

[222] *Id.*

To borrow Chief Justice Roberts' famous statement that to be a judge is to simply call "balls and strikes," [223] these are cases generally right down the center of the *Chevron* strike zone. And yet *Chevron* doesn't matter, and is typically not even mentioned by the Court.

TABLE 2:
Cases Concerning Criminal Grounds of Removal

Case	**Issue**	**Deference requested?**	***Chevron* mentioned by SCOTUS?**	**Deference applied by SCOTUS?**
Leocal v. Ashcroft (2004)	**Definition of aggravated felony** (crime of violence/DUI)	No[224]	No	**No** (immigrant prevailed)
Lopez v. Gonzales (2006) [225]	**Definition of aggravated felony** (trafficking in a controlled substance)	Yes (but not explicitly *Chevron* deference) [226]	No	**No** (immigrant prevailed)
Gonzales	**Definition of**	No[228]	No	**No**

[223] CNN.com, *Roberts: 'My job is to call balls and strikes and not to pitch or bat'* (Sept. 12, 2005), http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/index.html.

[224] Leocal v. Ashcroft, Brief for the Respondents, 2004 WL 1617398, at 5 (2004) (noting that the BIA had followed circuit court case law, rather than issued its own interpretation of the statute).

[225] 549 U.S. 47 (2006).

[226] Lopez, Brief for the Respondent at 32 FN 26, 2006 WL 2474082 (2006).

v. Duenas-Alvarez (2007)[227]	**aggravated felony** (theft offense/aiding and abetting)			(government prevailed)
Nijhawan v. Holder (2009)[229]	**Definition of aggravated felony** (fraud or deceit)	Yes[230]	No	**No** (government prevailed)
Carachuri-Rosendo v. Holder (2010)[231]	**Definition of aggravated felony** (trafficking in a controlled substance)	No[232]	No	**No** (immigrant prevailed)
Moncrieffe v. Holder (2013)[233]	**Definition of aggravated felony** (trafficking in a controlled substance)	No[234]	No	**No** (immigrant prevailed)
Mellouli	**Criminal**	Yes[236]	Yes[237]	**No**[238]

[228] Gonzales v. Duenas-Alvarez, Brief for the Petitioner, 2006 WL 3064108, at 19 Fn 12.
[227] 549 U.S. 183 (2007).
[229] 557 U.S. 29 (2009).
[230] Nijhawan v. Holder, Brief for the Respondent, 2009 WL 815242, at 14-15, 45-50 (2009).
[231] 560 U.S. 563 (2010).
[232] Carachuri-Rosendo v. Holder, Brief for Respondent, 2010 WL 723015 (2010).
[233] 133 S.Ct. 1678 (2013).
[234] Moncrieffe v. Holder, Brief for the Respondent, 2012 WL 3803440 (2012).

v. Lynch (2015)[235]	**ground of removal** (definition of controlled substance violation, not aggravated felony)			(immigrant prevailed)
Torres v. Lynch (2016)[239]	**Definition of aggravated felony** (arson/jurisdictional elements)	Yes[240]	No	**No** (government prevailed)
Esquivel-Quintana v. Sessions (2017)[241]	**Definition of aggravated felony** (sexual abuse of a minor)	Yes[242]	Yes	**No**[243] (immigrant prevailed)

While in these cases the Court is consistent in not deferring to the agency, the government still often wins. This is consistent with an assertion of judicial supremacy on questions of law, but it

[236] Mellouli v. Holder, Brief for the Respondent, 2014 WL 6613094, at 45-52 (2014)

[237] Mellouli, 135 S.Ct. at 1989.

[238] *Id.* ("Because it makes scant sense, the BIA's interpretation is owed no deference under the doctrine described in *Chevron*") (full citation omitted).

[235] 135 S.Ct. 1980 (2015).

[239] 136 S.Ct. 1619 (2016)

[240] Torres v. Lynch, Brief for the Respondent, 2015 WL 5626637 (2015).

[241] ___ S.Ct. ___ (2017).

[242] Esquivel-Quintana v. Lynch, Brief for the Respondent, 2017 WL 345128, at 36-54 (2017).

[243] Esquivel-Quintana, ___ S.Ct. at ___ ("We have no need to resolve whether the rule of lenity or *Chevron* receives priority in this case because the statute, read in context, unambiguously forecloses the Board's interpretation. Therefore, neither the rule of lenity nor *Chevron* applies.").

does not necessarily favor one policy outcome (deportation or non-deportation) over another. The lack of a pattern on the result, as contrasted to the clear pattern of non-deference, is relevant to a currently open question about whether criminal grounds of removal should be interpreted according to the rule or lenity. This is explored in more detail in Part IV.D. But for present purposes, the necessary next step is to try to describe the pattern so that we can then try to identify potential doctrinal rules that might explain it.

These cases all involve criminal grounds of removal. The Sixth Circuit's Judge Sutton has argued that *Chevron* can only apply to the interpretation of civil statutes, but not criminal statutes.[244] Immigration is general seen as falling on the civil side of the line, but the definition of aggravated felonies is a hybrid. In these cases, "the same statute has criminal *and* civil applications."[245] Aggravated felonies are defined in one part of the Immigration and Nationality Act.[246] Another section refers to this definition setting out a ground of removal in administrative proceedings.[247] But other sections incorporate this definition as an element of an immigration-related crime, such as severely enhancing the maximum sentence for illegal re-entry.[248] That means that when a court is asked to interpret the definition of an aggravated felony in a deportation case, it is also defining the elements of a crime. This may explain why *Chevron* deference is inappropriate, as well forming the basis for applying the rule of lenity, which I discuss in Part IV.D.

However, the dual-use statute theory does not explain the Supreme Court's lack of deference in *Mellouli*, which did not involve a statute with a dual application in criminal law.[249] Second, immigration is not the only field of administrative law that has dual use statutes. Judge Sutton's colleagues on the Sixth Circuit rejected his view because the Supreme Court had previously found that deference applies to the Department of Interior's

[244] Esquivel-Quintana v. Lynch, 810 F.3d at 1027 (J. Sutton concurring in part and dissenting in part). *See also* Whitman v. U.S., 135 S.Ct. 352, 353-354 (2014) (J. Scalia, statement regarding denial of certiorari).

[245] *Id.* at 1028.

[246] 8 U.S.C. § 1101(a)(43)(A).

[247] 8 U.S.C. § 1227(a)(2)(A)(iii).

[248] 8 U.S.C. § 1326(b)(2); *Id.* at § 1327.

[249] *See* discussion, *supra*, at text beginning at FN 218.

interpretation of the Endangered Species Act, even though that act has criminal as well as civil applications.[250] Nevertheless, the majority of the Sixth Circuit panel recognized that the Supreme Court had appeared to move away from deference, but relied on the non-removal immigration case law that we discussed above in Part III.C, which seemed to still require the application of *Chevron*.[251]

A slightly broader description of the pattern would say that in immigration cases the Supreme Court does not defer with regard to any grounds of removal based on criminal convictions, not only dual-use statutes that can define stand-alone crimes as well. Descriptively, this captures *Mellouli*, *Moncrieffe* and other aggravated felony cases that we have discussed in this Article. But while it describes the decisions that the Supreme Court has given us, it may have theoretical problems. Whether we take this slightly broader view, or Judge Sutton's theory about dual use statutes, tremendous stress is places on the formalistic civil-criminal distinction. The Court has said that "criminal laws are for the courts, not for the Government, to construe."[252] But even in the criminal context the Court has occasionally shown there can be some room for the executive branch to autonomously proscribe conduct, at least when stringent safeguards are in place, including preserving a role for the courts.[253] Rather than focus on a formalistic bright line that may not exist, we need to know not just the general rule, but the reason why deference is generally inappropriate in criminal law.

Deferring to the executive branch on matters of criminal law would invite arbitrary use of draconian state power, by allowing an administrative agency "to create (and uncreate new crimes at

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[250] Esquivel-Quintana v. Lynch, 810 F.3d at 1024, discussing *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 (1995). *But See* Whitman, 135 S.Ct. at 353-354 (J. Scalia statement) (arguing that the Court's willingness to defer in *Sweet Home* "contradicts the many cases before and since holding that, if a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings.").

[251] Esquivel-Quintana v. Lynch, 810 F.3d at 1024.

[252] Abramski v. United States, 134 S.Ct. 2259, 2274 (2014).

[253] *See* Touby v. United States, 500 U.S. 160, 167-168 (1991) (affirming the power to criminally punish manufacture of designer drugs when the controlled substance was proscribed by expedited procedure when the administrative power was subject to "multiple specific restrictions" and judicial review was available). *But See* United States v. Booker, 543 U.S. 220 2005) (mandatory sentencing factors must be proved to a jury).

will)."[254] This was at the heart of Judge Sutton's concern regarding the intersection of *Chevron* and dual-use statutes:

> [Applying deference] would leave this distasteful combination: The prosecutor would have the explicit (executive) power to enforce the criminal laws, an implied (legislative) power to fill policy gaps in ambiguous criminal statutes, and an implied (judicial) power to interpret ambiguous criminal laws laws. *Cf.* The Federalist No. 47, at 297–99 (James Madison) (Clinton Rossiter ed., 1961). And it would permit this aggregation of power in the one area where its division matters most: the removal of citizens from society.[255]

The last line in this passage uses the word "removal," which is the word that immigration law uses for deportation. The pivotal question seems to be whether it matters, for separation of powers purposes whether the Government aims to remove a person to prison as a matter of criminal punishment, or to remove him from the country. The Supreme Court has long recognized that rigid application of the civil-criminal distinction is not always appropriate in immigration cases.[256] Justice Gorsuch has argued that the separation of powers concerns that mitigate against deference on criminal law apply with equal force to some immigration contexts (and, apparently for Gorsuch, in all administrative contexts).[257] Some commentators have speculated that in avoiding deference in certain immigration cases, the Court may be acting on an unspoken inclination that "deportation is different."[258] This suggests that the real explanation for non-

[254] Whitman, 135 S.Ct. at 353 (J. Scalia statement).

[255] Esquivel-Quintana v. Lynch, 810 F.3d at 1027 (J. Sutton concurring in part and dissenting in part) (internal citation truncated).

[256] *See* Jordan v. De George, 341 U.S. 223, 231 (1951) (conducting a void for vagueness examination of a ground of deportation because "Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine to this case. We do this in view of the grave nature of deportation.").

[257] *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149, 1156 *et seq.* (10th Cir. 2016) (J. Gorsuch, concurring) (questioning whether Judge Sutton's rationale against deference can be limited to dual use statutes).

[258] Patrick Glen, *Response to Walker on Chevron Deference and* Mellouli v. Lynch, YALE J. ON REG.: NOTICE & COMMENT (June 20, 2015) (discussing the possibility of a "deportation-is-different" explanation for the

deference in criminal grounds of removal cases is not the criminal law issues but rather the removal. In order to understand why that might be the case, it is important to put deportation itself in a broader enforcement context.

E. Physical Liberty and Separation of Powers

To this point I have argued that Supreme Court's practice in immigration cases follows a consistent pattern: If deportation is at stake, the Court either ignores *Chevron* deference entirely or fails to apply it in any meaningful way. In this section, I will argue why this pattern makes normative sense. Deportation means the government uses force to expel a person from the United States, to a place she does not want to go.[259] Much like imprisonment, this kind of deprivation of physical liberty calls for strong checks and balances between the judiciary and the executive branches, which makes judicial deference to administrative interpretations of the law especially indefensible. As the Court has said in a different context, deprivation of physical liberty "is a penalty different in kind."[260]

My normative assertion could be stated this way: If one branch of government infringes a person's physical liberty (either by detention or deportation) she should have the right to go before a separate branch of government for an assessment of whether this action was justified under law. That is a basic check and balance, a feature of our constitutional separation of powers. Immigration enforcement distorts this separation, however. In immigration, people are arrested, confined behind bars, judged, and deported all by the executive branch. *Chevron* would mean that even in the limited judicial check that exists on this immense power that the federal government wields over the physical liberty of individuals, the judiciary should defer back to the executive

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Court's reluctance with regard to *Chevron*). *See also* Chris Walker, *The "Scant Sense" Exception to Chevron Deference in Mellouli v. Lynch*, YALE J. ON REG.: NOTICE & COMMENT (June 2, 2015) (discussing the possibility that the Roberts Court may be reluctant to give deference in certain deportation cases).

[259] *See* Padilla v. Kentucky, 559 U.S. 356, 365 (2010) ("We have long recognized that deportation is a particularly severe penalty.") (internal quotations omitted); Jordan, 341 U.S. at 231 (1951) ("deportation is a drastic measure and at times the equivalent of banishment or exile It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty.").

[260] Scott v. Illinois, 440 U.S. 367, 373 (1979).

branch on questions of law. This is too much power for one branch of government to have.

I trust that few would seriously contest that physical liberty is a sacrosanct constitutional value. For purposes of *Chevron* deference, the real problem is to connect physical liberty with the role of the judiciary. At a general level, the centrality of the courts in protecting physical liberty has been recognized since the early days of the Republic. In *Ex Parte Bollman* Chief Justice Marshall wrote:

> Of a tribunal whose members, having attained almost all that the constitution of their country permits them to aspire to, are exempted, as far as the imperfection of our nature allows us to be exempted, from all those sinister influences that blind and swerve the judgments of men—have nothing to hope, and nothing to fear, except from their own consciences, the opinion of the public, and the awful judgment of posterity? It is in the hands of such a tribunal alone, that in times of faction or oppression, the liberty of the citizen can be safe.[261]

In a similar vein, Alexander Hamilton quoted Montesquieu for the maxim that "there is no liberty, if the power of judging be not separated from the legislative and executive powers."[262] In a passage that reads today like a swipe at *Chevron*, Hamilton wrote:

> as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches.[263]

[261] Ex Parte Bollman and Ex Parte Swartwout, 4 Cranch 75, 82 (1807).
[262] ALEXANDER HAMILTON, THE FEDERALIST NO. 78 (1788).
[263] *Id.*

The precise nexus between physical liberty and separation of powers can be seen in more recent illustrations of the point. In particular, useful guidance may be the Fourth Amendment, because this amendment concerns physical seizures before a person has been convicted in a criminal trial.[264] The landmark case of *Gerstein v. Pugh* is especially informative because the Court there wrestled with what amounted to a separation of powers question. In that case, Florida used a procedure by which a suspect could be detained pending after a warrantless arrest based solely on a prosecutor having filed charges, with no judicial review of probable cause.[265] Florida argued that the prosecutor's involvement was a sufficient safeguard, but the Court found this unconvincing, insisting on maintaining separation of powers through a "neutral and detached magistrate."[266]

IV. Beyond Deportation Cases

A. Immigration Detention

Given the competing explanations for why deportation cases seem to be treated differently, immigration detention cases offer a critical test of alternative theories about the limits of *Chevron*. In the *Chevron* era, Supreme Court has dealt with fewer cases concerning detention of immigrants than it has cases dealing with the deportation of immigrants. However, these cases have the potential to tell us a great deal about how we should interpret the reason for the Court's apparent hesitation about *Chevron* deference. If the pivotal issue is physical liberty, then detention cases should be handled much like deportation cases, e.g. without deference.

As Alina Das has noted, the federal government has often succeeded in persuading lower courts to apply *Chevron* deference in habeas cases concerning the mandatory detention of

[264] *See* Gerstein v. Pugh, 420 U.S. 103, 120 (1975) ("These adversary safeguards [of a criminal trial] are not essential for the probable cause determination required by the Fourth Amendment.").

[265] *Id.* at 116.

[266] *Id.* at 117-118.

immigrants.[267] Not all circuit courts have seemed equally receptive to *Chevron* in immigration detention cases, though (much like the Supreme Court) they sometimes avoid *Chevron* by simply failing to mention it in their decisions rather than explaining why they chose not to apply it.[268] As Das argues, the application of *Chevron* in habeas cases undermines the role the judiciary has traditionally played in reviewing deprivations of liberty:

> Any habeas challenge to the scope of an immigration detention statute—whether it focuses primarily on constitutional concerns or involves broader tools of statutory construction—ultimately requires review of the lawfulness of the executive's deprivation of an immigrant's physical liberty. … In the context of immigration detention challenges, the interpretive choice is almost always between an agency view that would result in continuing detention and a countervailing interpretation that would result in the detainee's freedom or more robust procedural protections. The application of Chevron deference in immigration detention cases thus operates as a presumption in favor of detention, at least in the absence of countervailing norms that would give weight to the physical liberty interest at stake.[269]

What we have from the Supreme Court so far follows the same pattern we saw in deportation cases. In the landmark case of *Zadvydas v. Davis*, the Court wrestled with whether a statute authorized indefinite detention of deportable immigrants.[270] The government asked for *Chevron* deference for its interpretation of the statute, which would have allowed indefinite detention.[271] The Court acknowledged that the statute in question was

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[267] Alina Das, *Unshackling Habeas Review: Chevron Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 146-148 (2015).

[268] *Compare* Rodriguez v. Robbins, 804 f.3d 1060 (9th Cir. 2015) (not mentioning Chevron in a case concerning pre-removal mandatory detention), *cert. granted* Jennings v. Rodrigruez, 136 S.Ct. 2489 (2016), *with* Lora v. Shanahan, 804 F.3d 601, 609 (2d Cir. 2015) (applying *Chevron* to interpretation of the mandatory detention statute).

[269] *Id.* at 149.

[270] 533 U.S. 678 (2001).

[271] Reno v Ma, Brief for the Petitioners at 44, 2000 WL 1784982 (2000).

ambiguous,[272] but resolved the case in favor of the immigrants using the doctrine of constitutional avoidance.[273] *Chevron* appears nowhere in the decision.

In *Clark v. Martinez*, the majority opinion by Justice Scalia similarly made no mention of *Chevron* deference.[274] It was in this decision that Scalia famously said that a statute cannot be a "chameleon"[275] because the government wanted to give the detention statute a different meaning than it had been given in *Zadvydas*. In dissent, Justice Thomas thought that *Chevron* should have applied.[276]

Zadvydas and *Martinez* both dealt with detention after an order of removal, with the Court finding against indefinite detention in both cases. In *Demore v. Kim*, the Court affirmed temporary mandatory detention while a removal case is pending.[277] The Court again made no mention to *Chevron*, but it is less clear if the government asked for it. The government asked for deference based on its plenary power over immigration, not based on *Chevron*.[278] We are awaiting the results of a new test of this issue in *Jennings v. Rodriquez*, which challenges long term mandatory detention while cases are pending in Immigration Court. In this case, the government has asked strongly for *Chevron* deference to apply.[279] While the Court's ultimate decision will have substantial ramifications for immigration detention generally, for purposes of this discussion the relevant question will be whether *Chevron* deference plays any role in how the Court gets to its ultimate conclusion.

B. Other Liberties

If I am correct that there is a physical liberty exception to *Chevron* deference a question will arise about whether there are

[272] 533 U.S. at 697.
[273] *Id.* at 690.
[274] 543 U.S. 371 (2005).
[275] *Id.* at 381.
[276] *Id.* at 402 (J. Thomas, dissenting).
[277] 538 U.S. 510 (2003).
[278] Demore v. Kim, Brief for the Petitioners at 9, 2002 WL 31016560.
[279] *Jennings v. Rodriguez*, Brief for the Petitioners at 18, 52, 54.

other administrative law contexts where there is an interest at stake so weighty that a similar Step Zero limitation to *Chevron* is called for. For those who believe the entire *Chevron* enterprise is flawed, this will be of little concern. But those who believe *Chevron* has real value in many contexts, making an exception for physical liberty will be a real concern.[280] Certainly, the Constitution protects property, as well as physical liberty, and many regulatory policies impact property rights. There are certainly strong critiques of *Chevron* that focus on broader conception of liberty, rather than the narrower focus on physical liberty that I have used.[281]

In the abstract, it is certainly possible that a deportation or immigration detention case could be the occasion for the Court to kill off *Chevron* entirely, if that is what five justices on the Supreme Court want. Moreover, I would not attempt here to contest Judge Gorsuch's broad assertion that administrative agencies generally have the capacity "to penalize persons in ways that can destroy their livelihoods and intrude on their liberty even when exercising only purely civil powers."[282] This broader liberty argument would call for a wholesale dismantling of deference. I have not attempted in this Article to wrestle with this larger attack on *Chevron*, except to observe how it makes the doctrine's future reach less certain. My purpose has been to develop a more narrow and thus more modest argument focused on physical liberty only, rather than all forms of liberty.

As explained already in Part II, while *Chevron* is on shakier ground today than it once was, it is still ambitious to suggest that it is on the verge of being overturned, rather than merely having its wings clipped. We already know from *King v. Burwell* that *Chevron* does not apply in certain "major questions" involving matters of great social and economic consequence.[283] The Court has not clarified the parameters of this exception, but the existence of the exception shows that the Court thinks there are some matters too

[280] *See* Family, *supra* 7, at ___ (noting that a potential alliance between immigration advocates and conservative critics of Chevron could pose a threat to the entire doctrine).

[281] *See, e.g.*, Gutierrez-Brizuela, 834 F.3d at 1155 (J. Gorsuch, concurring) (arguing that administrative agencies have the power).

[282] *Id.*

[283] *See* discussion, *supra*, at Part II.C.

weighty for deference to be appropriate. The physical liberty exception is similar.

There is no need to up-end all of *Chevron* in order to recognize that a government intrusion on physical liberty entails more protections than purely monetary intrusions. This is a line that the Supreme Court has drawn in other contexts, especially in criminal law, which is the field of law most attuned to governing the power of the government to seize and detain people.[284] Moreover, the fact that the Court has given consistent force to *Chevron* deference in immigration cases that do not involve deportation or detention should be seen as an affirmation of the doctrine's vitality in contexts for which it is appropriate.

C. Relief From Removal

A removal proceeding in Immigration Court proceeds in two stages. The Immigration Judge first must find that the person is removable.[285] In common situations, this would be shown if the person is present in violation of the law[286] (i.e. an undocumented immigrant), or if a legal resident is convicted of a certain type of criminal offense, such as an aggravated felony or a crime relating to a controlled substance.[287] The deportation cases that I have discussed in Part III.C where the Court failed to apply *Chevron* arose when these grounds of removal were contested.

Once removability is established, the proceeding moves to a second stage at which the non-citizen may ask for relief from removal.[288] This takes many forms, but it includes protection from persecution abroad through asylum[289] and withholding of removal,[290] as well as discretionary cancellation of removal for long-time residents who have not been convicted of an aggravated

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[284] *See* Scott, 440 U.S. at 373-374 (1979) (denying right to appointed counsel to defendant sentenced to a fine because "the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense."); Duncan v. Louisiana, 391 U.S. 145 (1968) (no right to jury trial when defendant charged only with petty offenses).

[285] 8 U.S.C. § 1229A(c).

[286] 8 U.S.C. § 1227(a)(1)(B).

[287] 8 U.S.C. § 1227(a)(2) (setting out criminal grounds of removal).

[288] 8 U.S.C. § 1229A(c)(4).

[289] 8 U.S.C. § 208.14(a).

[290] 8 U.S.C. § 1231(b)(3); 8 C.F.R § 208.16.

felony.[291] It is common for there to be no dispute about the non-citizen's threshold removability, but for eligibility for asylum to be hotly contested. A great deal of the appellate immigration litigation at the circuit courts concerns eligibility for relief from removal, and *Chevron* deference has often played a central role.[292] In these cases the Supreme Court has consistently applied *Chevron*, dating back to its 1987 decision in *Cardoza-Fonseca*, and followed by *Aguirre-Aguirre* (1999), *Negusie* (2009), and *Martinez-Gutierrez* (2012).[293]

In my view, the Court should revisit the application of deference in relief from removal cases. Compelling arguments can be made that *Chevron* should not apply in these cases. When there is a dispute about relief from removal, what is ultimately at stake is the same as in criminal grounds of removal cases: will the person be deported? Moreover, in asylum cases, the non-citizen is arguing that she will be subject to persecution if deported. However, to prevail on this immigrants would have to convince the Court that its consistent practice has been wrong. By contrast, on grounds of removal immigrants must only ask the Court to continue on a well-trod path.

There are plausible arguments that may explain the differences in *Chevron's* application, although I do not find them fully satisfactory. Grounds of removal constitute the legal justification for forcibly expelling someone from the country. They are the legal regulation of the government's power over the individual. Since these statutes are the direct justification for violating individual liberty, their application and interpretation require special judicial attention. By contrast, relief from removal is more akin to eligibility for an immigration benefit or seeking an admission. This distinction may make judges more comfortable with permitting some range of executive discretion. The Court has long held that a person making such an application is not entitled to due process.[294] The justices may perceive that deferring to

[291] 8 U.S.C. 1229B.

[292] *See, e.g.*, *Reyes v. Lynch*, 842 F.3d 1125, 1129 (9th Cir 2016) (in an asylum eligibility case, "We conclude that the BIA's articulation of its "particularity" and "social distinction" requirements for demonstrating membership in a "particular social group" are entitled to *Chevron* deference.").

[293] *See* discussion, *supra*, at Part III.C.

[294] *See* Landon v. Plasencia, 459 U.S. 21, 32(1982).

congressional delegation to make these judgments makes more sense. Nevertheless, unlike an applicant for a visa (the issue in *Cuellar de Osorio*) a person seeking asylum in a removal hearing is inside the U.S. and is entitled to due process.[295] The matters under review in court are legal definitions, not matters of discretion.[296] Congress explicitly preserved judicial review on questions of law in these cases, which undermines the argument that deference would respect an implicit congressional delegation to the executive branch.[297]

It is worth noting that then-Judge Gorsuch issued his broadside against *Chevron* in an immigration case that was not about a ground of deportation, but instead involved eligibility for an immigration benefit.[298] Nevertheless, there is a coherent distinction between grounds of removal and claims for relief from removal, which is embodied in the removal proceedings themselves. There is also a fairly consistent pattern to the way the Supreme Court has applied of not applied *Chevron* in these cases, which suggests that the justices perceive the two types of immigration cases to be different.

D. The Lenity Question

Immigrants have often argued that grounds of deportation based on criminal convictions must be interpreted narrowly (and thus in their favor) according to the rule of lenity, an issue that has also emerged in some tax law contexts.[299] Lenity requires that an ambiguous criminal statute be interpreted in the manner most favorable to the defendant.[300] Justice Scalia, as well as the Sixth Circuit's Judge Sutton, have argued that lenity should be invoked

[295] *Id.* ("Our cases have frequently suggested that a continuously present resident alien is entitled to a fair hearing when threatened with deportation.").

[296] *See* 8 U.S.C. § 1252 (prohibiting judicial review on matters of discretion).

[297] *See id.*

[298] Gutierrez-Brizuela, 834 F.3d at 1144.

[299] *See* Kristin E. Hickman, *Of Lenity,* Chevron*, and KPMG*, 26 VA. TAX. REV. 905 (discussing application of lenity and Chevron in tax cases).

[300] *See* U.S. v. Thompson/Center Arms Co., 504 U.S. 505, 518 (1992); Crandon v. U.S., 494 U.S. 152, 168 (1990).

for dual use statutes, since they have a criminal law application.[301] Several scholars have weighed in as well in favor of lenity when deportation is premised on a criminal conviction.[302]

The Supreme Court itself appeared to endorse the argument for lenity with regard to immigration aggravated felonies in its 2004 decision in *Leocal v. Ashcroft*, albeit only in a footnote.[303] However, the Court (in an opinion by Justice Scalia) cited this footnote approvingly in a case concerning immigration detention,[304] and has said in at least one other context that ambiguities about grounds of removal should be construed in favor of the immigrant.[305] The Court has also indicated support for lenity in a case involving dual use statutes outside the immigration context.[306] The Court has more recently avoided the question.[307]

In the criminal context, the rule of lenity ensures that people have "fair warning of the boundaries of criminal conduct" while also reinforcing the primacy of courts in interpreting the law.[308] In Judge Sutton's words, "When a single statute has twin applications, the search for the least common denominator leads to the least liberty-infringing interpretation."[309] There are different ways to conceive of how lenity, if applicable, would interact with *Chevron* deference when an agency seeks to impose in a civil context a statute that also have a criminal application. One approach would be to just say that deference does not apply to dual use statutes.[310] This might be thought of as a Step Zero formulation, because it articulated a limitation or exception on *Chevron*. Another option would be to apply *Chevron*'s analytical

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[301] *See* Whitman, 135 S.Ct. at 353 (2014) (J. Scalia statement); Esquivel-Quintana v. Lynch, 810 F.3d at 1027-1028 (J. Sutton concurring in part and dissenting in part).

[302] Rebecca Sharpless, *Zone of Non-Deference: Chevron and Deportation for a Crime*, 9 DREXEL L. REV. 323 (2018); Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L. J. 515 (2003).

[303] Leocal, 543 U.S. at 11 n. 8 ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.").

[304] Clark v. Martinez, 543 U.S. 371, 380 (2005).

[305] *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 320 (2001).

[306] *See, e.g.*, Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 515 U.S. 687 (1995) (Endangered Species Act); Thompson/Center Arms Co., 504 U.S. at 518;

[307] *See* David Hahn, *Silent and Ambiguous: The Supreme Court Dodges* Chevron *and Lenity in* Esquivel-Quintana v. Sessions, 102 MINN. L. REV. DE NOVO ___ (Nov. 29, 2017).

[308] Crandon, 494 U.S. at 168.

[309] Esquivel-Quintana v. Lynch, 810 F.3d at 1028 (J. Sutton concurring in part and dissenting in part).

[310] *See*, e,g., Whitman, 135 S.Ct. at 353 (2014) (J. Scalia statement)

framework, but to then hold that the rule of lenity applies to Chevron's second step – the question of whether the BIA's interpretation is reasonable.[311] This seems consistent with the way the Court has tended to first try to resolve statutory ambiguity, and only if that fails invoke lenity.[312] On the other hand, it is difficult to see how either of these formulations would lead to different results. Either way, lenity's demand for a narrow interpretation of the statute would trump any contrary interpretation from the agency. Some have argued that lenity does not really fit in either step, and may not be appropriate in non-criminal cases.[313]

The rule of lenity is usually cited in reference to criminal grounds of removal. However, Das argues for something quite similar in reference to statutes authorizing the detention of immigrants.[314] Based on the normative importance of liberty, she argues for "a presumption in favor of physical liberty" when interpreting statutes.[315] She notes that, much like lenity, this could lead either to not applying *Chevron* or to constraining when a statute is considered ambiguous under step one.[316] These are compelling arguments, but they are different than the thesis of this Article because they dictate how to resolve substantive interpretive questions in the law, whereas the question with *Chevron* is a matter of separation of powers, e.g. who should be the primary decision-maker.

Despite the Court's past statements that appear favorable to lenity in immigration cases, the Court has recently avoided re-affirming it when presented with two golden opportunities to do so. In *Torres*, the BIA decided that jurisdictional elements of the aggravated felony definition should not count for the categorical approach.[317] Mr. Torres argued that the Court should apply lenity

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[311] *See* Brian G. Slocum, The Immigration Rule of Lenity and Chevron Deference, 17 GEO. IMMIGR. L. J. 515, 575 (2002); David S. Rubenstein, *Putting the Immigration Rule of Lenity its Proper Place: A Tool of Last Resort After Chevron*, 59 ADMIN L. REV. 479, 517-519 (2007).

[312] *See* Thompson/Center Arms Co., 504 U.S. at 518; Crandon, 494 U.S. at 168; *Kasten v. Saint–Gobain Performance Plastics Corp.,* 563 U.S. 1 (2011); *Maracich v. Spears,* 133 S.Ct. 2191, 2209 (2013); Chapman v. United States, 500 U.S. 453, 463 (1991).

[313] David S. Rubenstein, Putting the Immigration Rule of Lenity in its Place: A Tool of Last Resort After Chevron, 59 Admin. L. Rev. 479, 505-510 (2007).

[314] Das, *supra* n. 267, at 202-205.

[315] *Id.* at 205.

[316] *Id.*

[317] *Id.*

rather than *Chevron* because deportation is especially grave, and because the aggravated felony definition has a criminal application.[318] As we have seen in Part III.C, the government asked for deference, and the Court decided the case in favor of the government – but mentioning neither *Chevron* deference, nor lenity.[319] In 2017, the Court decided *Esquivel-Quintana*, in which the parties raised essentially the same arguments about lenity and *Chevron*. This was the case, when it was in the lower courts, in which Judge Sutton had issued his widely-cited opinion opposing deference and calling for lenity. The Court this time acknowledged the issues, but dispensed with them in a single sentence, holding that the statutory provision was not ambiguous, so there was no need to resolve the *Chevron*-lenity dispute.[320]

The lenity question is clearly unresolved and likely to re-emerge. I do not seek to resolve this question in this Article, and I do not need to in order to make the case that *Chevron* does not (and recently, has not) applied in cases involving physical liberty. While lenity is often proposed as an alternative to *Chevron*, the Court could choose to reject both. As we have already seen in Part III.C, the Court in removal cases has consistently avoided deference, but it has not consistently resolved the statutory provisions in favor of the immigrant as the rule of lenity would likely require. Even in the criminal context, the Court has long noted that lenity has limits, and only applies when it cannot otherwise resolve ambiguity in a statute.[321] It stands to reason that if the Court is growing more confident in its ability to find meaning in superficially ambiguous statutes, the rule of lenity will ebb in importance just as *Chevron* seems to have declined.

Limiting *Chevron* deference re-asserts the judicial role in interpreting the statute, but it does not say anything about how the statute should actually do the interpretation. One could coherently argue that the severity of deportation calls for narrow

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[318] Torres v. Lynch, Brief for the Petitioner, at 38 *et seq*.

[319] *See* discussion, *supra*, at Part III.C.

[320] *See* discussion, *supra*, at Part III.C.

[321] *See* U.S. v. Wiltberger, 18 U.S. 76, 77 (1820) ("Though penal laws are to be construed strictly; yet the intention of the legislature must govern in the construction of penal, as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the legislature."); Chapman v. United States, 500 U.S. 453, 463 (1991); United States v. Castleman, 134 S.Ct 1405, 1416 (2014) (lenity only applies in cases of "grievous ambiguity").

interpretations. Or one could argue that lenity should apply in dual use statutes only because, keeping the rule of lenity tethered to the criminal law arena. While these are coherent theoretical arguments, it is harder to make the case that this is what the Supreme Court has been doing. Rather, the clear pattern is that the Court has not applied *Chevron*, and has been re-asserting the judicial role in immigration cases that involve grounds for deportation and detention. But that does not mean the Court will always accept the statutory interpretation that is most favorable to the immigrant. The government can still win these cases. It just is not getting deference.

The rule of lenity is clearly appealing for an immigrant fighting deportation, or for anyone fighting the government over a statutory interpretation. If lenity is indeed an application of due process that constrains the power of the federal government, then there is indeed a compelling constitutional case for it. But some important doubts have been raised about whether this constitutional argument is somewhat overstated.[322] As Jill E. Family explains in a recent article, the intersection of *Chevron* and lenity is "opaque."[323] As she explains, lenity is really about how to interpret a statute, while *Chevron* is about who should do the interpretation.[324]

The claim to lenity skirts the central problem that courts face when reviewing deportation cases, which is deportation. Instead of focusing on the stakes of immigration enforcement, lenity asks the court considering a deportation case to instead focus on the fact that the statutes are also used in a criminal context in other cases. Applied rigidly and in isolation, lenity could lead to a situation in which judges defer to the executive branch on detention questions, and as a default on most grounds of deportation, but then apply a highly pro-immigrant canon of interpretation if the ground of deportation happens to be a dual use statute. That would not seem to be a coherent or satisfactory approach. It also avoids the possibility that the Court is forging a somewhat hybrid approach in removal cases, treating them as

[322] *See* Hickman, *supra* n. 299, at 935.
[323] *See* Family, *supra* n. 1, at ___.
[324] *Id.*

neither purely criminal nor purely administrative.[325] For these reasons, it would seem better for the Court to focus on what is at stake in deportation and detention cases, and to focus on the role the judiciary should play given those stakes.

V. Conclusion

Deportation truly is different, at least from more typical issues that arise in administrative law. But it is fundamentally similar to a question that has long been a concern in Anglo-American law, and especially in constitutional law: how should law regulate government intrusions on physical liberty? Maintaining separation of powers, especially a fully independent review by the judiciary, is a well-established part of the answer to that question. *Chevron* deference in the context of immigration enforcement undermines this safeguard. Cases involving physical liberty are different, giving the judiciary a unique and sacred role in a democracy based on checks and balances.

Unlike arguments for lenity, avoiding *Chevron* deference in deportation cases "would not lead to any guaranteed results, either pro-immigrant or anti-immigrant," as Jill E. Family writes.[326] Moreover, as I have tried to show here, it would not amount to a broadside attack on *Chevron* in all cases. Even in the supposedly exceptional realm of immigration, there are many situations in which the Supreme Court has applied *Chevron* with full force, precisely as administrative law textbooks would anticipate. Rather than see immigration cases as unique, courts should approach them with a focus on what is at stake for the people involved.

If *Chevron* applies in cases of deportation and detention, a single branch of government would be able to both execute the law against individuals, and at the same time issue authoritative interpretations of the law under which physical liberty is to be violated. The application of *Chevron* deference would be wrong in this context, and while the Supreme Court has never articulated

[325] *See generally* CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW (2015).
[326] Family, *supra* n. **Error! Bookmark not defined.**, at ___.

this as a rule, it has been correct in practice to avoid applying *Chevron* in these cases. It is time for the Court to state the rule.