Chevron's Liberty Exception

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ABSTRACT: 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, nor in cases concerning immigration detention. 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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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 broader political narrative. Around the time when President Trump nominated Judge Gorsuch, presidential advisor Steve Bannon declared that the Trump Administration would be working toward the "deconstruction of the administrative state."[3] The Gorsuch nomination seemed to be a step in this direction. 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

1. *See, e.g.*, Peter J. Henning, *Gorsuch Nomination Puts Spotlight on Agency Powers*, N.Y. TIMES (Feb. 6, 2017), https://www.nytimes.com/2017/02/06/business/dealbook/gorsuch-nomination-puts-spotlight-on-agency-powers.html; Steven Davidoff Solomon, *Should Agencies Decide Law? Doctrine May Be Tested at Gorsuch Hearing*, N.Y. TIMES (Mar. 14, 2017), https://www.nytimes.com/2017/03/14/business/dealbook/neil-gorsuch-chevron-deference.html.

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

3. Philip Rucker, *Bannon: Trump Administration is in Unending Battle for 'Deconstruction of the Administrative State,'* WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/news/powerpost/wp/2017/02/23/bannon-trump-administration-is-in-unending-battle-for-deconstruction-of-the-administrative-state; *see also* Matt Ford, *Judge Gorsuch Goes to Washington*, ATLANTIC (Mar. 20, 2017), https://www.theatlantic.com/politics/archive/2017/03/judge-gorsuch-goes-to-washington/520230; Henry Gass, *Gorsuch Hearings: Should Agencies—or Courts—Decide the Law?*, CHRISTIAN SCI. MONITOR (Mar. 22, 2017), https://www.csmonitor.com/USA/Justice/2017/0322/Gorsuch-hearings-Should-agencies-or-courts-decide-the-law.

4. *See, e.g.*, Ian Mason, *Neil Gorsuch is Ready to Take on Administrative State*, BREITBART (Nov. 17, 2017), https://www.breitbart.com/big-government/2017/11/17/gorsuch-ready-administrative-state.

courts to overturn important agency decisions protecting public health and the environment."[5]

For those who are familiar with *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 interesting 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] This is just one recent indication that there is potential for alliance between immigrant rights advocates and conservative critics of *Chevron*.[7]

It is difficult to find a more striking example of a largely unchecked administrative state imposing itself against the liberty of individuals 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—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 the immigration system only reaches the judicial branch of government late in the adjudication

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

6. *See* discussion *infra* Part III.

7. *See* Jill E. Family, *Immigration Law Allies and Administrative Law Adversaries*, 32 GEO. IMMIGR. L.J. 99, 122–26 (2017); Sarah Madigan, *Revisiting Deference to Agencies in Criminal Deportation Cases*, REG. REV. (Nov. 16, 2017), https://www.theregreview.org/2017/11/16/madigan-revisiting-deference-criminal-deportation (summarizing arguments for immigration-specific exceptions to *Chevron*). *See generally* Gabriel J. Chin et al., Chevron *and Citizenship*, 52 U.C. DAVIS L. REV. 145 (2018) (questioning the application of *Chevron* in citizenship adjudication).

8. *See, e.g.*, ATTORNEY GENERAL, MEMORANDUM FOR THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: RENEWING OUR COMMITMENT TO THE TIMELY AND EFFICIENT ADJUDICATION OF IMMIGRATION CASES TO SERVE THE NATIONAL INTEREST 1–2 (Dec. 5, 2017) (calling on Immigration 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 FOR IMMIGRATION REVIEW (Oct. 12, 2017) (criticizing liberal interpretations of asylum law and "dirty immigration lawyers"); Jeff Sessions, *Attorney General Jeff Sessions Delivers Remarks on Violent Crime to Federal, State and Local Law Enforcement*, U.S. DEP'T OF JUSTICE (Apr. 28, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-violent-crime-federal-state-and-local-law; Jeff Sessions, *Attorney General Jeff Sessions Delivers Remarks Before Media Availability in El Paso, Texas*, U.S. Dep't of Justice (Apr. 20, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-media-availability-el-paso-texas; Jeff Sessions, *Attorney General Jeff Sessions Announces The Department of Justice's Renewed Commitment to Criminal Immigration Enforcement*, U.S. DEP'T OF JUSTICE (Apr. 11, 2017), https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-department-justice-s-renewed-commitment-criminal.

process, as a last resort when all administrative appeals have been exhausted.[10] The legal issues 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."[11] 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.[12]

On the other hand, the Court appears to honor this prescription in the breach. This kind of inconsistency with the application of *Chevron* deference 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.[13] 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.[14] It has led to the descriptive observation that "deportation is different" for the Supreme Court, although the Court itself has never quite said so explicitly.[15] Moreover, the description raises a deeper question: Why is deportation different?

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

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10. 8 U.S.C. § 1252 (2012).

11. *Id.* § 1252(a)(2)(D).

12. *See* discussion *infra* Section III.C.

13. *See generally* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1 (2017) (discussing how the *Chevron* deference doctrine is applied in administrative law cases).

14. *See generally* David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583 (2017) (discussing the exceptional treatment the Supreme Court tends to give immigration law).

15. *See generally* Patrick Glen, *Response to Walker on* Chevron *Deference and* Mellouli v. Lynch, YALE J. ON REG.: NOTICE & COMMENT (June 20, 2015), http://yalejreg.com/nc/response-to-walker-on-chevron-deference-and-mellouli-v-lynch-by-patrick-glen (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), http://yalejreg.com/nc/chevron-s-immigration-exception-revisited-by-michael-kagan (discussing the role of *Chevron* in immigration cases and advocating for a "deportation-is-different" theory); Chris Walker, *The "Scant Sense" Exception to* Chevron *Deference in* Mellouli v. Lynch, YALE J. ON REG.: NOTICE & COMMENT (June 2, 2015), http://yalejreg.com/nc/the-scant-sense-exception-to-chevron-deference-in-mellouli-v-lynch-by-chris-walker (discussing the possibility that the Roberts Court may be reluctant to give deference in certain deportation cases).

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.[16] But the Court does apply *Chevron* deference in other kinds of immigration cases. This pattern suggests important differences exist between certain immigration cases which influence the extent to which *Chevron* deference applies, if at all. 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. This Article identifies several possible distinctions between different kinds of immigration issues on which deference may be more or less justified, including grounds for removal, relief from removal, detention, and eligibility for visas to enter the country.

Second, this pattern of avoiding deference in deportation and detention cases makes normative sense. I will argue that *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. Immigration is the rare field of administrative law in which an executive branch agency can arrest, detain and force an individual to go someplace 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 an explanation for why.[17] Courts should be willing to state clearly that deference on questions of law is inappropriate in the immigration context for the same reasons why it is inappropriate in questions of criminal law.[18] Ambiguity from the Supreme Court on 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 identifying patterns from the Supreme Court's seemingly inconsistent rulings. Part III examines the role of *Chevron* in the Court's immigration decisions and demonstrates the existence of a pattern and

16. *See* discussion *infra* Section IV.A.

17. 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, 182 (2d Cir. 2011) ("[W]here the regulation identified by the [BOP] does not speak to the statutory ambiguity at issue, *Chevron* deference is inappropriate.").

18. *See* discussion *infra* Section IV.D; *infra* text accompanying notes 91–92, 268–74.

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. 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."[19] In one of his last opinions, Justice Kennedy wrote: "[I]t seems necessary and appropriate to reconsider . . . the premises that underlie *Chevron* and how courts have implemented that decision."[20]

The basic rule of *Chevron* requires a two-step analysis when an administrative agency interprets and applies a statute.[21] The first is whether the intent of Congress is clear.[22] 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."[23]

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."[24]

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—it has taken on a meaning quite different, or at least quite a bit more important, than someone who had only

19. Barnett & Walker, *supra* note 13, at 2.

20. Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring).

21. 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.").

22. *Id.*

23. *Id.* at 843.

24. *Id.* at 844.

read the decision itself might understand.[25] 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 initial *Chevron* decision.[26] Interestingly, 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.[27] That lower court decision is important because when the Supreme Court announced *Chevron*, it was understood as a more narrow decision about environmental law. Gary Lawson and Stephen Kam, the authors of an authoritative history which explains how the *Chevron* case developed into 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."[28] In other words, the Supreme Court did not necessarily intend to launch a new doctrine with its initial ruling.

Despite its odd birth, for roughly the first two decades of its existence, the *Chevron* doctrine 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.[29] 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 III. 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.

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

26. *See* Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1, 63 (2013).

27. *Id.* at 39–41 (discussing General Motors Corp. v. Ruckelshaus, 742 F.2d 1561 (D.C. Cir. 1984)).

28. *See id.* at 6.

29. *See* Connor N. Raso & 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.").

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."[30] 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.[31] Despite all the fanfare, it is now well known that the Supreme Court itself applies *Chevron* inconsistently at best.[32] Once this inconsistency became apparent, leading scholars sought to reframe *Chevron* as a looser set of jurisprudential principles rather than a rigid formula.[33] The most influential of these efforts is probably Peter Strauss' concept of "*Chevron* space" as contrasted with "*Skidmore* weight."[34]

But inconsistency has also led to doubts about how much *Chevron* matters. 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."[35]

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*.[36] Justices Scalia, Alito, and Thomas indicated an interest in reconsidering *Auer* deference, an offshoot of *Chevron* (also known as *Seminole Rock* deference),[37] under which a court defers to an agency's

30. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

31. *See generally* Raso & Eskridge, *supra* note 29 (finding that justices apply *Chevron* differently in different contexts).

32. *See* Barnett & Walker, *supra* note 13, at 12; William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1124–25 (2008); Michael Herz, Chevron *is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1870 (2015). *But see* Natalie Salmanowitz & Holger Spamann, Does the Supreme Court Really Not Apply *Chevron* When It Should? (September 2, 2018) (working paper), *available at* https://ssrn.com/abstract=3243095 (presenting new empirical research findings indicating that the Court may invoke *Chevron* more consistently than previous research indicated).

33. *See* Raso & Eskridge, *supra* note 29, 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.").

34. Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and* "Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1144–45 (2012).

35. Herz, *supra* note 32, at 1867.

36. Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).

37. *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

interpretation of its own regulation.[38] There is a school of thought that suggests 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* strongest advocate during his early years on the Court.[39] Regardless of whether that is true, Scalia was replaced by a justice who had very recently criticized *Chevron* in terms arguably stronger than those used by Thomas.[40]

Christopher Walker has suggested that it is possible that Chief Justice Roberts has his own, albeit different, issues with *Chevron*.[41] 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.[42] Sounding much like a critique of *Chevron*, the Chief Justice worried about the "vast power" of the administrative state over everyday life.[43] 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 had previously lost to Justice Scalia . . . ."[44]

Walker is not alone in thinking that the Chief Justice has been quietly moving the Court away from *Chevron* deference and toward judicial empowerment vis-à-vis the administrative state.[45]

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38. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210–13 (2015) (Scalia, J., concurring) (arguing that even if *Chevron* remains, *Auer* deference should be reversed); *id.* at 1231 (Thomas, J. concurring) (arguing the *Seminole Rock*/*Auer* "line of precedents undermines our obligation to provide a judicial check on the other branches"); *id.* at 1210 (Alito, J., concurring) ("The opinions of Justice SCALIA and Justice THOMAS offer substantial reasons why the *Seminole Rock* doctrine may be incorrect.").

39. *See* Aaron L. Nielson, *D.C. Circuit Review—Reviewed: A New Step for* Chevron*?*, 36 YALE J. ON REG.: NOTICE & COMMENT (June 16, 2017), http://yalejreg.com/nc/d-c-circuit-review-reviewed-a-new-step-for-chevron; *cf.* Auer v. Robbins, 519 U.S. 452, 457–58 (1997); Adam J. White, *Scalia and* Chevron*: Not Drawing Lines, But Resolving Tensions*, 36 YALE J. ON REG: NOTICE & COMMENT (Feb. 23, 2016), http://yalejreg.com/nc/scalia-and-chevron-not-drawing-lines-but-resolving-tensions-by-adam-j-white.

40. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (Gorsuch, J., concurring) ("*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty.").

41. *See generally* Christopher J. Walker, *Toward a Context-Specific* Chevron *Deference*, 81 MO. L. REV. 1095 (2016) (discussing the possibility that the Court will embrace Chief Justice Roberts' context-specific *Chevron* approach following Justice Scalia's death).

42. *Id.* at 1103–05; *see* City of Arlington v. FCC, 569 U.S. 290, 318 (2013) (Roberts, C.J., dissenting).

43. *City of Arlington*, 569 U.S. at 313 (quoting Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010)).

44. Walker, *supra* note 41, at 1103.

45. *See* Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1439–41 (2017); Note, *The Rise of Purposivism and the Fall of* Chevron*: Major Statutory Cases in the Supreme Court*, 130 HARV. L. REV. 1227, 1227–30 (2017) [hereinafter *The Rise of Purposivism*].

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 to limit deference in specific ways.[46]

To be clear, this does not mean *Chevron* is dead.[47] Even conservative justices are not always critics of *Chevron*. In *Pereira v. Sessions*, the 2018 decision in which Justice Kennedy called for a re-consideration of the doctrine, Justice Alito complained that the Court is ignoring *Chevron*: "In recent years, several Members of this Court have questioned *Chevron*'s foundations. But unless the Court has overruled *Chevron* in a secret decision that has somehow escaped my attention, it remains good law."[48] There are still only two justices (Thomas and Gorsuch) fully on record supporting its reversal. Indeed, there are good reasons to think that a doctrine similar to *Chevron* deference is unavoidable given the tendency by legislators to deflect difficult policy questions to executive agencies.[49] But it does mean that *Chevron's* vitality and its reach are suddenly in doubt.

However, new doubts about *Chevron* at the Supreme Court arguably are not as significant as one might think, given that the Supreme Court has been inconsistent in applying *Chevron* deference at times. 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 great number of administrative law cases that are resolved in the circuit courts of appeals.[50] 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.[51] 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.[52] That lecture is remembered and often cited as a key moment in the solidification of the

46. *See* discussion *infra* Section II.C.

47. *Cf.* SAS Inst. Inc. v. Iancu, 138 S. Ct. 1348, 1358 (2018) ("[W]hether *Chevron* should remain is a question we may leave for another day.").

48. Pereira v. Sessions, 138 S. Ct. 2105, 2129 (2018) (Alito, J., dissenting) (citations omitted).

49. *See* Bednar & Hickman, *supra* note 45, at 1446–49.

50. *See* Barnett & Walker, *supra* note 13, at 4–6.

51. *Id.* at 6.

52. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512–17.

doctrine. Scalia's justified judicial deference explained in terms of congressional intent and separation of powers would become extremely influential—a rationale that the Court eventually adopted in *United States v. Mead*.[53] Yet, in a less cited passage of his lecture, Scalia frankly acknowledged that there were reasons for constitutional doubt about *Chevron*:

> 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.[54]

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.

The expertise explanation carries the oldest pedigree, and is 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.[55] After considerable struggle, the Court eventually realized that the Interstate Commerce Commission was better suited to set railroad rates.[56] Despite having sometimes derided technical expertise as a reason for deference, Justice Scalia himself sometimes fell back on it.[57]

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53. *See* United States v. Mead Corp., 533 U.S. 218, 226–27, 229 (2001).

54. Scalia, *supra* note 52, at 513 (alteration in original) (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).

55. *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 950–51 (2011).

56. *Id.*

57. *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 [is] its expert knowledge of the interpretation's practical consequences."), *with* Scalia, *supra* note 52, at 521 (criticizing technical expertise as insufficient to justify judicial deference).

However, as Lawson and Kam have explained, "[e]pistemological deference . . . does not require any specific doctrine for implementation."[58] If a doctrine is needed, *Skidmore* deference would appear to suffice; 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 Section 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.[59]

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 policymaking 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.[60]

This rationale has become a prominent argument in defense of the administrative state, advocated prominently by Elena Kagan (during her days as a law professor), among others.[61] 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 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 that choice. A related

58. Lawson & Kam, *supra* note 26, at 11.

59. Scalia, *supra* note 52, at 514.

60. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

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

argument for judicial deference is that it may lessen the influence of the political preference of judges.[62]

The political accountability rationale for *Chevron* may have been given a recent re-boost by the D.C. Circuit. In its June 2017 decision in *Global Tel*Link v. F.C.C.*, the D.C. 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."[63] Critically, this would allow an agency to change course without actually going through the full process necessary to promulgate a new rule. The agency can simply tell a reviewing court that it does not want judicial deference. Such a change is especially likely to occur (and in *Global Tel*Link*, did occur) when a new presidential administration takes office, and thus is empowering to voters.

The rationale that the Supreme Court has relied on most in recent years is one of congressional intent, particularly since its 2001 decision in *United States v. Mead Corp.*[64] This theory is utilized when a statute gives an agency responsibility for a particular area of public policy and simultaneously leaves a particular policy question, with regard to how that agency should operate, ambiguous—the theory supposes that Congress implicitly, but nevertheless, intentionally, delegated to the agency the authority to decide how to act. *Mead's* emphasis on congressional intent gave rise to the recognition that in addition to *Chevron's* two steps, there is a Step Zero.[65] 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.[66]

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62. *See generally* Kent Barnett et al., *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463 (2018) (describing administrative law's political dynamics and effect on partisanship in judicial decision making).

63. Glob. Tel*Link v. FCC, 866 F.3d 397, 408 (D.C. Cir. 2017); *see also* Aaron Nielson, *D.C. Circuit Review – Reviewed: A New Step for Chevron?*, YALE J. ON REG.: NOTICE & COMMENT (June 16, 2017), http://yalejreg.com/nc/d-c-circuit-review-reviewed-a-new-step-for-chevron.

64. United States v. Mead Corp., 533 U.S. 218, 226–27, 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 & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 863–64 (2001) (noting that congressional intent theory is the primary foundation for *Chevron*).

65. *See* Merrill & Hickman, *supra* note 64, at 873, 912; Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006).

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

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.[67] This is how Scalia explained the delegation rationale for *Chevron* in his 1989 lecture.[68]

He argued that when a statute is ambiguous, the interpretation may involve a policy choice.[69] He said, "[u]nder our democratic system, policy judgments are not for the courts but for the political branches."[70] 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 increasingly 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 conceptualization of how the doctrine should have been implemented 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.[71] 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 leaned toward looser approaches to *Chevron*, such as Strauss' notion of "Chevron space."[72] As Strauss describes it, despite apparent inconsistency, *Chevron* embodies a coherent approach to allocating authority to agencies.[73] 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."[74] This certainly can be ascribed to simple self-interest; judges may only be willing to restrain the powers of their branch so much. It also has links to growing confidence among judges in their ability to reach definitive interpretations of statutory texts, either through textualism or purposivism.[75] These methodological approaches allow

67. *See* Edward H. Stiglitz, *Delegating for Trust*, 166 U. PA. L. REV. 633, 637 (2018).
68. *See* Scalia, *supra* note 52, at 515.
69. *Id.*
70. *Id.*
71. *See* Barnett & Walker, *supra* note 13, at 33–34.
72. *See* Strauss, *supra* note 34, at 1145.
73. *Id.* at 1144.
74. *See The Rise of Purposivism*, *supra* note 45, at 1227.
75. *Id.*

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.[76]

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.[77] 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 by which the agency reached its interpretation.[78] Walker surmises that Breyer's context-specific approach might often be roughly compatible with the inclinations of the Chief Justice.[79] 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.[80]

The *Chevron* doctrine as it is classically presented presumes 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*)[81] and extended again in a labor law case (*Auer*).[82] This one-size-fits-all understanding may obscure the degree to which the legitimacy of the administrative state is built on several competing theories about accountability, each of which competes to a certain extent with the others.[83] 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,

76. *See* City of Arlington v. FCC, 569 U.S. 290, 312–17 (Roberts, C.J., dissenting).

77. *Id.* at 309 (Breyer, J., concurring).

78. *Id.*

79. Walker, *supra* note 41, at 1112.

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

81. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 974 (2005).

82. Auer v. Robbins, 519 U.S. 452, 458 (1997).

83. *See* Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2488 (2017) (arguing that there are plural, conflicting justifications for the administrative state which cannot be fully reconciled with each other).

some areas of agency action may present additional compelling reasons for courts to not act deferentially.

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.[84] The Court rationalized that if the guidelines were mandatory, those mandatory guidelines would violate the Sixth Amendment right to have factual allegations determined by a jury.[85] 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."[86] In other words, a role assigned to a jury by the Constitution could not be delegated by Congress to anyone else.

Since *Booker* focused on criminal sentencing, it would be reasonable to ask what relationship it has with *Chevron*. As we will see later in Section III, 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 same 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.[87] 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.[88] 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 articulate what the law is.[89] But Gorsuch expressed considerable suspicion about rationales for deference that Scalia had once found persuasive. For instance, Gorsuch expressed concern citizens would be unable to influence agencies "without an army of perfumed lawyers and

84. United States v. Booker, 543 U.S. 220, 226–27 (2005).

85. *Id.* at 239.

86. *Id.* at 237.

87. *See* F. Andrew Hessick & Carissa Byrne Hessick, *The Non-Redelegation Doctrine*, 55 WM. & MARY L. REV. 163, 172–90 (2013).

88. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring).

89. *Id.* at 1152.

lobbyists."[90] In other words, Gorsuch suggested that political accountability —which is what makes the political branches open to lobbyists—might be an institutional weakness in some situations. He endorsed the critique, well-developed in legal scholarship, that *Chevron* may conflict with the Administrative Procedure Act.[91] He indicated that he shares Justice Thomas' skepticism about whether Congress can actually delegate its lawmaking functions to the executive branch.[92]

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.[93] 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.[94] 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."[95] 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."[96]

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.[97] 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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90. *Id.*

91. *Id.* at 1151; *see also* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 985, 1000 (2017) (detailing that "section 706 of the APA that a 'reviewing court shall decide all relevant questions of law' and 'interpret constitutional and statutory provisions'" and "[*Chevron*] cannot be squared with the text of section 706 of the APA"); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 193–99 (1998) (explaining that the Administrative Procedure Act and *Chevron* are at odds).

92. *Gutierrez-Brizuela*, 834 F.3d at 1154 (Gorsuch, J., concurring) (citing Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring)).

93. *Id.* at 1154–55.

94. *Id.* at 1156–57.

95. *Id.* at 1156.

96. *Id.* at 1155.

97. *See* Raso & Eskridge, *supra* note 29, 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 the Supreme Court's proclamations, and the Court's subsequent actions. This inconsistency can certainly be explained, and to some extent probably should be explained, by simple human nature. It is easier for Supreme Court justices 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 who are accustomed to definitively stating 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.[98]

It is also possible that the Court's inconsistency reflects an underlying ambivalence. The justices wrestle with challenging problems and may sometimes be unsure of their footing—they may change their perspective as they see the doctrine's potential application in different situations. This possibility is consistent with the fact that over time individual justices argue for both sides of the issue and appear to contradict themselves. Perhaps this is most evident with Justice Thomas, who reiterated a highly deferential 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."[99]

The *Brand X* articulation of *Chevron* is especially deferential because it states bluntly that judges should permit legal interpretations that they sincerely do not think are the best. And yet, ten years later, Justice Thomas wrote this, derisively quoting back to 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 best reading of an ambiguous statute" in favor of an agency's construction. It thus wrests from Courts the ultimate interpretative authority to "say what the law is," and hands it over to the Executive.[100]

98. *Cf. id.* ("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.").

99. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005).

100. Michigan v. E.P.A., 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (citations omitted).

Given the organic manner in which *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 the inconsistencies can be attributed to natural human vacillation, the justices have likely re-analyzed the issue, or discovered that *Chevron* was not as appropriate in a particular case as the original doctrine might have previously implied. Perhaps the Court's articulation of the *Chevron* doctrine may have been premature. Whereas the justices might have once been enamored with *Chevron's* apparently broad usefulness, "the Court's recent treatment of *Chevron* [has been] as a doctrine to ignore, disparage, or distinguish."[101]

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 loud approaches to *Chevron* and soft ones.[102]

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 opinion 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 the majority opinion really stand.[103]

But it is "loud" in the sense that it explicitly states a rule even if it is a poorly defined rule. Anytime a court explicitly adds (or takes away) an element of *Chevron's* new "Step Zero," it is issuing a loud decision about *Chevron*'s reach. The D.C. Circuit's recent decision in *Global Tel*Link* to not apply *Chevron* in cases where a new Administration does not request such deference would be another example.[104]

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

101. Barnett & Walker, *supra* note 13, at 4 (citing Herz, *supra* note 32).

102. I have explained the logic underlying this methodology elsewhere. *See generally* Michael Kagan, *Loud and Soft Anti-*Chevron *Decisions*, 53 WAKE FOREST L. REV. 37 (2018) (explaining the difference between loud and soft *Chevron*).

103. *See* Walker, *supra* note 41, at 1096.

104. *See supra* text accompanying note 60.

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 so.[105] "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."[106] 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 lead to a situation where the agency always loses. But it does mean that the Court acted as if *Chevron* deference did not 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 the statutory text is sufficiently clear. If the statute is actually clear, then this result is what we would expect. However, the cases that I include 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 a likely reason why the Supreme Court might take on such a case. Of course, it is the Supreme Court's job to resolve such disputes about what a statute means. But such disputes make it hard to accept that the statute is not really ambiguous, if ambiguity is to have any concrete meaning. In 2018, Justice Alito criticized his colleagues for failing to meaningfully apply *Chevron* in precisely this kind of case in his dissent in *Pereira v. Sessions*.[107]

Another example of Type II can be seen from a 2017 Supreme Court decision in *Esquivel-Quintana v. Sessions*, in which the Court dealt with the statutory meaning of "sexual abuse of a minor."[108] 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*.[109] 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:

105. *See* Kent Barnett, *Why Bias Challenges to Administrative Adjudication Should Succeed*, 81 MO. L. REV. 1023, 1035–39 (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)).

106. *Id.*

107. Pereira v. Sessions, 138 S. Ct. 2105, 2121–29 (2018) (Alito, J., dissenting).

108. Esquivel–Quintana v. Sessions, 137 S. Ct. 1562, 1567 (2017).

109. *See infra* Section III.D.

> [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 Board's interpretation. Therefore, neither the rule of lenity nor *Chevron* applies.[110]

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.[111] 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.[112] But then, what is *Chevron* for? What happened to the range of acceptable policy choices that should be left to the political branches?

Such soft approaches to *Chevron* are nothing new.[113] 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."[114] Of course, for quite a while the Supreme Court justices were ostensibly all committed to the *Chevron* doctrine. A later study concluded that continued inconsistency by the Supreme Court justices called for "caution about the Court's collective ability to follow any doctrinal framework consistently."[115] Nevertheless, lower courts attempted to energetically follow *Chevron* because the Supreme Court had prescribed it,[116] while the Supreme

110. *Esquivel–Quintana*, 137 S. Ct. at 1572.

111. *See The Rise of Purposivism*, *supra* note 45, at 1243–45.

112. *Cf.* Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 319–20 (2017) (arguing that statutes, if interpreted diligently, are not ambiguous). "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." *Id.*

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

114. *Id.*

115. Eskridge & Baer, *supra* note 32, at 1091.

116. *See* Barnett & Walker, *supra* note 13, at 72–73.

Court itself often "honored in the breach."[117] While somewhat confusing, this asymmetric application of *Chevron* was not necessarily fatal to the doctrine.[118]

However, currently 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* in cases where it appears it should—a soft anti-*Chevron* decision—we should understand it as a possible sign that the justices might have found 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 when *Chevron* is applied and when it is not.[119] 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"

In theory, there could be strong arguments for judicial deference in immigration cases. 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 clear in all immigration cases.[120] Recent scholarship has raised doubt as to whether foreign policy remains as important a rationale for immigration jurisprudence as it once was.[121] If it is convincing in any situation, the foreign policy rationale would seem to be most convincing in cases that involve requests for visas for foreigners who are actually abroad. Those situations most directly invoke the relationship of the United States to the rest of the world, in that it involves consulates dealing directly with a non-citizen in a foreign country. The foreign policy implications are signaled by the fact that Congress

117. Herz, *supra* note 32, at 1870.

118. *Cf.* Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 799–800 (2017) (arguing that the major cases exception should be used only at the Supreme Court level).

119. *See, e.g.*, Eskridge & Baer, *supra* note 32, at 1097 (reporting different empirical patterns in *Chevron*'s application in different areas of law); Raso & Eskridge, *supra* note 29, at 1776.

120. *See* Matthew J. Lindsay, *Disaggregating "Immigration Law,"* 68 FLA. L. REV. 179, 182–83 (2016).

121. *See id.* at 185 n.23.

assigns the State Department to play a significant role in the process. Immigration law has long recognized a significant constitutional difference for non-citizens who are already in the United States and those who are trying to enter.[122] When the government takes action against a person who is inside the country, the foreign policy implications are more attenuated. That is not to say there are never foreign policy ramifications of domestic immigration policy, but there are occasionally foreign policy dimensions of many types of domestic policy.

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.[123] Others do not. Finally, some matters of immigration law are grounds for criminal prosecution.[124] 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.[125]

The diversity of contexts within the field of immigration law is extremely important if the *Chevron* doctrine is moving toward a context-specific orientation, and away from a rigid one-size-fits-all paradigm, as discussed in Section II.C.

B. Process Problems with Chevron *Deference in Immigration Cases*

Before delving into different concerns raised by 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.[126] 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.[127]

122. *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982).

123. *See supra* Section II.A; *infra* Section III.C.

124. *See supra* Section II.A; *infra* Section III.C.

125. *See* Lindsay, *supra* note 120, at 185; *see also* Michael Kagan, *Shrinking the Post-Plenary Power Problem*, 68 FLA. L. REV. F. 59, 61–62 (2016) (explaining that immigration law may really be many different bodies of law that share an impact on non-citizens).

126. 8 C.F.R. § 1003.0 (2018).

127. *Id.* § 1003.1(b).

Once the BIA resolves an appeal, any order of removal becomes final.[128] A final order of removal may be appealed by filing a petition for review with the U.S. Court of Appeals, which has jurisdiction over the state where the immigration court was located.[129]

In practical terms in these cases, the BIA is the agency whose decision is usually under review by a court; thus, if *Chevron* deference were applied, a federal court of appeals would defer to the BIA on its interpretation of immigration 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. 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, the expertise rationale for deference 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.[130] However, the BIA is designed to be fairly isolated within the immigration bureaucracy. It is not involved in crafting immigration legislation, nor in setting enforcement policy—a matter left to the Department of Homeland Security. It does not have a major role in granting or reviewing most visa applications, because these roles are left to DHS and the State Department. It interprets the statute through case-by-case adjudication, much like the courts. The federal courts of appeals are experts in statutory interpretation, so it is harder to argue that the BIA has a technical expertise advantage in interpreting immigration law.[131] 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.[132] 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.

Doubts about the BIA's comparative competence relative to the judiciary were heightened in 2002 when the George W. Bush Administration streamlined the BIA, the result being that the agency now devotes far fewer resources to deciding each case.[133] Since then, federal judges have issued

128. *Id.* § 1241.1.

129. 8 U.S.C. § 1252(a) (2012).

130. *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).

131. *See* Shruti Rana, Chevron *Without the Courts?: The Supreme Court's Recent* Chevron *Jurisprudence Through an Immigration Lens*, 26 GEO. IMMIGR. L.J. 313, 325 (2012) (questioning whether immigration agencies have a legitimate claim to special expertise).

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

133. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,877, 54,878 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 3).

scathing decisions about the quality of BIA decision-making.[134] At the same time, Immigration Courts are famously backlogged and under-resourced.[135] Some courts have raised these resource concerns as reasons to doubt the utility of deferring to the BIA.[136] 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."[137]

We should not be particularly surprised that some judges who review many BIA decisions are less willing to defer to the BIA. 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."[138] 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.[139] After the 2002 reforms to the BIA, petitions to the federal courts surged.[140] Immigration cases came to represent nearly a fifth of the dockets of the Second and Ninth Circuits.[141] One result of this is that any judge on those courts is likely to become familiar with immigration law issues. Of course, judges on circuits that see fewer immigration matters might not develop the same familiarity. But they could just as easily rely on the precedent rulings of their sister circuits, rather than defer to the executive branch.

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134. *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 also, 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." (citations omitted)).

135. *See* 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."); *Immigration Court Filings Take Nose Dive, While Court Backlog Increases*, TRACIMMIGRATION (Oct. 30, 2017), http://trac.syr.edu/immigration/reports/487.

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

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

138. Benslimane v. Gonzales, 430 F.3d 828, 830 (7th Cir. 2005).

139. David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 183–84 (2010) (finding that 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).

140. *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).

141. *See* Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1683–84 nn. 41–42 (2007).

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.[142] 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."[143] BIA members are career appointees, meaning that federal law prohibits considering political affiliation in hiring.[144] Electing a new president thus would do little to change the BIA. It is also relevant that the BIA has no influence on 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 BIA require an important caveat: The Attorney General can overrule the BIA.[145] The Attorney General retains the authority "to exercise full decision-making upon review."[146] This includes the power to make independent findings of facts and law.[147] President Obama's Attorneys General used this authority sparingly, but there have been calls to use this power more aggressively.[148] Attorney General Jeff Sessions is doing just that.[149] Beyond issuing precedent decisions that change legal interpretations, during the first year of the Trump Administration, Department of Justice leadership took several steps to assert stronger control over the operational management of the Immigration Courts, which led to protests that their independence was in question.[150]

During the George W. Bush Administration, the Department of Justice emphasized the fact that members of the Board are mere employees "who

142. *See* Merrill, *supra* note 113, at 996.

143. 8 C.F.R. § 1003.1(d)(ii) (2008).

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

145. *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.").

146. *Id.*

147. *Id.*; *see also In re* D-J-, 23 I & N Dec. 572, 575 (A.G. 2003).

148. *See* Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841, 894–95 (2016). *But see* Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. ONLINE 129, 132–34 (2017) (arguing that the Attorney General's unique role in adjudication would make expansive use of political decision-making problematic).

149. *See* Dara Lind, *Jeff Sessions is Exerting Unprecedented Control Over Immigration Courts—by Ruling on Cases Himself*, VOX (May 21, 2018, 1:06 PM), https://www.vox.com/policy-and-politics/2018/5/14/17311314/immigration-jeff-sessions-court-judge-ruling.

150. *See* Memorandum from James R. McHenry III, Director, Exec. Office for Immigration Review, to The Office of the Chief Immigration Judge, All Immigration Judges, All Court Administrators, and All Immigration Court Staff (Jan. 17, 2018) (setting case completion targets for immigration court docket management).

[are] appointed by, and may be removed or reassigned by, the Attorney General."[151] Indeed, there have long been arguments that the BIA was never as independent from political interference as it should have been.[152] This view of the BIA raises an interesting thought experiment about the various explanations for deference. In most cases, the personal involvement of the Attorney General would not add technical expertise relative to the more specialized BIA, 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 equally 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 cases, 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.[153]

C. NON-REMOVAL IMMIGRATION

Immigration cases have been a challenge for the *Chevron* doctrine essentially from the beginning. In 1987, the Court decided *I.N.S. v. Cardoza-Fonseca*, which remains one of the seminal cases in U.S. asylum law.[154] The Court overruled an interpretation by the BIA, but in a majority decision authored by Justice Stevens the Court gave two explanations for this holding. First, the Court concluded that the question at hand could be decided based

151. 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. 1003); *see also* Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L REV. 369, 372–76 (2006) (describing reforms of the BIA and problems posed for independent immigration adjudication).

152. *See generally* Legomsky, *supra* note 144 (arguing that immigration adjudication should be transferred to an Article III court so as to provide it the required independence).

153. 8 U.S.C. § 1103(a)(1) (2012).

154. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987).

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."[155] 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."[156] *Chevron*, Justice Stevens suggested, was more appropriate when an agency applies laws to particular facts.[157] This was an early expression of doubt, from no less than the author of *Chevron* itself.[158] Had the Court embraced this approach, we might have had an early Step Zero limitation on the doctrine. But the Court abandoned it quickly.[159]

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.[160] Yet, in a 1992 case concerning eligibility for asylum, the government asked for application of *Chevron* deference,[161] but the Court made no reference to *Chevron* in its decision.[162] The Court clarified matters in *I.N.S. v. Aguirre-Aguirre*, another case concerning eligibility for asylum.[163] This time the Court affirmed that "[i]t is clear that principles of *Chevron* deference are applicable to this statutory scheme."[164] The Court explained that Congress has explicitly delegated to the Attorney General authority to decide questions of law under the Immigration and Nationality Act.[165] Deference did not seem determinative of the result, however. The Court agreed with the BIA's interpretation of the statute as the best reading of the text.[166] When a Court would have reached the same interpretation of a statute as the agency did, deference does not impact the result. 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

155. *Id.* at 453.

156. *Id.* at 446.

157. *Id.* at 448.

158. *See* Merrill, *supra* note 113, at 986 ("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.").

159. *Id.*

160. *Cardoza-Fonseca*, 480 U.S. at 445–48; *id.* at 453–55 (Scalia, J., concurring).

161. Brief for the Petitioner, I.N.S. v. Elias-Zacarias, 502 U.S. 478 (1992) (No. 90-1342), 1991 WL 11003946, at *23.

162. *See generally Elias-Zacarias*, 502 U.S. at 478 (making no mention of *Chevron* or of deference).

163. I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 424–25 (1999).

164. *Id.* at 424.

165. *Id.* (citing 8 U.S.C. § 1103(a)(1) (1994 ed., Supp. III)).

166. *Id.* at 425–26.

instance.[167] 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 statute, rather than have the court impose one.[168] The Court has used this rule in three asylum cases, *Negusie v. Holder* and two other per curiam decisions.[169] 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.[170] Because there was no statutory question involved, *Chevron was not applicable*, and thus may not be relevant to this analysis. 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.[171]

The Supreme Court's most recent full throated embrace of *Chevron* in an immigration case came in its 2014 decision in *Scialabba v. Cuellar de Osorio*, which concerned eligibility for a visa based on family sponsorship.[172] 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."[173] 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 caused some immigrant families to wait years to be reunified in the United States. Justice Kagan wrote that the statute "makes possible alternative reasonable constructions."[174] 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."[175] 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.[176]

It would not be true to say that the Court has been consistent in these cases, since the Court failed to address *Chevron* in an early case where it would

167. *See* Negusie v. Holder, 555 U.S. 511, 517 (2009).

168. *See* Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553, 1579 (2014).

169. *Negusie*, 555 U.S. at 517; Gonzales v. Thomas, 547 U.S. 183, 187 (2006); I.N.S. v. Orlando Ventura, 537 U.S. 12, 16–17 (2002).

170. I.N.S. v. Abudu, 485 U.S. 94, 96 (1988).

171. *See id.*

172. Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191, 2213 (2014).

173. *Id.* at 2203 (citations omitted).

174. *Id.*

175. *Id.* at 2207.

176. *Id.* at 2214 (Roberts, C.J., concurring).

seem to be applicable.[177] But after an early false start, and especially since *Aguirre-Aguirre*, the Court seemed to re-affirm the applicability of *Chevron* deference in immigration cases, especially in cases like *Negusie* and *Cuellar de Osorio*. Moreover, in several of these cases the deference impacted 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.[178] These cases are summarized in Table 1. But as we will see in Section III.D, the Court behaves very differently in how it applies *Chevron* in deportation related immigration cases.

TABLE 1

Immigration Cases Not Concerning Grounds of Deportation

Case	**Issue**	**Deference requested?**	***Chevron* mentioned by SCOTUS?**	**Deference applied by SCOTUS?**
I.N.S. v. Cardoza-Fonseca (1987)[179]	**Eligibility for Asylum** (definition of "well-founded fear")	Yes[180]	Yes[181]	**No**[182] (immigrant prevailed)
I.N.S. v. Elias-Zacarias (1991)[183]	**Eligibility for Asylum** (meaning of "on account of political opinion")	Yes	No	**No** (government prevailed)
I.N.S. v. Elias-Zacarias (1992)[184]	**Eligibility for Asylum** (meaning of "on account of political opinion")	Yes	No	**No** (government prevailed)

177. 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 generally* Kerry v. Din, 135 S. Ct. 2128 (2015) (making no reference to *Chevron* in the opinion).

178. *But see* Pereira v. Sessions, 138 S. Ct. 2105, 2113 (2018) (avoiding *Chevron* deference by finding clear meaning in a statute lower courts had found ambiguous). For further discussion of *Pereira*, see *infra* Section IV.C.

179. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987).

180. Brief for the Petitioner, I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987) (No. 85-782), 1986 WL 727528, at *9.

181. *Cardoza-Fonseca*, 480 U.S. at 447.

182. *See supra* note 150 and accompanying text.

183. I.N.S. v. Elias-Zacarias, 500 U.S. 915 (1991).

184. I.N.S. v. Elias-Zacarias, 502 U.S. 478 (1992).

I.N.S. v. Aguirre-Aguirre (1999)[185]	**Eligibility for Withholding of Removal** (exclusion for "serious nonpolitical crime")	Yes	Yes	**Yes**[186] (government prevailed)
Negusie v. Holder (2009)[187]	**Eligibility for Asylum** (persecution of others exclusion)	Yes[188]	Yes	**Ordinary remand rule applied**[189] (immigrant prevailed)
Judulang v. Holder (2011)[190]	**Discretionary relief from deportation** (criminal grounds of inadmissibility, not removal)	Yes[191]	Yes (in a footnote only)	**Yes** (arbitrary and capricious review, not *Chevron*)[192] (immigrant prevailed)
Holder v. Martinez Gutierrez (2012)[193]	**Discretionary relief from deportation** (cancellation of removal/duration of residence)	Yes[194]	Yes	**Yes**[195] (government prevailed)
Scialabba v. Cuellar de Osorio (2014)[196]	**Eligibility for Family-Based Visa**	Yes	Yes	**Yes**[197] (government prevailed)
Pereira v. Sessions (2018)[198]	**Discretionary relief from deportation** (cancellation of removal)	Yes[199]	Yes	**No** (immigrant prevailed)

185. I.N.S. v. Aguirre-Aguirre, 526 U.S. 415 (1999).

186. *Id.* 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*.").

187. Negusie v. Holder, 555 U.S. 511 (2009).

188. Brief for the Respondent at 10–11, Negusie v. Holder 555 U.S. 511 (2008) (No. 07-499), 2008 WL 3851621, at 10.

189. *Negusie*, 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 'giv[e] the BIA the opportunity to address the matter in the first instance in light of its own expertise." (alteration in original) (quoting I.N.S. v. Orlando Ventura, 537 U.S. 12, 16–17 (2002)).

190. Judulang v. Holder, 565 U.S. 42 (2011).

191. *Id.* at 52 n.7.

192. *Id.* at 52.

193. Holder v. Martinez Gutierrez, 566 U.S. 583 (2012).

194. Brief for the Petitioner, Holder v. Martinez Gutierrez, 566 U.S. 583 (2012) (Nos. 10-1542 & 10-1523), 2011 WL 5544816, at *33.

195. *Martinez Gutierrez*, 566 U.S. at 597–98.

196. Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191 (2014).

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

198. Pereira v. Sessions, 138 S. Ct. 2105 (2018).

199. Brief for the Respondent, Pereira v. Sessions, 138 S. Ct. 2105 (2018) (No. 17-459), 2018 WL 1557067, at *18–19.

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,"[200] and often focusing on analysis of state criminal codes. For purposes of 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."[201] Similarly, the Immigration and Nationality Act lists "burglary offense" as an aggravated felony that would trigger both removal and mandatory detention.[202] The problem is that definitions vary as to what constitutes a burglary.[203] The Model Penal Code defined burglary as breaking into any occupied structure, unless the building was open to the public or the perpetrator had permission to enter.[204]

But 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.[205] 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.[206] 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.[207] If the state definition of the crime is broader—meaning it criminalizes more conduct than the federal definition—then there would be

200. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006).

201. While this offense normally carries a ten-year *maximum* sentence, the Act enhances the penalty to a 15-year *minimum* sentence. *See* 18 U.S.C. § 922(g) (2012); *id.* § 924(b), (e)(1), (e)(2)(B)(ii).

202. 8 U.S.C. § 1101(a)(43)(G) (defining "burglary offense" as an "aggravated felony"); *id.* § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."); *id.* § 1226(c) (prohibiting release on bond for non-citizens with aggravated felony convictions).

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

204. *See* MODEL PENAL CODE § 221.1 (AM. LAW INST. 1985).

205. *See, e.g.*, Cal. Penal Code § 459 (2017); Nev. Rev. Stat. § 205.060 (2017).

206. *Taylor*, 495 U.S. at 598–602.

207. *Id.* at 599.

no categorical match.[208] 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.[209] 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.[210] 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.[211] The state burglary conviction at issue was "missing an element" from the generic definition of the crime.[212] 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*.[213] *Moncrieffe* concerned a legal resident of the United States who was arrested for marijuana possession.[214] He was convicted under a Georgia statute that punished both simple possession and distribution and sale of marijuana.[215] 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."[216] However, the federal law contained an exception for "distributing a small amount of marihuana for no remuneration."[217] Because the Georgia statute was broader—it swept in simple possession and distribution without

208. *Id.* at 601–02.

209. *See* Descamps v. United States, 570 U.S. 254, 257 (2013).

210. *See id.* at 264–65; Moncrieffe v. Holder, 569 U.S. 184, 190–91 (2013); Mellouli v. Lynch, 135 S. Ct. 1980, 1987 (2015).

211. *Descamps*, 570 U.S. at 258–59.

212. *Id.* at 276.

213. *Moncrieffe*, 569 U.S. at 184.

214. *Id.* at 188.

215. *Id.* at 192.

216. *Id.* at 193–94; 8 U.S.C. § 1101(a)(43) (2012).

217. 21 U.S.C. § 841(b)(4); *Moncrieffe*, 569 U.S. at 193–94.

remuneration, as well as actual sale—it was not a "categorical match."[218] 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.[219]

The import of this was that there was justification for the BIA to consider any other evidence once it was clear that the statutory elements of the conviction were overbroad.

There is good reason to think that the categorical approach inherently leaves little room for judicial deference.[220] In *Moncrieffe*, just as in *Descamps*, the word "Chevron" does not appear. This absence was more noteworthy in *Moncrieffe* because this case involved 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 BIA decided that it was bound to follow *Descamps* in immigration cases.[221] 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."[222] 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*.[223] To be clear, these cases are not all alike, and several of them on their own might not raise doubts about the viability of *Chevron*. In some cases the Department of Justice did not ask for deference, usually because there was no published BIA decision at issue.[224] In another case, the government asked for

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218. *See Moncrieffe*, 569 U.S. at 190 (contrasting the Georgia statute with its federal counterpart).

219. *Id.* (internal quotation marks omitted).

220. *See* Shannon M. Grammel, Note, Chevron *Meets the Categorical Approach*, 70 STAN. L. REV. 921, 935–38 (2018) (outlining the rationale behind the categorical approach).

221. Chairez-Castrejon, 26 I. & N. Dec. 349, 354 (BIA 2014), *superseded in part by In re* Chairez-Castrejon, 26 I. & N. Dec. 819 (BIA 2016).

222. *Chairez-Castrejon*, 26 I. & N. Dec. at 354.

223. *See infra* Table 2, notes 243–65.

224. *See, e.g.*, Brief for the Respondent, Moncrieffe v. Holder, 569 U.S. 184 (2013) (No. 11-702), 2012 WL 3803440, at *9–12; Brief for the Petitioner, Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007) (No. 05-1629), 2006 WL 3064108, at *19 n.12 (noting that the BIA had not issued a published

deference, but only in a footnote to its brief, and did not appear to demand *Chevron* deference specifically.[225] But those factors cannot explain the pattern. In two cases, *Nijhawan v. Holder* and *Torres v. Lynch*, Board decisions had been published and the government asked vigorously and at length for *Chevron* deference, the Court still ignored *Chevron* entirely in its decision.[226]

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 give deference. 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."[227] The government sought to deport an immigrant on the basis of a California statutory rape criminal statute which required only a three-year age difference if the purported victim was under 18 years old, thus criminalizing sex between a 21-year-old and a 17-year-old.[228] This case contained a published agency decision and a circuit split on the question.[229] A divided Sixth Circuit panel upheld the BIA.[230] The Supreme Court dispensed with *Chevron* in one sentence, stating: "[T]he statute, read in context, unambiguously forecloses the Board's interpretation."[231] 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.[232] If

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decision on the issue at hand). *But see* Brief for Respondent, Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010) (No. 09-60), 2010 WL 723015, at *11–14 (summarizing argument without asking for deference, despite a published en banc BIA decision).

225. Brief for the Respondents, Lopez v. Gonzales, 549 U.S. 47 (2006) (Nos. 05-547, 05-7664), 2006 WL 2474082, at *32 n.26 ("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.").

226. *Compare* Brief for the Respondent, Nijhawan v. Holder, 557 U.S. 29 (2009) (No. 08-495), 2009 WL 815242, at *14, *45–50 (arguing *Chevron* deference should be applied), *with* Torres v. Lynch, 136 S. Ct. 1619 (2016) (making no mention of *Chevron* or deference of any kind), *and* Nijhawan v. Holder, 557 U.S. 29 (2009) (same).

227. Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1568 (2017).

228. *Id.* at 1572–73.

229. *See id.* at 1567.

230. *Id.*

231. *Id.* at 1572.

232. *Compare* Pelayo-Garcia v. Holder, 589 F.3d 1010, 1014 (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, 1243 (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).

this statute is not ambiguous, it is difficult to imagine exactly what kind of statute would be considered ambiguous.[233]

The other case, *Mellouli v. Lynch*, concerned whether a Kansas misdemeanor conviction for possession of drug paraphernalia counted as a ground of removal for a "controlled substance violation" (but not an aggravated felony).[234] The BIA had previously published a decision which was on point.[235] But the Board's approach differed from the categorical approach that the Court had required in *Moncrieffe*.[236] *Moncrieffe* involved an alleged aggravated felony of drug trafficking, which in the immigration statute is more serious than simple possession.[237] 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.[238] 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* . . . ."[239] On the surface, this appears to be an emphatic Step One decision, except that the reason why the BIA's interpretation made "scant sense" was due to the Supreme Court's own decision in *Moncrieffe*, where the Court insisted on the categorical approach.[240]

These two groups of cases are summarized below in Table 2. 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 Section III.D. Consistently, in case after case in this category, the Court does not defer to the Attorney General (or the BIA). 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 in

233. *Cf.* Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1027 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part) ("Either reading has much to commend it . . . ."), *rev'd on other grounds*, Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017).

234. Mellouli v. Lynch, 135 S. Ct. 1980, 1984 (2015); *see also* 8 U.S.C. § 1227(a)(2)(B)(i) (2012) ("Any alien who at any time after admission has been 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, is deportable.").

235. *Mellouli*, 135 S. Ct. at 1988–89.

236. *Id.* at 1989.

237. *Compare* 8 U.S.C. § 1227(a)(2)(B) (classifying controlled substance violations generally as a removable offense), *with* 8 U.S.C. § 1101(a)(43)(B) (defining "illicit trafficking in a controlled substance" as an aggravated felony).

238. *Mellouli*, 135 S. Ct. at 1989.

239. *Id.*

240. *Id.* at 1988.

Moncrieffe might be such an example.[241] But if the Court cared about *Chevron* in these cases, it could simply categorize this is a Step One decision. In other cases the statutory language is decidedly ambiguous, if the concept of ambiguity is to have any coherency. To borrow Chief Justice Roberts' famous statement that to be a judge is to simply "call balls and strikes," [242] these are cases generally right down the center of the *Chevron* strike zone. And yet in those cases, *Chevron* does not impact the Courts' ruling, 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)[243]	**Definition of aggravated felony** (crime of violence/DUI)	No[244]	No	**No** (immigrant prevailed)
Lopez v. Gonzales (2006)[245]	**Definition of aggravated felony** (trafficking in a controlled substance)	Yes (but not explicitly *Chevron* deference)[246]	No	**No** (immigrant prevailed)
Gonzales v. Duenas-Alvarez (2007)[247]	**Definition of aggravated felony** (theft offense/aiding and abetting)	No[248]	No	**No** (government prevailed)
Nijhawan v. Holder (2009)[249]	**Definition of aggravated felony** (fraud or deceit)	Yes[250]	No	**No** (government prevailed)

241. Moncrieffe v. Holder, 569 U.S. 184, 190 (2013).

242. *Roberts: 'My Job is to Call Balls and Strikes and Not to Pitch or Bat,'* CNN (Sept. 12, 2005, 4:58 PM), http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/index.html.

243. Leocal v. Ashcroft, 543 U.S. 1 (2004).

244. Brief for the Respondents at 5, Leocal v. Ashcroft, 543 U.S. 1 (2004) (No. 03-583), 2004 WL 1617398, at *5 (noting that the BIA had followed circuit court case law, rather than issued its own interpretation of the statute).

245. Lopez v. Gonzales, 549 U.S. 47 (2006).

246. Brief for the Respondents, Lopez v. Gonzales, 549 U.S. 47 (2006) (No. 05-547), 2006 WL 2474082, at *32 n.26.

247. Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007).

248. Brief for the Petitioner, Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007) (No. 05-1629), 2006 WL 3064108, at *19 n.12.

249. Nijhawan v. Holder, 557 U.S. 29 (2009).

250. Brief for the Respondent, Nijhawan v. Holder, 557 U.S. 29 (2009) (No. 08-495), 2009 WL 815242, at *14–15, *45–50.

Carachuri-Rosendo v. Holder (2010)[251]	**Definition of aggravated felony** (trafficking in a controlled substance)	No[252]	No	**No** (immigrant prevailed)
Moncrieffe v. Holder (2013)[253]	**Definition of aggravated felony** (trafficking in a controlled substance)	No[254]	No	**No** (immigrant prevailed)
Mellouli v. Lynch (2015)[255]	**Criminal ground of removal** (definition of controlled substance violation, not aggravated felony)	Yes[256]	Yes[257]	**No**[258] (immigrant prevailed)
Torres v. Lynch (2016)[259]	**Definition of aggravated felony** (arson/jurisdictional elements)	Yes[260]	No	**No** (government prevailed)
Esquivel-Quintana v. Sessions (2017)[261]	**Definition of aggravated felony** (sexual abuse of a minor)	Yes[262]	Yes	**No**[263] (immigrant prevailed)
Sessions v. Dimaya (2018)[264]	**Definition of aggravated felony/Void for vagueness on grounds of removal**	Yes[265]	No	**No** (immigrant prevailed)

251. Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010).

252. Brief for the Respondent, Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010) (No. 09-60), 2010 WL 723015.

253. Moncrieffe v. Holder, 133 S. Ct. 1678 (2013).

254. Brief for the Respondent, Moncrieffe v. Holder, 133 S. Ct. 1678 (2013) (No. 11-702), 2012 WL 3803440.

255. Mellouli v. Lynch, 135 S. Ct. 1980 (2015).

256. Brief for the Respondent, Mellouli v. Holder, 134 S. Ct. 2873 (2014) (No. 13-1034), 2014 WL 6613094, at *45–52.

257. *Mellouli*, 135 S. Ct. at 1989.

258. *Id.* ("Because it makes scant sense, the BIA's interpretation . . . is owed no deference under the doctrine described in *Chevron*.").

259. Torres v. Lynch, 136 S. Ct. 1619 (2016).

260. Brief for the Respondent, Torres v. Lynch, 136 S. Ct. 1619 (2016) (No. 14-1096), 2015 WL 5626637, at *14.

261. Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017).

262. Brief for the Respondent, Esquivel-Quintana v. Sessions, *formerly* Esquivel-Quintana v. Lynch, 137 S. Ct. 1562 (2017) (No. 16-54), 2017 WL 345128, at *36–54.

263. Brief for the Respondent, Esquivel-Quintana, 137 S. Ct. 1562, 1572 (2017) (No. 16-54) ("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.").

264. Sessions v. Dimaya, 138 S. Ct. 1204 (2018).

265. Brief for the Petitioner, Sessions v. Dimaya, *formerly*, Lynch v. Dimaya, 138 S. Ct. 1204 (2018) (No. 15-1498), 2016 WL 6768940, at *24.

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

The cases in Table 2 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.[266] Immigration is generally 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."[267] Aggravated felonies are defined in one part of the Immigration and Nationality Act.[268]

Another section refers to this definition as setting out a ground of removal in administrative proceedings.[269] 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.[270] 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 Section 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.[271] Also, 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 the Interior's interpretation of the Endangered Species Act, even though that act has criminal as well as civil applications.[272] Nevertheless, the majority of the Sixth

266. Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1027 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part); *see also* Whitman v. United States, 135 S. Ct. 352, 353–54 (2014) (Scalia, J., statement regarding denial of certiorari).

267. *Esquivel-Quintana*, 810 F.3d at 1028.

268. 8 U.S.C. § 1101(a)(43) (2012).

269. *Id.* § 1227(a)(2).

270. *Id.* § 1326(b)(2); *id.* § 1327.

271. *See supra* notes 255–58.

272. *Esquivel-Quintana*, 810 F.3d at 1024 (discussing *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 704 (1995)), *overruled by* Esquivel-Quintana v. Sessions,

Circuit panel recognized that the Supreme Court had appeared to move away from deference, but relied on the non-removal immigration case law discussed above in Section III.C, which suggested that the application of *Chevron* was still required.[273]

The dual-use statute theory relies heavily on the traditional distinction between civil and criminal areas of law. But the civil-criminal distinction was pointedly attacked by five Supreme Court justices in the 2018 decision in *Sessions v. Dimaya*.[274] The key question in *Dimaya* was whether the same void for vagueness standard applied to deportation statutes in immigration cases as in criminal cases. The Court held that the standard is the same, albeit with a spit decision. Justice Kagan's opinion, which attracted four total votes, argued that the higher standard was necessary because of the "grave nature of deportation."[275] Justice Gorsuch concurred, but resisted carving out an exception only for deportation cases. He argued that many civil cases carry serious consequences, and thus questioned whether the civil-criminal distinction would ever matter.[276]

If the dual-use statute theory is not fully satisfactory, how else can we explain the Court's reluctance to apply *Chevron* deference? A slightly broader description of the pattern would suggest that in immigration cases the Supreme Court does not defer with regard to any grounds of removal based on criminal convictions, regardless of whether they are dual-use statutes. Descriptively, this captures *Mellouli*, *Moncrieffe* and other aggravated felony cases 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 placed on the formalistic civil-criminal distinction. The Court has said that "criminal laws are for the courts, not for the Government, to construe."[277] But even in the criminal context the Court has occasionally shown that 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.[278] Rather than focus on a

137 S.Ct. 1562 (2017). *But see* Whitman v. United States, 135 S. Ct. 352, 353–54 (2014) (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").

273. *Esquivel-Quintana*, 810 F.3d at 1024.

274. Sessions v. Dimaya, 138 S. Ct. 1204, 1217 (2018).

275. *Id.* at 1234 (internal quotation marks omitted).

276. *Id.* at 1231 (Gorsuch, J., concurring).

277. Abramski v. United States, 134 S. Ct. 2259, 2274 (2014).

278. *See* Touby v. United States, 500 U.S. 160, 167 (1991) (affirming the power to criminally punish the 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, 230 (2005) (mandatory sentencing factors must be proved to a jury).

formalistic bright line that may not exist, it is important to understand not just the general rule, but also 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 will."[279] 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. And it would permit this aggregation of power in the one area where its division matters most: the removal of citizens from society.[280]

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.[281] Justice Gorsuch has argued that the separation of powers concerns that weigh against deference on criminal law apply with equal force to some immigration contexts (and, apparently for Gorsuch, in all administrative contexts).[282] 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."[283] This suggests that the real explanation for non-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.

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279. Whitman v. United States, 135 S. Ct. 352, 353 (2014).

280. Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1027 (2016) (Sutton, J., concurring in part and dissenting in part) (citation omitted), *rev'd on other grounds sub nom.*, Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017).

281. *See, e.g.*, Jordan v. De George, 341 U.S. 223, 231 (1951) (conducting a void for vagueness examination of a ground of deportation because "[d]espite 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.").

282. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–56 (10th Cir. 2016) (Gorsuch, J., concurring) (questioning whether Judge Sutton's rationale against deference can be limited to dual use statutes).

283. Glen, *supra* note 15 (discussing the possibility of a "deportation-is-different" explanation for the Court's reluctance with regard to *Chevron*); *see also* Walker, *supra* note 15 (discussing the possibility that the Roberts Court may be reluctant to give deference in certain deportation cases).

E. PHYSICAL LIBERTY AND SEPARATION OF POWERS

Up to this point I have argued that the 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.[284] 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."[285]

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 the immense power that the federal government wields over the physical liberty of individuals, the judiciary should defer back to the executive 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, it has been recognized since the early days of the Republic that courts play a special role in safeguarding liberty. 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,

284. *See* Padilla v. Kentucky, 559 U.S. 356, 365 (2010) ("We have long recognized that deportation is a particularly severe 'penalty.'" (quoting Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893))); *Jordan*, 341 U.S. at 231 ("[D]eportation 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." (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948))). *See generally* Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299 (2011) (describing why deportation is a distinct area of the law).

285. Scott v. Illinois, 440 U.S. 367, 373 (1979).

> 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.[286]

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."[287] In a passage that reads today like a swipe at *Chevron*, Hamilton wrote:

> [A]s 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. . . .[288]

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.[289] The landmark case of *Gerstein v. Pugh* is especially informative because the Court there wrestled with what amounted to a separation of powers question.[290] In this case, the State of Florida used a procedure by which a suspect could be detained after a warrantless arrest based solely on a prosecutor having filed charges, with no judicial review of probable cause.[291] 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."[292]

IV. BEYOND DEPORTATION CASES

A. IMMIGRATION DETENTION

Given the competing potential explanations for why deportation cases are treated differently, immigration detention cases offer a critical test of alternative theories about the limits of *Chevron*. In the *Chevron* era, the

286. *Ex Parte* Bollman, 8 U.S. 75, 82 (1807).

287. THE FEDERALIST NO. 78 (Alexander Hamilton) (McLean ed., 1810) (internal quotation marks omitted).

288. *Id.*

289. *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.").

290. *Id.*

291. *Id.* at 116.

292. *Id.* at 117–18.

Supreme Court has heard fewer cases concerning detention of immigrants than cases related to the deportation of immigrants. However, these cases have the potential to provide a window of explanation into 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 immigrants.[293] Not all circuit courts have been 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.[294] 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.[295]

The Supreme Court's rulings thus far follow the same pattern illustrated in deportation cases. In the landmark case of *Zadvydas v. Davis*, the Court wrestled with whether a statute authorized indefinite detention of deportable immigrants.[296] The government asked for *Chevron* deference in favor its interpretation of the statute, which would have allowed indefinite detention.[297] The Court acknowledged that the statute in question was

293. Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 146–48 (2015).

294. *Compare* Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015) (failing to mention *Chevron* in a case concerning pre-removal mandatory detention), *rev'd sub nom.* Jennings v. Rodriguez, 138 S. Ct. 830 (2018), *with* Lora v. Shanahan, 804 F.3d 601, 609 (2d Cir. 2015) (applying *Chevron* to interpretation of the mandatory detention statute).

295. Das, *supra* note 293, at 149.

296. Zadvydas v. Davis, 533 U.S. 678, 682 (2001).

297. Brief for the Petitioners at 44, Reno v. Ma, 533 U.S. 678 (2001) (Nos. 99-7791, 00-38), 2000 WL 1784982, at *43–44.

ambiguous,[298] but resolved the case in favor of the immigrants using the doctrine of constitutional avoidance.[299] *Chevron* appears nowhere in the decision.

In *Martinez*, the majority opinion by Justice Scalia similarly made no mention of *Chevron* deference.[300] It was in this decision that Scalia famously said that a statute cannot be "a chameleon"[301] 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.[302]

Zadvydas and *Martinez* both tackled the issue of 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 was pending.[303] The Court again made no mention to *Chevron*, but it is less clear if the government asked for such deference. In this instance, the government asked for deference based on its plenary power over immigration, not based on *Chevron*.[304]

The pattern held in the 2018 decision in *Jennings v. Rodriguez*, which involved a challenge to long-term mandatory detention while cases are pending in Immigration Court. The Court's decision focused extensively on statutory interpretation, and it declined to immediately resolve the central constitutional challenge to mandatory detention.[305] In this case, the government made it clear that *Chevron* deference should apply.[306] *Jennings*, a case about statutory interpretation concerning administrative agencies, would appear to be a good candidate for *Chevron* to play some role. But, true to the historical pattern, neither the words *Chevron* nor defer appear anywhere in the decision.[307]

B. OTHER LIBERTIES

If I am correct in arguing that a physical liberty exception to *Chevron* deference exists, a question will arise about whether there are other administrative law contexts where there is an interest at stake so weighty that

298. *Zadvydas*, 533 U.S. at 697.

299. *Id.* at 690.

300. Clark v. Martinez, 543 U.S. 371 (2005).

301. *Id.* at 382.

302. *Id.* at 402 (Thomas, J., dissenting).

303. Demore v. Kim, 538 U.S. 510, 539 (2003).

304. Brief for the Petitioners, *Demore*, 538 U.S. 510 (2003) (No. 01-1491), 2002 WL 31016560, at *9.

305. *See* Michael Kagan, Jennings v. Rodriguez *Might Not Be About Immigration After All*, 36 YALE J. ON REG.: NOTICE & COMMENT (Mar. 2, 2018), http://yalejreg.com/nc/jennings-v-rodriguez-might-not-be-about-immigration-after-all.

306. Brief for the Petitioners, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204), 2016 WL 5404637, at *18, *52, *54.

307. *See* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

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 for those who believe *Chevron* has real value in many contexts, making an exception for physical liberty will be a real concern.[308] Certainly, the Constitution protects the right to own property as well as physical liberty, and many regulatory policies impact property rights. There are also strong critiques of *Chevron* that focus on broader conceptions of liberty, rather than the narrower focus on physical liberty presented in this Article.[309]

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. 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."[310] 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 narrower 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.[311] 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 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.[312] Moreover, the fact that the Court has given consistent force to *Chevron*

308. *See* Family, *supra* note 7, at 103 (noting that a potential alliance between immigration advocates and conservative critics of *Chevron* could pose a threat to the entire doctrine).

309. *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d, 1142, 1155 (Gorsuch, J., concurring) (arguing that administrative agencies have the power).

310. *Id.* at 1156.

311. *See supra* Section II.A.

312. *See* Scott v. Illinois, 440 U.S. 367, 373–74 (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, 160–61 (1968) (finding no right to a jury trial when the defendant is charged only with petty offenses).

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.[313] Usually this could be shown if the person is present in violation of the law[314] (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.[315] The deportation cases that I have discussed in Section III.C where the Court failed to apply *Chevron* arose when these grounds of removal were contested. But that is not the end of a typical case in Immigration Court. In fact, it is often only the beginning. In fact, in many cases removability is conceded immediately.

Once removability is established, the proceeding moves to a second stage at which the non-citizen may ask for relief from removal.[316] Potential relief takes many forms, but it includes protection from persecution abroad through asylum[317] and withholding of removal,[318] as well as discretionary cancellation of removal for long-time residents who have not been convicted of an aggravated felony.[319] Often, there is no dispute over the non-citizen's threshold removability, but eligibility for asylum is 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.[320]

On the question of whether *Chevron* should matter with regard to claims of relief, I can offer two different answers. The first answer is descriptive —what is the Court actually doing? The second answer is prescriptive—what should the Court do?

In cases concerning relief from removal the Supreme Court has been more willing to apply *Chevron*, dating back to its 1987 decision in *Cardoza-Fonseca*, and followed by *Aguirre-Aguirre* (1999), *Negusie* (2009), and *Martinez*

313. 8 U.S.C. § 1229a(c) (2012).

314. *Id.* § 1227(a)(1)(B).

315. *Id.* § 1227(a)(2) (setting out criminal grounds of removal).

316. *Id.* § 1229a(c)(4).

317. 8 C.F.R. § 208.14 (2018).

318. 8 U.S.C. § 1231(b)(3); 8 C.F.R § 208.16.

319. 8 U.S.C. § 1229b.

320. *See, e.g.*, Reyes v. Lynch, 842 F.3d 1125, 1129 (9th Cir. 2016) (holding, in an asylum eligibility case, that "[w]e 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").

Gutierrez (2012).[321] There are plausible arguments that may explain the Court's apparent inclination that *Chevron* should apply to relief from removal, but not to grounds of removability. 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.[322] The justices may perceive that deferring to congressional delegation is justified.

Before 2018, it would have been correct to say that the Court consistently applies meaningful *Chevron* deference in relief from removal cases. But this must be tempered by the Court's decision in *Pereira v. Sessions*.[323] This case concerned eligibility for cancellation of removal, which is a form of relief adjudicated in immigration court.[324] The lower court had found the statute ambiguous,[325] and the circuits had split how the statute should be understood.[326] Nevertheless, writing for an 8-1 majority, Justice Sotomayor found the statute "clear and unambiguous" and thus "the Court need not resort to *Chevron* deference, as some lower courts have done."[327] The majority issued a soft anti-*Chevron* decision, in that it renders Chevron irrelevant even in a case where many other judges found a statute unclear. This is notable because this was a relief from removal case, the kind of case in which the Court had previously appeared comfortable applying meaningful deference. It also drew a pointed rebuke from Justice Alito:

> Here, a straightforward application of *Chevron* requires us to accept the Government's construction of the provision at issue. But the Court rejects the Government's interpretation in favor of one that it regards as the best reading of the statute. I can only conclude that the Court, for whatever reason, is simply ignoring *Chevron*.[328]

Justice Alito is right; the Court was effectively ignoring *Chevron*. But that just begs the questions: Was this a case where *Chevron* should have applied?

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321. *See supra* Section III.C.

322. *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982).

323. *See generally* Pereira v. Sessions, 138 S. Ct. 2105 (2018) (considering eligibility for cancellation of removal).

324. *Id.* at 2109.

325. *Id.* at 2113.

326. *Id.* at 2114.

327. *Id.* at 2113.

328. *Id.* at 2121 (Alito, J., dissenting).

I am not convinced that using deference in relief from removal cases is more justified than in grounds of removal 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. Unlike an applicant for a visa (the topic at issue in *Cuellar de Osorio*) a person who is seeking asylum in a removal hearing is inside the United States and is entitled to due process.[329] The matters under review in court are legal definitions, not matters of discretion.[330] 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.[331] Thus, I argue that the Supreme Court should treat the interpretation of asylum eligibility as it does grounds of removability. 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.[332] This departs from the pattern observable in Supreme Court cases, but I would argue that Gorsuch got it right.

Nevertheless, there is a consistent pattern in the way the Supreme Court has applied or not applied *Chevron* in these cases, which suggests that the justices perceive claims for relief to be better candidates for deference than grounds of removal. While my main argument in this Article aims to describe, explain and defend the Court's practice—on relief from removal I am making the more ambitious claim that the Court should change its approach.

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.[333] Lenity requires that an ambiguous criminal statute be interpreted in the manner most favorable to the defendant.[334] Justice Scalia, as well as the Sixth Circuit's Judge Sutton, have argued that lenity should be invoked for

329. Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("Our cases have frequently suggested that a continuously present resident alien is entitled to a fair hearing when threatened with deportation . . . .").

330. *See* 8 U.S.C. § 1252 (2012) (prohibiting judicial review on matters of discretion); *see also* Diallo v. Holder, 715 F.3d 714, 716 (8th Cir. 2013) ("[T]here is no constitutionally protected liberty interest in discretionary relief from removal.").

331. *See supra* note 330 and accompanying text.

332. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1144 (10th Cir. 2016).

333. *See* Kristin E. Hickman, *Of Lenity,* Chevron*, and KPMG*, 26 VA. TAX REV. 905, 920 (2006) (discussing application of lenity and *Chevron* in tax cases).

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

dual use statutes, since they have a criminal law application.[335] Several scholars have also weighed in, favoring lenity when deportation is premised on a criminal conviction.[336]

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.[337] However, the Court (in an opinion by Justice Scalia) cited this footnote approvingly in a case concerning immigration detention,[338] and has said in at least one other context that ambiguities over grounds of removal should be construed in favor of the immigrant.[339] The Court has also indicated support for lenity in a case involving dual use statutes outside the immigration context.[340] The Court has more recently avoided the question.[341]

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.[342] In Judge Sutton's words, "[w]hen a single statute has twin applications, the search for the least common denominator leads to the least liberty-infringing interpretation."[343] 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 has a criminal application. One approach would suggest that deference does not apply to dual use statutes.[344] This might be thought of as

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335. *See* Whitman v. United States, 135 S. Ct. 352, 353 (2014) (denying cert.); Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1027–28 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part).

336. *See* Rebecca Sharpless, *Zone of Nondeference:* Chevron *and Deportation for a Crime*, 9 DREXEL L. REV. 323, 350 (2018); Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 GEO. IMMIGR. L.J. 515, 525–26 (2003). *But see* David S. Rubenstein, *Putting the Immigration Rule of Lenity in its Proper Place: A Tool of Last Resort After* Chevron, 59 ADMIN. L. REV. 479, 488–90 (2007) (arguing that lenity should be relevant in immigration cases only if deference to the agency fails to resolve all ambiguity, and that lenity should not apply with the same force that it does in criminal cases).

337. Leocal v. Ashcroft, 543 U.S. 1, 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.").

338. Clark v. Martinez, 543 U.S. 371, 380 (2005).

339. *See, e.g.*, I.N.S. v. St. Cyr, 533 U.S. 289, 320 (2001).

340. *See, e.g.*, Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687, 704 (1995) (discussing the Endangered Species Act); United States v. Thompson/Center Arms Co., 504 U.S. 505, 518 (1992) (discussing the National Firearms Act).

341. *See* David Hahn, Note, *Silent and Ambiguous: The Supreme Court Dodges* Chevron *and Lenity in* Esquivel-Quintana v. Sessions, MINN. L. REV. DE NOVO (Nov. 29, 2017), http://www.minnesotalawreview.org/2017/11/silent-and-ambiguous.

342. Crandon v. United States, 494 U.S. 152, 158 (1990).

343. Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1028 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part).

344. *See, e,g.*, Whitman v. United States, 135 S. Ct. 352, 353 (2014) (Scalia, J., statement respecting denial of certiorari).

a Step Zero formulation, because it articulated a limitation on when *Chevron* should apply. Another option would be to apply *Chevron*'s analytical 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.[345] This seems consistent with the manner in which the Court has tended to first attempt to resolve statutory ambiguity, and only if that fails, invoke lenity.[346] 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.[347]

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.[348] Based on the normative importance of liberty, she argues for "a presumption in favor of physical liberty" when interpreting statutes.[349] She notes that, much like lenity, this could lead either to not applying *Chevron* or to constraining the agency's actions when a statute is considered ambiguous under step one.[350] These are compelling arguments, but they are different than the thesis of this Article because they dictate how to resolve substantive interpretive questions of 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 the use of lenity in immigration cases, the Court has recently avoided re-affirming its application when presented with two opportunities to do so. In *Torres*, the BIA decided that jurisdictional elements of the aggravated felony definition should not count for the categorical approach.[351] Mr. Torres argued that the Court should apply lenity rather than *Chevron* because deportation is especially grave, and because the aggravated felony definition has a criminal application.[352] As we have seen in Section III.D, the government asked for deference, and the Court decided the case in favor of the government—but, did not mention *Chevron* deference, nor lenity.[353] In 2017, the Court decided

345. *See* Slocum, *supra* note 336, at 575; Rubenstein, *supra* note 336, at 517–19.

346. *See* United States v. Thompson/Center Arms Co., 504 U.S. 505, 518 (1992); *Crandon*, 494 U.S. at 168; *see also* Maracich v. Spears, 133 S. Ct. 2191, 2209 (2013); Kasten v. Saint–Gobain Performance Plastics Corp., 563 U.S. 1, 16 (2011); Chapman v. United States, 500 U.S. 453, 463 (1991).

347. Rubenstein, *supra* note 336, at 505–10.

348. Das, *supra* note 293, at 202–05.

349. *Id.* at 205.

350. *Id.*

351. *Id.*

352. Brief for the Petitioner at 18–20, Torres v. Lynch, 136 S. Ct. 1619 (2016) (No. 14-1096), 2015 WL 4967191, at *18–20.

353. *See supra* Section III.D.

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.[354]

The lenity question is unresolved and likely to re-emerge. I do not seek to resolve this question in this Article, and it is not necessary 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 Section III.B, 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.[355] 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* deference has declined.

Limiting *Chevron* deference re-asserts the judicial role in interpreting statutes, but it does not provide instructions on how the judiciary should approach a statutory interpretation. One could coherently argue that the severity of deportation calls for narrow interpretations. Or one could argue that lenity should apply in dual use statutes only which would keep 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 instead has re-asserted 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 receiving deference as of late.

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

354. *See supra* Section III.D.

355. *See* United States v. Castleman, 572 U.S. 157, 173 (2014) (holding that lenity only applies in cases of "grievous ambiguity"); Chapman v. United States, 500 U.S. 453, 463 (1991); United States 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.").

whether this constitutional argument is somewhat overstated.[356] As Jill E. Family explains in a recent article, the intersection of *Chevron* and lenity is opaque.[357] As she explains, lenity is really about how to interpret a statute, while *Chevron* is about who should do the interpretation.[358]

The claim to lenity skirts the central problem that courts face when reviewing deportation cases, which is the deportability of the non-citizen. Instead of focusing on the stakes of immigration enforcement, lenity asks courts 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 these cases as neither purely criminal nor purely administrative.[359] For these reasons, the Court should 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.[360] 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

356. *See* Hickman, *supra* note 333, at 935.

357. Family, *supra* note 7, at 116–17.

358. *Id.*

359. *See generally* CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW 3 (2015) (explaining the emergence of "crimmigration law" which is the "intersection of criminal law and procedure with immigration law and procedure").

360. Family, *supra* note 7, at 117.

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 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.