

Chevron's Asylum: Re-Assessing Deference in Refugee Cases

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WORKING PAPER

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I. Introduction

Chevron deference seems to be at the height of its powers in refugee and asylum cases, with the highest possible human consequences. Efforts by the Trump Administration to curtail eligibility for asylum may depend on how far courts are willing to go with deference to executive branch. In addition, this role of deference in refugee cases illustrates the potential for immigration questions to scramble the politics surrounding *Chevron* deference.¹ The fact that Trump-era immigration restrictions would rely on *Chevron* deference is at least a little ironic, since in its judicial nominations the Trump Administration has been portrayed as an opponent of the *Chevron* doctrine.² Democratic senators have attacked President Trump’s judicial nominees for lacking fealty to *Chevron* deference.³ And yet, immigrant rights advocates have recently joined conservatives in attacking *Chevron* and its progeny.⁴ The heightened importance of *Chevron* in refugee and asylum cases also stands in contrast to the diminished importance that this doctrine had played in other types of immigration cases, in which the Supreme Court has consistently ignored government requests for deference when considering legal grounds for deporting and detaining immigrants.

¹ Compare Brief of Amicus Curiae Senator Sheldon Whitehouse in Support of Respondent, *Kisor v. Wilkie*, No. 18-15 (2019) at 2 (argument from a Democratic senator that attempts to undermine deference to administrative agencies are “part of a larger strategy to disable public interest regulation.”) with Brief for Amici Curiae The National Immigrant Justice Center and the American Immigration Lawyers Association in Support of Petitioner, *Kisor v. Wilkie*, No. 18-15 (2019) at 2, 26-29 (argument from immigrant advocacy organizations that the Supreme Court is right to reconsider aspects of deference to agencies and that deference poses heightened problems in immigration cases) (hereafter “Brief of NIJC/AILA”).

² See, e.g., Michael McConnell, *Kavanaugh and the “Chevron Doctrine,”* DEFINING IDEAS (Hoover Institution) (July 30, 2018), available at <https://www.hoover.org/research/kavanaugh-and-chevron-doctrine>; Joshua A. Geltzer, *Trump’s Supreme Court might overturn a doctrine, but that won’t destroy the ‘administrative state’*, L.A. TIMES (Aug. 5, 2018), available at <https://www.latimes.com/opinion/op-ed/la-oe-geltzer-kavanaugh-administrative-state-20180805-story.html>; 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>.

³ 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>; Sen. Dianne Feinstein, *Dianne Feinstein: Why I’m voting ‘no’ on Brett Kavanaugh’s Supreme Court nomination*, LOS ANGELES TIMES (Sept. 16, 2018).

⁴ See Brief of NIJC/AILA (arguing against *Auer* deference).

A reassessment of whether deference to the executive branch makes sense when interpreting asylum law is critical right now, both because it may determine the resolution of high stakes cases in which people are in danger of grave harm, and because it may offer broader lessons about the relative strength of various justifications for this central doctrine in modern administrative law. The Supreme Court has avoided meaningful application of *Chevron* deference in two key types of immigration cases: grounds of removal and immigration detention.⁵ The Court has never explicitly explained this as a rule, but the pattern is clear, and it is consistent with a general principle that judicial deference is inappropriate when physical liberty is at stake.⁶ Or, as several authors have put it more bluntly: “Deportation is different.”⁷ And yet, *Chevron* deference has exerted a powerful and consistent influence on a closely related area of law that in practice effectively determines whether tens of thousands of people are deported every year: Eligibility for asylum.⁸ Recent decisions by President Trump’s attorneys general to narrow asylum protections rely explicitly and extensively on this deference, and are likely to test how far the courts are actually willing to go with it.

One of the earliest invocations of *Chevron* deference by the Supreme Court was an asylum case, *I.N.S. v. Cardoza-Fonseca*, and it remains a seminal case in the field of asylum law.⁹ But in many ways, the full importance of *Chevron* in asylum cases has become more clear in recent years at the circuit court level. This can be seen in cases debating the nexus clause of the refugee definition, a

⁵ See Michael Kagan, *Chevron’s Liberty Exception*, 104 IOWA L. REV. 491 (2019); Michael Kagan, *Chevron Goes Missing in an Immigration Case. Again*, YALE J. ON REG. NOTICE & COMMENT (March 19, 2019).

⁶ *Id.*

⁷ See Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299 (2011); Patrick Glen, *Response to Walker on Chevron Deference and Mellouli v. Lynch*, YALE J. ON REG. NOTICE & COMMENT (June 20, 2015) (discussing the possibility of a “deportation-is-different” explanation for the Court’s reluctance with regard to Chevron); Michael Kagan, *Chevron’s Immigration Exception, Revisited*, YALE J. ON REG. NOTICE & COMMENT (June 10, 2016) (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) (discussing the possibility that the Roberts Court may be reluctant to give deference in certain deportation cases).

⁸ See Kagan, *supra* n. 5 at 520, 537-539 (showing the Supreme Court has been consistently more willing to apply *Chevron* in relief from removal cases, especially asylum). *But see* *Pereira v. Sessions*, 138 S. Ct. 2105, 2129 (2018) (Alito, J., dissenting) (complaining that the Court had ignored *Chevron*, in an immigration case that did not concern deportation or detention).

⁹ *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

provision that effectively means that asylum-seekers will be denied protection and deported even when there is no doubt that they are in grave danger. The government has prevailed in much of this litigation by relying on *Chevron* deference.¹⁰ Close reading hints that judges in some of these cases have had doubts about the interpretations of the asylum statute offered by the Board of Immigration Appeals, but have affirmed removal orders solely because of deference to the agency.¹¹ In other words, these are cases where the *Chevron* revolution is really happening, and with the highest possible stakes.¹² Lives are literally at risk.

These patterns raise an important question: Why does the Supreme Court seem so comfortable with *Chevron* deference in asylum cases, when it has been reluctant to defer to the government on other kinds of deportation cases? More to the point, is this deference justified?

This question is urgent.¹³ The efforts of President Trump’s first Attorneys General to narrow eligibility for asylum may determine the fates of tens of thousands of asylum-seekers fleeing gang violence in Central America.¹⁴ In perhaps the most important change to the American understanding of what it means to be a refugee, Attorney General William Barr issued a decision eliminating family-based persecution as a basis for asylum.¹⁵ Barr acknowledged openly that this change goes against a well-developed body of circuit court case law,¹⁶ but emphasized the congressionally delegated power given to him to change interpretations of the law under *Chevron* and *Brand X*.¹⁷ However, even

¹⁰ See, e.g., *Reyes v. Lynch*, 842 F.3d 1125, 1133 et seq (9th Cir 2016) (affirming the BIA’s “particularity” and “social distinction” requirements for membership in a particular social group under *Chevron*); *S.E.R.L. v. Attorney Gen. United States of Am.*, 894 F.3d 535, 549 et seq (3d Cir. 2018).

¹¹ See, e.g., *S.E.R.L.*, 894 F.3d at 550 (critiques of the BIA interpretation “raise legitimate concerns ... [but] notwithstanding our concerns, we conclude that the requirements are reasonable and warrant *Chevron* deference.”)

¹² Cf. Michael Herz, *Chevron is Dead, Long Live Chevron*, 115 COLUM. L. REV. 1867 (2015) (“Despite all the attention, the ‘Chevron revolution’ never quite happens.”).

¹³ See Maureen Sweeney, *Enforcing/Protection: The Danger of Chevron in Refugee Act Cases*, 71 ADMIN L. REV. 127, 130 (2019) (“This question of deference can mean the difference between lifesaving protection and deportation back to danger.”).

¹⁴ See generally Fatma Marouf, *Becoming Unconventional: Constricting the ‘Particular Social Group’ Ground for Asylum*, 44 N.C.J. INT’L L. 487 (2019)

¹⁵ *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019).

¹⁶ *Id.* at 589 (“I recognize that a number of courts of appeals have issued opinions that recognize a family-based social group as a “particular social group” under the asylum statute.”)

¹⁷ *Id.* at 591- 592.

before that decision it was clear that the Department of Justice will defend its efforts to restrict asylum through heavy reliance on *Chevron*.¹⁸

The purpose of this paper will be to two-fold.

First, it will explore how *Chevron* deference appears to have had a significant impact in asylum law. It will identify the reasons why asylum applications may be different from other cases wither deportation is at stake. There are formalistic differences, beginning with the fact that asylum is a form of relief from removal, not a ground for removal. There may also be different concerns at play in this area of law, which may make agency expertise or political accountability more important.

Second, the paper will re-assess whether deference in asylum cases is warranted. This assessment builds, in part, on the theory that the Supreme Court has had good reason to not apply deference in deportation cases.¹⁹ Asylum cases are in every practical sense about deportation, and if anything the stakes for the immigrant are even higher in a case where there is a fear of severe human rights violations. This is not the case in all immigration cases that reach the federal courts.²⁰ But there is also good reason to doubt that the Attorney General and Board of Immigration Appeals have actually handled this area of law in a manner that supports a claim for deference. As Judge Posner wrote, “Deference is earned; it is not a birthright.”²¹ And yet, as we will see, there are cogent arguments justifying more deference in asylum cases than in other kinds of deportation cases. These arguments rest to a great extent on the premise that greater political accountability is a good thing when interpreting a statute. Yet, that proposition in effect encourages politicization of immigration adjudication, a phenomenon that is already happening, has proven to be highly controversial, and which may pose practical problems.

¹⁸ See, e.g., S.E.R.L., 894 F.3d at 539.

¹⁹ See generally, Kagan, *supra* n. 6, at 532-533.

²⁰ Cf. *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014) (applying *Chevron* deference in the denial of a family-sponsored visa application).

²¹ *Kadia v. Gonzales*, 501 F.3d 817, 821 (7th Cir. 2007).

Part II offers a brief primer for the uninitiated on the basic vocabulary of asylum and refugee law, especially as it relates to the definition of a “particular social group” and the requirement that a refugee must be in danger of a certain kind of reason. Part III summarizes, based on previous research, patterns in the Supreme Court’s use of *Chevron* deference in immigration cases, showing how asylum cases are treated differently than deportation and detention cases. Part IV looks at deference in circuit court case law on asylum, showing that *Chevron* has proven to be extremely influential in these cases. Part V assesses possible rationales for deference in asylum cases, and for why they might be treated differently than other immigration cases, and concludes that political accountability and presidential prerogatives over a foreign affairs offer the strongest justification for deference on asylum law. Part VI highlights the dilemma posed by politicization of adjudication. I conclude in Part VII.

II. A Brief Primer on Asylum

In order to qualify as a “refugee,” and thus in order to win asylum, a non-citizen must show that she is outside her country of nationality “and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”²² The refugee cases at issue in this Article area about the definition of “membership in a particular social group,” which has long been one of the hardest to interpret phrases in the refugee definition.

To be clear, there are a many high stakes questions about the United States’ asylum system and the Trump Administration has sought to change a number of policies which are currently the subject of litigation, but I will not attempt to address most of them in this Article. These issues include the question whether asylum-seekers may be forced to wait in Mexico while their

²² 8 U.S.C. § 1158(b)(1); 8 U.S.C. § 1101(a)(42)(A).

applications are pending, whether passing through a third country before reaching the southern border may be a bar to asylum, and whether entering the country illegally may be a bar to asylum. This article will not address these questions. I will instead focus solely on the legal definition of a refugee – the core eligibility criteria for asylum. The refugee definition is routinely contested in petitions for review of orders of removal filed by immigrants in the circuit courts of appeal. In these appeals, the Department of Justice has often relied on *Chevron* deference to defend limitations on eligibility for asylum.

The requirement that a refugee must fear persecution on account of an enumerated protected ground (race, religion, nationality, membership in a particular social group, or political opinion) is one of the harshest limitations in asylum law. It means that a person who is genuinely in danger of severe harm (“a well-founded fear of persecution”) will be denied and deported because she would not be persecuted for the right reason. Defining “membership in a particular social group” has proven especially fraught and has been the subject of legal to-and-fro since at least the 1990s, affecting cases of severe gender-based violence and also violence by criminal gangs who target families and children, among others. The other four grounds – race, religion, nationality and political opinion – all have their potential interpretive pitfalls, but have tended to be more straight forward. When a person flees imprisonment because he has participated in anti-government demonstrations, the crux of the case will be whether the evidence is strong enough that he is genuinely in danger, but there will not typically be a dispute that this type of danger would qualify. When a person makes an asylum claim because he says he has converted from one religion to another and that his government would lash him or torture him for doing so, there may be doubt about whether he is manufacturing the conversion to generate an asylum claim, but there will not usually be doubt that this kind of claim if credible should succeed. But when a person flees gender-based violence, or threats from a criminal group, it is not necessarily enough to show that she is

genuinely in danger, nor that she has already been a victim. These cases depend on the far more ambiguous category “membership in a particular social group.” The results are often strikingly harsh, because it leads judges to effectively say: I agree you will be killed or raped, but not for the right reason. A recent decision by the Eleventh Circuit illustrates this stark reality:

The Immigration Judge (IJ) denied relief because, although Perez-Zenteno was beaten and brutally raped and her daughter kidnapped, she failed to prove that she was persecuted on account of membership in a statutorily protected group. The social group offered was neither sufficiently particular nor socially distinct. ... Because we too agree that Perez-Zenteno has failed to establish membership in a particular social group, as defined by Congress, and because no nexus has been shown, we hold that the petition must be denied.²³

It is probably no surprise that the law in such cases would be hotly contested. And it may be in these cases that *Chevron’s* fullest potential power may be seen in action, with the gravest stakes on the line.

The Board of Immigration Appeals has long struggled to develop a coherent interpretation of “particular social group” and to apply it consistently.²⁴ From the mid-1980s until 2006, the BIA defined a social group by fundamental or immutable characteristics.²⁵ The BIA reached this understanding by applying a cannon of construction to the statute. Since “particular social group” appears in a list of other protected grounds, the principle of *ejusdem generis* called for interpreting this category to be analogous to race, religion, nationality and political opinion.²⁶ This interpretive approach was well-received by circuit courts, but the BIA began to move away from it.²⁷ Eventually, in 2014, the BIA added two new criteria. In addition to being defined by a fundamental or

²³ Perez-Zenteno v. U.S. Att’y Gen., 913 F.3d 1301, 1304 (11th Cir. 2019).

²⁴ See Marouf, *supra* n. 14, at 489 *et seq* (tracing the evolution of BIA jurisprudence).

²⁵ *Id.* at 489.

²⁶ See *Matter of Acosta*, 19 I.&N. Dec. 211, 233 (1985).

²⁷ See discussion, *infra*.

immutable characteristic, a particular social group must be “socially distinct” and “particularity.”²⁸ This new framework has largely been accepted by the circuit courts, although not without some resistance, as I will explain more shortly. As Fatma Marouf has noted, the BIA itself has struggled to provide consistent and coherent guidance about how the definition should be applied.²⁹

In 2018, Attorney General Jeff Sessions issued a major decision, *Matter of A-B*.³⁰ Sessions largely affirmed the BIA’s new test for a particular social group,³¹ but rejected a precedent decision that had allowed asylum claims from women fleeing domestic violence.³² The actual impact of *Matter of A-B* is disputed, however, because its holding is fairly narrowly. *Matter of A-B*, read narrowly, focused only on domestic violence-based asylum claims, and it does not even entirely foreclose some of them from succeeding. For example, the Fifth Circuit has affirmed *Matter of A-B*, but only after stating that it does not categorically exclude all domestic violence-based asylum claims, and stating that “*A-B* does not constitute a change in policy” because it relied on “standards firmly established in BIA precedents.”³³ Attorney General Sessions rejected the somewhat convoluted way the BIA had previously analyzed domestic violence cases, but did not offer direction about the kind of asylum claim that might succeed.³⁴ In fact, by discarding a convoluted but constraining BIA precedent, Attorney General Sessions may have opened the door for some Immigration Judges to use a simpler and broader definition of asylum eligibility. The Attorney General rejected a social group defined as “married women who are unable to leave the relationship,” but some immigration judges have since decided that domestic violence victims might instead be persecuted simply because they are part of the particular social group of “women,” full stop.³⁵

²⁸ See Marouf, *supra* n. 14, at 490.

²⁹ *Id.* at 490-491.

³⁰ 27 I&N Dec. 316 (A.G. 2018), *overruling* *Matter of A-R-C-G*, 26 I&N Dec. 338 (BIA 2014).

³¹ *Id.* at 330 *et seq.*

³² *Id.*

³³ *Gonzalez-Veliz v. Barr*, ___ F. 3d ___ (5th Cir 2019).

³⁴ Marouf, *supra* n. 14, at 492.

³⁵ *Id.* at 513-514.

In a number of respects, *Matter of A-B-* may be as much an example of political rhetoric as it is a precedent decision offering a legal interpretation. Attorney General Sessions offered a lengthy decision expressing skepticism about asylum claims based on fears of criminal actors, but this may be entirely *dicta*.³⁶ In line with Sessions' public rhetoric on asylum and immigration, he seemed to lecture asylum-seekers:

there are alternative proper and legal channels for seeking admission to the United States other than entering the country illegally and applying for asylum in a removal proceeding. ... Aliens seeking an improved quality of life should seek legal work authorization and residency status, instead of illegally entering the United States and claiming asylum.³⁷

The Attorney General's decision in *Matter of A-B-* echoes far broader concerns about Central American asylum-seekers arriving in large numbers at the U.S. southern border, with refugee claims based on fears of rampant gang violence. Its restrictive view of asylum eligibility is very much in sync with the Trump Administration's generally hostile and restrictive view of these migrants.³⁸ Narrowing eligibility for asylum makes it easier to deny and deport these asylum-seekers. It also bolsters public rhetoric arguing that they never had valid asylum claims anyway, although that claims depends on what should even be considered a valid asylum case.³⁹ This complementarity might be a compelling argument for giving the executive branch space to interpret ambiguous statutes in line with the President's policy agenda. But it might equally be a reason for concern that the notion of

³⁶ *Id.* at 343 ("No country provides its citizens with complete security from private criminal activity, and perfect protection is not required.").

³⁷ *Id.* at 345

³⁸ See, e.g., Dara Lind, *Trump wants to make asylum seekers' stay in the US harder — and shorter*, VOX (Apr. 30, 2019) <https://www.vox.com/2019/4/30/18523990/trump-asylum-border-new>.

³⁹ See, e.g., THE WHITE HOUSE, OUR NATION'S WEAK ASYLUM LAWS ARE ENCOURAGING AN OVERWHELMING INCREASE IN ILLEGAL IMMIGRATION (Nov. 1, 2018) (citing low final grant rates in asylum claims as a reason to reform asylum policy).

neutral adjudication has been seriously undermined, which might be a reason for federal courts to scrutinize decisions more rigorously.⁴⁰ I will discuss this concern in more detail in Section **Error!**

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Attorney General William Barr also issued a precedent decision on the definition of membership in a particular social group, and his decision may have more potential to upend the law governing asylum eligibility in the United States.⁴¹ Since 1985, the BIA had embraced “family” as a quintessential example of a particular social group.⁴² The full reach of this understanding was often contested, so that the BIA had raised caution that the validity of a family group may depend on “the degree of relationships involved and how those relationships are regarded by the society in question.”⁴³ Yet, the BIA had re-affirmed the essential validity of family-based refugee claims as recently as 2017.⁴⁴ In July 2019, Attorney General Barr overruled that decision, and issued a holding quite likely at odds with decades of established law, find that “in the ordinary case, a nuclear family will not, without more, constitute a ‘particular social group.’”⁴⁵ The Attorney General acknowledged that several circuit courts had held that family ties can in fact define a particular social group.⁴⁶ He argued that the circuit courts had gotten this wrong, and that some of their decisions had been undermined by later case law.⁴⁷ But he did not rely on this claim alone. He argued that he had the authority to replace the circuit courts’ interpretations with his own, first because Congress had explicitly delegated interpretation of the Immigration and Nationality Act to the Attorney General,⁴⁸

⁴⁰ See generally Barnett, *supra* n. 82, at 1023 (“challenges to adjudicators’ appearance of partiality are well positioned to be part of the new wave of structural challenges to the administrative state.”).

⁴¹ Matter of L-E-A-, 27 I.&N. Dec. 581 (A.G. 2019).

⁴² Matter of Acosta, 19 I.&N. Dec. at 233.

⁴³ Matter of L-E-A-, 27 I.&N. Dec. 40, 43 (BIA 2017).

⁴⁴ *Id.*

⁴⁵ *Id.* at 589.

⁴⁶ *Id.* (“I also recognize that certain courts of appeals have considered the requisite elements of a “particular social group” and ... have nonetheless suggested that shared family ties alone are sufficient to satisfy the INA’s definition of ‘refugee’”).

⁴⁷ *Id.* at 590.

⁴⁸ *Id.* at 591 (citing 8 U.S.C. § 1103(a)(1), which provides that “determination and ruling by the Attorney General with respect to all questions of law shall be controlling” under the INA.).

and second because of *Chevron* deference.⁴⁹ He stressed *Brand X* deference, because it requires *Chevron* deference “even in cases where the courts of appeals might have interpreted the phrase differently in the first instance.”⁵⁰

Barr’s reason for pre-emptively, and perhaps a bit defensively, citing *Brand X* is clear, given his acknowledgement that several circuits had already held that family can be the basis for a valid asylum claim. As of early October 2019, no circuit had issued a decision reviewing the Attorney General’s decision in *Matter of L-E-A*.⁵¹ However, the Fifth Circuit – which had actually never reviewed family as a social group – had already noted in *dicta*: “*Matter of L-E-A* is at odds with the precedent of several circuits.”⁵² It seems clear that if Barr’s new interpretation survives, it will likely be because of *Chevron* deference applied with full force.

III. Evolving Patterns of Deference in Immigration Appeals

Chevron deference involves two famous steps when an administrative agency interprets a statute which it administers.⁵³ The first is whether the intent of Congress is clear from the statute. 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.”⁵⁴ The most prominent justification for this deference is that it respects congressional intent to delegate interpretation of a law to the agency responsible for implementing it.⁵⁵ But the Supreme Court has

⁴⁹ *Id.* at 591-592 (“Congress thus delegated to the Attorney General the discretion to reasonably interpret the meaning of ‘membership in a particular social group,’ and such reasonable interpretations are entitled to deference.” Citing to *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*).

⁵⁰ *Id.* at 592, citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)

⁵¹ *Cf. Perez-Sanchez v. U.S. Att’y Gen.*, 935 F.3d 1148, 1158 FN 7 (11th Cir 2019) (declining to review the validity of *Matter of L-E-A* on the facts of the case presented).

⁵² *Pena Oseguera v. Barr*, 936 F.3d 249, 251 (5th Cir. 2019).

⁵³ *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.”).

⁵⁴ *Id.* at 843.

⁵⁵ *See 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.”).

offered other rationales as well. One is political accountability. The central idea here is that interpreting statutes often requires making policy choices, and these policy choices are better left to the executive branch than to the courts.⁵⁶ Another justification for deference is the proposition that agencies that technical expertise that helps them interpret complex statutes.⁵⁷

Deference by a court to an executive agency on a matter of statutory interpretation ought to require a compelling justification. Section 706 of the Administrative Procedure Act assigns to courts the responsibility to resolve “all relevant questions of law” and “constitutional and statutory provisions.”⁵⁸ Justice Antonin Scalia, a prominent proponent of *Chevron* deference for much of his career, warned early on that “it is not immediately apparent why a court should ever accept the judgment of an executive agency on a question of law.”⁵⁹ He wrote that in 1989. Today, it would seem even more urgent to examine whether there is a good reason for deference because the Supreme Court seems increasingly unsure about the doctrine. Some justices have directly questioned its constitutionality.⁶⁰ Even before these doubts surfaced explicitly, it had become clear that the Supreme Court has been extremely inconsistent in its application of *Chevron* deference.⁶¹ As Justice Kennedy wrote in an immigration case in his last term, “[I]t seems necessary and appropriate to reconsider . . . the premises that underlie *Chevron* and how courts have implemented that decision.”⁶²

⁵⁶ See *Chevron*, 467 U.S. at 865–66; 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).

⁵⁷ See *Chevron*, 467 U.S. at 865 (“Judges are not experts in the field.”). But See, Kagan, *supra* n. 5, at 501–502 (summarizing critiques of the technical expertise justification for deference).

⁵⁸ 5 U.S.C. § 706.

⁵⁹ Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 513.

⁶⁰ See *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *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.”).

⁶¹ See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 12 (2017); 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).

⁶² *Pereira v. Sessions*, 138 S. Ct. at 2121 (2018) (Kennedy, J., concurring).

Chevron deference would seem to have particularly strong foundations in immigration law, a field in which deference to the executive branch predated modern administrative law.⁶³ Congress has explicitly stated in the Immigration and Nationality Act that the Attorney General’s determination on questions of law “shall be controlling.”⁶⁴ In most cases, the Attorney General exercises this power through adjudication, either by decisions he makes himself, or through decisions by the Board of Immigration Appeals (BIA). In a 1999 asylum case, the Supreme Court said, “[i]t is clear that principles of *Chevron* deference are applicable to this statutory scheme.”⁶⁵ In 2014, the Court was more emphatic in a case concerning eligibility for a family-sponsored visa: “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.”⁶⁶ There are at least four Supreme Court immigration cases decided since 1999 in which the Court has meaningfully applied *Chevron* deference.⁶⁷ But none of these involved grounds of removal or immigration detention. In a recent study, I found that in many decisions “concerning the BIA’s interpretation of criminal grounds of removal the Supreme Court [have] simply failed to even mention the existence of *Chevron*.”⁶⁸ In other criminal ground of removal cases, the Court mentioned *Chevron* but avoided actually giving any deference.⁶⁹ It seems that *Chevron* matters a lot in some immigration cases, but not in others.

There is a longstanding question about whether the Supreme Court is ever consistent in applying *Chevron* deference, and about whether it should be. The Court itself has hinted at that it

⁶³ See generally Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

⁶⁴ 8 U.S.C. § 1103(a)(1).

⁶⁵ *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999).

⁶⁶ *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2213 (2014).

⁶⁷ See Kagan, *supra* n. 5, at 520-521.

⁶⁸ *Id.* at 524.

⁶⁹ *Id.* at 525-6.

does not expect itself to be rigorously consistent.⁷⁰ In an oft-cited study, William N. Eskridge, Jr., and Lauren E. Baer found broad inconsistency across more than 1000 Supreme Court cases where Chevron should have been applicable.⁷¹ Because of this inconsistency, Eskridge and others argued that “scholars are being unrealistic when they demand that the Supreme Court adopt and consistently apply formal deference regimes.”⁷² Instead, *Chevron’s* analytical framework offers “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.”⁷³ More recently, Natalie Salmanowitz and Holger Spamann have raised important doubts about the empirical basis for this skepticism about Supreme Court consistency.⁷⁴ In a replication study, they found – contrary to Eskridge and Baer – that the Court had actually been quite consistent.⁷⁵ The flaw in the original study was that it ignored whether the parties asked the Court to apply deference.⁷⁶ When the cases in which no one asked for deference in the briefs are removed from the analysis, the Court appeared to invoke *Chevron* quite consistently.⁷⁷

My own research is more narrow, focusing only on immigration cases, but it may offer a bridge between these two opposing views of whether the Supreme Court is consistent in applying *Chevron*. First, my study did take note of whether the government asked for *Chevron* deference, and found that this factor did *not* explain the Court’s failure to apply *Chevron* in certain types of

⁷⁰ See *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015) (*Chevron* deference is a method that the court says it “often” applies).

⁷¹ William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1124-25 (2008). See also 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, 1765-66 (2010).

⁷² *Id.* at 1735.

⁷³ *Id.* at 1766.

⁷⁴ Natalie Salmanowitz and Holger Spamann, *Does the Supreme Court Really Not Apply Chevron When It Should?* 57 INT’L REV. L. & ECON. 81 (2019).

⁷⁵ *Id.* at ____ (“Our reexamination of this study finds that the fraction of such cases is far lower, and indeed closer to zero.”).

⁷⁶ *Id.*

⁷⁷ *Id.*

immigration cases.⁷⁸ My study anticipated the type of nuanced analysis advocated by Salmanowitz and Spamann, but nevertheless found the following:

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*. 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. In another case, the government asked for deference, but only in a footnote to its brief, and did not appear to demand *Chevron* deference specifically. 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.⁷⁹

However, I also argued that Eskridge and his colleagues had erred in concluding that the Court's inconsistency was essentially idiosyncratic.⁸⁰ If that were a correct description, then it would be reasonable to conclude that the Supreme Court applies *Chevron* at best as a loose set of guiding principles, not as a binding rule. But what if it is not random? If clear patterns can be detected, they may help us better understand the situations in which the justices feel comfortable with deference,

⁷⁸ See Kagan, *supra* n. 5, at 524-525, 528.

⁷⁹ *Id.* at 524-525.

⁸⁰ Raso & Eskridge, Jr., *supra* note 71, at 1765. ("Idiosyncrasy in deployment (or not) of deference regimes is tolerated within the Court.").

and those where they do not.⁸¹ In other words, we should not be afraid to look for meaning and significance in the Court's failure to apply *Chevron* in cases where it would seem to be relevant.⁸²

Much like Salmanowitz and Spamann, I agree that we need to pay attention not just to the abstract normative question about *Chevron*'s applicability in a particular case, but to a longer list of factors that would make the Court's failure to apply deference more noteworthy.⁸³ As the justices seem to be growing more doubtful about *Chevron* deference, we should pay attention to both *loud* anti-*Chevron* decisions and *soft* anti-*Chevron* decisions.⁸⁴ The loud ones are decisions where the Court explicitly announced a limitation on *Chevron*.⁸⁵ The major cases exception for matters of "deep economic and political significance" in *King v. Burwell* would be an obvious example.⁸⁶ But we should also pay attention to soft decisions, where "where the Supreme Court failed to apply *Chevron* when it ostensibly should have mattered or applied it in such a way as to render the doctrine irrelevant."⁸⁷ These cases present themselves in two different ways, both evident in the Supreme Court's immigration jurisprudence. Sometimes, the Court simply fails to even mention *Chevron*, as if it doesn't even exist.⁸⁸ Other times, the Court mentions *Chevron*, but seems to give it no real force.⁸⁹ To be clear, a single soft anti-*Chevron* decision would not mean much. To paraphrase Freud, sometimes inconsistency is just inconsistency. But if there is a pattern, then it's not really inconsistency at all. Instead, the pattern indicates the circumstances in which the Supreme Court finds *Chevron* most

⁸¹ See Michael Kagan, *Loud and Soft Anti-Chevron Decisions*, 53 WAKE FOREST L. REV. 37, 40 (2018).

⁸² See Kent Barnett, *Why Bias Challenges to Administrative Adjudication Should Succeed*, 81 MO. L. REV. 1023, 1036 (2016).

⁸³ Kagan, *supra* n. 81, at 50 (noting factors such as: "1) whether the Supreme Court itself acknowledged lack of statutory clarity; (2) whether lower court judges were divided on the statutory meaning, providing an objective indication that the statute's meaning was subject to reasonable disagreement; (3) whether lower courts disagreed with the agency's interpretation, similarly indicating room for reasonable disagreement; (4) whether the lower court decision under review applied *Chevron*; and (5) whether the government asked for deference to the agency's interpretation.").

⁸⁴ Kagan, *supra* n. 81, at 40.

⁸⁵ *Id.* at 47-48.

⁸⁶ 135 S. Ct. 2480, 2488-2889 (2015).

⁸⁷ Kagan, *supra* n. 81, at 40, 48.

⁸⁸ *Id.* at 49

⁸⁹ *Id.*

applicable, and those for which it finds it inappropriate.⁹⁰ Such “soft” cases allow the Supreme Court to quietly test the appropriate boundaries of the doctrine, before eventually stating a rule.

When this kind of nuanced, factor-sensitive analysis is conducted in immigration cases, we do not find idiosyncrasy. Instead, we find a pattern. While the Supreme Court has applied *Chevron* deference in many types of immigration cases, it has quite consistently avoided meaningful deference in cases concerning grounds of removal and detention.⁹¹ *Chevron* avoidance is most clearly established in cases concerning grounds of removal, and most of these cases concern criminal grounds of removal. The typical version of this case involves a legal immigrant who is convicted of a state criminal offense, leading to a question of law about whether that conviction is one of the removable offenses listed in the Immigration and Nationality Act.⁹² One theory offered to explain these cases is that some of these grounds of removal are “dual-use” statutes, since the same ground of removal may be a civil ground for deportation in Immigration Court, and also an element in a criminal offense.⁹³ For example, a conviction that counts as an aggravated felony would allow for the removal of a legal resident.⁹⁴ But if a person re-entered the United States after an aggravated felony, it would constitute an element of a criminal offense as well.⁹⁵ Perhaps the reason these deportation cases are treated differently for *Chevron* purposes is that *Chevron* does not apply to elements of a criminal offense, and thus cannot apply to a dual use statute.⁹⁶

The dual-use theory does not explain the full pattern, for two reasons. First, the Supreme Court has also avoided meaningful *Chevron* deference in cases concerning grounds of removal that

⁹⁰ See *Id.* at 54.

⁹¹ See Kagan, *supra* n. 5, at 491, 495.

⁹² See, e.g., *Torres v. Lynch*, 136 S. Ct. 1619 (2016).

⁹³ See *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1027 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part, proposing the dual-use argument for avoiding *Chevron* deference).

⁹⁴ See 8 U.S.C. § 1101(a)(43) (2012) (defining an aggravated felony); *Id.* at § 1227(a)(2) (aggravated felony as a ground for removal).

⁹⁵ *Id.* § 1326(b)(2); *Id.* § 1327.

⁹⁶ See *Esquivel-Quintana v. Lynch*, 810 F.3d at 1027 (J. Sutton, concurring).

are not dual-use.⁹⁷ This was the case in *Mellouli v. Holder*, for instance, which involved removal for a purported violation of the Controlled Substance Act, but not for an aggravated felony.⁹⁸ In that case, the Court mentioned *Chevron*, but gave no real deference because, it said, the BIA’s interpretation of the statute made “scant sense.”⁹⁹ Second, and perhaps more important, the Court also avoids *Chevron* deference in cases involving immigration detention. This was true in two cases that are more than a decade old -- *Zadvydas v. Davis*¹⁰⁰ and *Clark v. Martinez*.¹⁰¹ It was also been true in a detention cases decided in 2018, *Jennings v. Rodriguez*,¹⁰² and one in 2019, *Preap v. Nielsen*.¹⁰³ Thus, it no longer is enough to say that deportation is different. Instead, it seems that deportation and detention are both different for *Chevron* purposes. I have explained this as a physical liberty exception to *Chevron*, on the theory that detention and deportation both involve deprivations of physical liberty, and non-deferential judicial review is especially sacred in this circumstance.¹⁰⁴

All of this still leaves *Chevron* deference very much intact with a wide range of immigration matters. One variety would be visa applications, which involve people wanting to come to the United States or sponsor their relatives to come.¹⁰⁵ Another concerns discretionary relief.¹⁰⁶ Another – and the most important for this Article – are claims for relief from removal, which includes asylum cases. Asylum law played a role in *Chevron*’s early history with the 1987 decision in *I.N.S. v. Cardoza-Fonseca*. The Court ignored *Chevron* (despite the Solicitor General requesting it) in a subsequent asylum case in 1991, *I.N.S. v. Elias-Zacarias*.¹⁰⁷ But since then the Court has been more consistent.

⁹⁷ See Kagan, *supra* n. 5, at 529-530.

⁹⁸ *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015).

⁹⁹ *Id.* at 1989.

¹⁰⁰ *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001).

¹⁰¹ *Clark v. Martinez*, 543 U.S. 371 (2005).

¹⁰² *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

¹⁰³ See *Nielsen v. Preap*, Slip Op. ___, No. 16-1362 (2019) (making no mention of *Chevron* deference in a case concerning immigrant detention where the parties had argued extensively about *Chevron*’s application).

¹⁰⁴ See Kagan, *supra* n. 1 at 532 *et seq.*

¹⁰⁵ See, e.g., *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014).

¹⁰⁶ See, e.g., *Judulang v. Holder*, 565 U.S. 42 (2011); *Holder v. Martinez Gutierrez*, 566 U.S. 583 (2012).

¹⁰⁷ *I.N.S. v. Elias-Zacarias*, 502 U.S. 478 (1992).

One of the most frequently cited invocations of *Chevron*'s applicability in immigration is another asylum case, *I.N.S. v. Aguirre-Aguirre*,¹⁰⁸ while another asylum case, *Negusie v. Holder*, became a vehicle for the Court to reinforce the ordinary remand rule.¹⁰⁹

One further caveat is important here, relating to the 2018 decision in *Pereira v. Sessions*.¹¹⁰ This case concerned eligibility for relief from removal, specifically cancellation of removal. The government asked for application of *Chevron* deference in the case.¹¹¹ But the Court did not defer. Justice Alito complained that the Court was ignoring *Chevron* as if it had been overruled “in a secret decision that has somehow escaped my attention.”¹¹² *Pereira* is thus a strong indicator that the Court is moving away from *Chevron* at least sometimes, but without clearly explaining what it is doing, leading to a period of unpredictability in the doctrine. Nevertheless, I believe we can state the following. The Supreme Court has consistently avoided meaningful application of *Chevron* deference in cases concerning grounds of deportation and detention. By contrast, it has usually applied deference in other types of immigration cases, although the trend may be to apply *Chevron* deference less and less. With this in mind, the next section will describe the outsized influence *Chevron* has had on asylum cases in the circuit courts.

IV. Deference in Circuit-Level Asylum Cases

To look for the practical impact of *Chevron* requires a search for a very particular sort of case. As a rule requiring deference, *Chevron* should make it easier for the government to win. But the government would win many cases when its interpretation of legislation is challenged anyway, even under *de novo* review. Moreover, even under a robust application of *Chevron*, the Government should

¹⁰⁸ *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 424–25 (1999).

¹⁰⁹ *Negusie v. Holder*, 555 U.S. 511, 517 (2009).

¹¹⁰ *Pereira v. Sessions*, 138 S. Ct. 2105 (2018).

¹¹¹ Brief for the Respondent, *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) (No. 17-459), 2018 WL 1557067, at *18–19.

¹¹² *Pereira v. Sessions*, 138 S. Ct. 2105, 2129 (2018) (Alito, J., dissenting) (citations omitted).

not always win, since *Chevron* does not call for an affirmance when the statute is clear or the agency's interpretation of it unreasonable. *Chevron's* true impact thus appears in a very specific kind of decision, where the court indicates that it might have ruled the other way, but for deference. Courts do not say this very often. In fact, I do not know of any ideal-type example in immigration law in which a court directly says, "I think the agency is wrong, and I would have ruled the opposite way under *de novo* review, but only because of the deference required I will affirm." But some recent cases litigating the boundaries of the asylum definition hint at this.

A case where *Chevron* appeared to have been decisive is a 2018 Third Circuit decision, *S.E.R.L. v. Attorney General*.¹¹³ The petitioner here was a Honduran woman whose daughter had already been granted asylum because the daughter had been abducted, raped and stalked by two men, including her step-father.¹¹⁴ The mother – the petitioner in the case that reached the Court of Appeals – feared they would abuse her, too.¹¹⁵ The Immigration Judge found her account of the facts to be credible, although the IJ quibbled some about how much the mother had actually been abused in the past.¹¹⁶ Regardless, the crux of the case was whether "S.E.R.L.'s proposed particular social group—immediate family members of Honduran women unable to leave a domestic relationship—lacked the requisite particularity and social distinction" to be considered a "particular social group" for purposes of asylum.¹¹⁷ The dual requirement that an asylum applicant show that the proposed group is particular and socially distinct was a departure from the longstanding test used by the BIA, known as the *Acosta* test, which had required that a particular social group be "a group of persons all of whom share a common, immutable characteristic."¹¹⁸

¹¹³ *S.E.R.L. et al v. Att'y Gen.*, 894 F.3d 535 (3d Cir. 2018).

¹¹⁴ *Id.* at 540.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 541.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 544, *citing* *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

S.E.R.L. was decided in 2018 but by that time the circuit courts had been battling with the Board of Immigration Appeals about the definition of a particular social group for more than a decade. The BIA had initially begun to tinker with the *Acosta* test in 2006.¹¹⁹ But its initial attempts did not fare well in the circuits, including in the Third Circuit.¹²⁰ Much of this concerned the BIA's attempts to impose a "social visibility" requirement, which several circuit courts had found to be inconsistently and unclearly defined in the Board's own case law.¹²¹ But the Board persisted, issuing two precedent decisions in 2014 that refined the criteria.¹²² In these cases, the Board replaced its failed "social visibility" test with a new "social distinct" criteria. Now, an applicant for asylum must show that she is persecuted on account of membership in a group that is "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question."¹²³ The BIA also clarified that particularity meant that the group must have "definable boundaries."¹²⁴ Social distinction meant not literal "visibility" but rather "whether the people of a given society would perceive a proposed group as sufficiently separate or distinct."¹²⁵

The new refinement to the particular social group has generally found a favorable reception in the courts of appeal, and as a result the BIA has succeeded in adding two narrowing criteria to the definition of a particular social group. For purposes of this Article, the important question is the role that *Chevron* played in the BIA's eventual success. The Third Circuit followed a textbook *Chevron* two-step analysis. The particular social group requirement was not clearly defined in the statute.¹²⁶

¹¹⁹ *Id.* at 546.

¹²⁰ *Id.* citing *Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582, 603-609 (3d Cir. 2011) (summarizing national litigation about the BIA's interpretation during this period).

¹²¹ *Id.* at 546-547.

¹²² *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (BIA 2014), and *Matter of W-G-R-*, 26 I. & N. Dec. 208 (BIA 2014).

¹²³ *Matter of M-E-V-G-*, I. & N. Dec. at 237.

¹²⁴ *Id.* at 239.

¹²⁵ *Id.* at 241.

¹²⁶ *S.E.R.L.*, 894 F.3d at 549.

The BIA’s new interpretation is reasonable, and so it was affirmed.¹²⁷ But the most telling part of the decision may be the way the court treated the arguments against the Board’s new standard, primarily that the BIA had not meaningfully refined an interpretation that had already been rejected, was acting inconsistently in different cases, and had acted against well-tested canons of construction.¹²⁸ The court said, “Those critiques raise legitimate concerns.”¹²⁹ The court examined the critiques extensively.¹³⁰ But the court concluded: “notwithstanding our concerns, we conclude that the requirements are reasonable and warrant *Chevron* deference.”¹³¹ This language is as strong an indication as we will ever normally find that *Chevron* deference was decisive to the outcome, because the court is signaling openly that it is sympathetic to critiques of the government’s new interpretation of the statute, but it is good enough for *Chevron* Step Two. Or, to put that another way, had this been *de novo* review, or maybe even *Skidmore* deference, the court might have ruled the other way.

The Third Circuit’s doubts about the Board’s interpretation do not seem to be unique. The Ninth Circuit affirmed the same BIA interpretation under a *Chevron* analysis.¹³² The Ninth Circuit did not communicate concerns about it as openly as the Third Circuit, but it found the BIA’s interpretation to be reasonable only after attaching to it a number of caveats about the degree to which it was really new.¹³³ The Seventh Circuit has apparently withheld judgment.¹³⁴

¹²⁷ *Id.* at 555.

¹²⁸ *Id.* at 549.

¹²⁹ *Id.*

¹³⁰ *Id.* at 549-555.

¹³¹ *Id.* at 550.

¹³² See *Garay Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016).

¹³³ See, e.g., *Id.* at 1135-1136 (“The BIA’s statement of the purpose and function of the “particularity” requirement does not, on its face, impose a numerical limit on a proposed social group. ... Nor is it contrary to the principle that diversity within a proposed particular social group may not serve as the sine qua non of the particularity analysis. ... The “social distinction requirement is not, as Garay contends, a “new” requirement.”).

¹³⁴ See *Melnik v. Sessions*, 891 F.3d 278, 286 FN 22 (7th Cir. 2018).

Two caveats are worth noting. First, it should come as no particular surprise that the circuit courts apply *Chevron* deference with more consistency and rigor than does the Supreme Court.¹³⁵ In some circuits, *Chevron* deference in immigration cases has a superficially separate life from Supreme Court case law, such that *Chevron* is not even cited in cases that clearly invoke the doctrine that we know as *Chevron* deference. This is the case in the Eighth Circuit, for example. Sometimes, the circuit will specifically state that it is applying *Chevron*.¹³⁶ But other times, it cites to its own case law.¹³⁷ This is to a large extent a formality, but it indicates symbolically the degree to which *Chevron* in the circuits is different than at the Supreme Court.

A second caveat is this: The government does not necessarily need *Chevron* to win in asylum cases. In nearly all of these cases, once the court affirms the Board's general framework of what may constitute a particular social group, it then examines whether the specific proposed group in that case could qualify. The Eleventh Circuit recently decided a case in which it was unsure whether *Chevron* applied to a single-member Board decision, but resolved in the alternative that the proposed group would fail under any interpretation of the statute.¹³⁸

Chevron deference in asylum cases is notable for two main reasons. First, on this subject the circuit courts are acting in line with Supreme Court tendencies, not in contrast to them. As we have already seen, the Supreme Court has avoided *Chevron* in grounds of removal cases, but it has more consistently applied it in asylum cases. Second, *Chevron* seems to be deciding high stakes cases at a time when its standing at the Supreme Court is in doubt. The Third Circuit stated this openly, in one

¹³⁵ See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1 (2017)

¹³⁶ See, e.g., *Cinto-Velasquez v. Lynch*, 817 F.3d 602, 606 (8th Cir. 2016) (“we give *Chevron* deference to the BIA's reasonable interpretation of this ambiguous statutory phrase.”); *De Guevara v. Barr*, 919 F.3d 538, 540 (8th Cir. 2019) (quoting the same).

¹³⁷ See, e.g., *Muiruri v. Lynch*, 803 F.3d 984 (8th Cir. 2015) (“the BIA's interpretation of immigration laws and regulations receives substantial deference.”), citing *Habchy v. Gonzales*, 471 F.3d 858, 862 (8th Cir. 2006) and *Bernal-Rendon v. Gonzales*, 419 F.3d 877, 880 (8th Cir. 2005) (we “accord substantial deference to the BIA's interpretation of immigration law and agency regulations”) citing *Tang v. INS*, 223 F.3d 713, 718–19 (8th Cir. 2000); *Ikenokwalu-White v. INS*, 316 F.3d 798, 804 (8th Cir. 2003).

¹³⁸ *Perez-Zenteno*, 913 F.3d at 1309.

of the several passages of its decision that seemed to signal misgiving about the legal interpretation that it affirmed: “The *Chevron* doctrine of deference to federal agencies is open to question, but it is the law, and it allows the BIA to change its statutory interpretation and still be entitled to full deference from Article III courts.”¹³⁹

V. Why Defer in Asylum Cases?

So far, my main point has been observational. *Chevron* does not seem to matter much in cases about immigration detention and grounds of removal. But it matters a lot in other immigration cases, and has been decisive in some extremely high stakes circuit cases about the boundaries of asylum law. The next question is normative. Is this pattern defensible?

Since the Supreme Court has said that *Chevron* deference should apply in all immigration cases, a baseline question is whether that proposition should be the actual rule. It is not what the Supreme Court has actually done. In my previous study of this issue, I argued that non-deference in grounds of removal cases is entirely appropriate because of a basic separation of powers concern:

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

¹³⁹ S.E.R.L., 894 F.3d at 545-555 (internal citation omitted).

judiciary should defer back to the executive branch on questions of law. This is too much power for one branch of government to have.¹⁴⁰

Of course, separation of powers is the foundation for a broader attack on *Chevron* writ large.¹⁴¹ For present purposes, I need not take a position on this broader attack. If *Chevron* is invalid in its entirety, then it is not applicable in asylum cases and we need not go any further. My argument is essentially more narrow. Separation of powers concerns should be especially heightened when deportation or detention is at stake, so that even if the Supreme Court does not overturn *Chevron* entirely, it is right to make an exception in these matters.

What do we make then of asylum cases? Why should *Chevron* play such an outsized role in high stakes asylum cases, when it does not in other deportation cases? There is a straightforward argument that they should be treated the same: Asylum cases are fundamentally about deportation, in that is what will happen if the government wins at in a petition for review in the federal courts. Moreover, these are deportation cases in which deportation is likely to subject a person to especially grave harm.

An argument may be made that there should be, if anything, less deference in asylum cases because the legal questions about the interpretation of the refugee definition invoke the implementation of an international treaty.¹⁴² The Supreme Court has long recognized that statutory eligibility criteria for asylum is a means of implementing treaty obligations, specifically obligations under the 1951 United Nations Convention Relating to the Status of Refugees.¹⁴³ Maureen Sweeney argues that instead of *Chevron*, interpretation of the refugee definition should be governed by the rule in *Murray v. The Schooner Charming Betsy*, which held that courts should avoid any interpretations of

¹⁴⁰ Kagan, *supra* n. 5, at 532.

¹⁴¹ See *Gutierrez-Brizuela v. Lynch*, 834 F.3d, 1142, 1154 (Gorsuch, J., concurring) (“Not only is *Chevron*’s purpose seemingly at odds with the separation of legislative and executive functions, its effect appears to be as well.”).

¹⁴² Sweeney, *supra* n. 13, at 179-187.

¹⁴³ *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 437-438 (1987); 189 U.N.T.S. 150 (July 28, 1951).

that clash with international law.¹⁴⁴ However, this argument may not fully resolve the question of whether *Chevron* should apply. The Supreme Court did not question the potential applicability of *Chevron* deference in the seminal case where it acknowledged the role of international law in asylum cases.¹⁴⁵ Also, the *Charming Betsy* doctrine could be invoked in the course of applying *Chevron*'s normal analysis, for instance by resolving statutory ambiguity at Step One. That would presumably constrain the amount of deference afforded to the executive branch without rejecting the *Chevron* doctrine outright.

There are several arguments that may justify *Chevron* deference in asylum law. These include formalistic differences between grounds of removal and asylum eligibility, special reasons for deference on matters of foreign affairs, reinforcing political accountability by deferring to political branches on policy choices, and expertise. I conclude that the political accountability rationale is the most persuasive, though it raises countervailing concerns about the use of administrative adjudication to make high stakes policy choices.

A. Formalism and Proof Burdens

Treating asylum eligibility different from grounds of removal flows naturally from the structure of removal proceedings. A standard case in Immigration Court begins with the Department of Homeland Security bearing the burden of proof to show that the respondent is removable from the United States.¹⁴⁶ The cases where the Supreme Court has avoided meaningful *Chevron* deference were decided at this stage. But once removability is established, the respondent has the opportunity to ask for relief from removal, or which asylum is just one variety.¹⁴⁷ The

¹⁴⁴ See Sweeney, *supra* n. 13, at 179-187; Murray v. The Schooner Charming Betsy, 6 U.S. 64, 118 (1804).

¹⁴⁵ Cardoza-Fonseca, 480 U.S. at 448.

¹⁴⁶ See 8 U.S.C. § 1229a(c) (2012).

¹⁴⁷ *Id.* § 1229a(c)(4).

respondent bears the burden of proof in applications for relief from removal, which operate in a manner loosely analogous to an affirmative defense in a criminal case.

The Supreme Court has in one important and very recent case ignored *Chevron* in adjudicating eligibility for relief from removal. *Pereira v. Sessions* concerned cancellation of removal, for which the calculating the length of residence in the United States is an important criteria.¹⁴⁸ The clock on residence in the U.S. stops when a removal proceeding begins – known as the stop time rule. But in *Pereira*, the Court found that time does not stop if the Notice to Appear that initiated removal proceedings was not completed properly. The lower court had found the statute ambiguous, leading to a *Chevron* analysis.¹⁴⁹ The Supreme Court found clarity in the statute that the lower court could not see, so that “the Court need not resort to *Chevron* deference, as some lower courts have done.”¹⁵⁰ This led to Justice Alito’s complaint that the Court was ignoring *Chevron* without overruling it,¹⁵¹ and to Justice Kennedy’s call for the Court to revisit the validity of *Chevron* entirely.¹⁵² The fact that this discussion among the justices occurred in a relief from removal case suggests that this formal distinction between removability and relief might not be a correct description of the Court’s pattern any longer. But for now, *Pereira* is just one data point and it appears to be an exception. Moreover, in *Pereira*, the majority did at least mention *Chevron* and purport to make a Step One decision, which it does not always do in removability cases.¹⁵³

Does the fact that the respondent, rather than the government, bears the burden of proof justify *Chevron* deference in some way? Allocation of the burden of proof is a different issue than allocation of responsibility for interpreting a statute, and it is by no means self-evident that one

¹⁴⁸ 138 S. Ct. 2105 (2018).

¹⁴⁹ *Id.* at 2113.

¹⁵⁰ *Id.* at 2113.

¹⁵¹ *Pereira*, 138 S. Ct. at 2129 (2018) (Alito, J., dissenting).

¹⁵² *Id.* at 2121 (Kennedy, J., concurring).

¹⁵³ *See Kagan, supra* n. 5, at 522 *et seq.*

should flow from another. It is important to remember in this context that the questions end up adjudicated in federal appellate cases under *Chevron* are questions about legal eligibility. Decisions that are discretionary are generally outside the courts' jurisdiction entirely.¹⁵⁴ But the fact that the respondent bears the burden may yet indicate something important. The reason the burdens of proof in deportation cases are allocated this way reflect the fact that on claims of relief, the respondent is trying to claim a benefit to which she is not by default entitled. By contrast, on removability the government is seeking to use force against someone (to deport them). It only arises when the government has already proven that she may otherwise be removed from the country. Thus, perhaps these differences make deference in relief from removal cases a less direct threat to separation of powers than in ground of removal cases.

It is important to note in this context that the fact that a respondent bears the burden of proof and the government gets *Chevron* deference on the law makes for a very steep hill to climb on appeal. The cases where circuit courts actually wrestle with the way the BIA has construed asylum law are relatively exceptional. It is far more common for asylum denials to be affirmed by deference to findings of fact, which are upheld if backed by substantial evidence. Circuit courts often rely on this even in cases that could raise legal disputes about the definition of a particular social group.¹⁵⁵

B. Expertise

¹⁵⁴ See 8 U.S.C. § 1252(a)(2)(B).

¹⁵⁵ See, e.g., *Paiz-Morales v. Lynch*, 795 F.3d 238, 245 (1st Cir. 2015) (rejecting a proposed particular social group “on the record in this case” only, based on a substantial evidence standard); *Velasquez v. Sessions*, 866 F.3d 188 (4th Cir. 2017) (affirming under substantial evidence for lack of nexus to a particular social group); *Cruz-Guzman v. Barr*, 920 F.3d 1033, 1038 (6th Cir. 2019) (“record did not compel” finding that the proposed ground caused the fear of persecution); *Bernal-Rendon v. Gonzales*, 419 F.3d 877, 881 (8th Cir. 2005) (“While petitioners correctly contend that a nuclear family can constitute a social group, petitioners fail to prove that a specific threat exists to their family as a social group.”). Cf. *Oliva v. Lynch*, 807 F.3d 53, 61 (4th Cir. 2015) (remanding for the BIA to consider all evidence about whether the proposed group met requirements).

A longstanding, but somewhat troubled, argument for deference is that executive agencies have an advantage over courts in terms of technical expertise on an area of law.¹⁵⁶ This is always a problematic foundation for *Chevron* deference, because *Skidmore* deference would seem sufficient for courts to take due account of technical explanations offered by experts.¹⁵⁷

Immigration cases nearly never involve any kind of scientific expertise. They almost always raise classic problems of fact and law, which would seem to dilute any claims that an executive body has a relative advantage compared to courts. That is especially so when the agency that would get deference operates through adjudication, using decision-making processes (briefing, examination of a record, reasoned written decisions) that mirror those of a court.¹⁵⁸ Deference sometimes might be justified by the complexity of a statutory scheme.¹⁵⁹ But the theory that the BIA has more expertise than federal courts cannot be accepted without a caveat:¹⁶⁰ The circuit courts of appeal decide *a lot* of asylum cases. The circuit courts thus do not necessarily lack expertise on the relevant questions of law. We know that judges tend to become less deferential as they encounter more and more cases in a particular area of law.¹⁶¹ The immigration cases where the Supreme Court has seemed most reluctant to defer have involved interpretations of criminal law, and constitutional due process. It would not be surprising for an Article III court would feel that no other branch of government has an advantage in resolving such problems. It could be that federal judges are more willing to defer on the interpretation

¹⁵⁶ 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) (historical origins of deference based on technical expertise). *But see* Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1, 11 (2013) (critiquing epistemological expertise as a ground for *Chevron* deference).

¹⁵⁷ See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514; Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1, 11 (2013);

¹⁵⁸ See Kagan, *supra* n. 5, at 513–517 (critiquing standard arguments for deference as applied to the BIA).

¹⁵⁹ 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).

¹⁶⁰ See also Sweeney, *supra* n. 13, at 174 (questioning the expertise rationale for deferring to the BIA).

¹⁶¹ See 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).

asylum law, which is famously amorphous, than on the interpretation of federal criminal law. But on the whole there is good reason to be skeptical that expertise is a fully convincing reason for disparate treatment between asylum and grounds of deportation.

C. Foreign Affairs

The application of *Chevron* in immigration cases flows naturally from the fact that immigration law is a species of administrative law. But the fact that immigration touches on foreign affairs is sometimes offered as an additional reason for granting *Chevron* deference.¹⁶² In a case about denying a visa to a would-be immigrant who was still outside the United States, the Supreme Court said:

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.¹⁶³

This rationale should not be accepted mechanically however, because not all immigration questions invoke foreign policy concerns in a meaningful way.¹⁶⁴ But perhaps this concern does offer a reason to see asylum and refugee cases differently from removability cases.

Removability cases are often mainly about interpreting American criminal law. They often involve the question of whether a state criminal conviction counts as a ground of removal under federal immigration law.¹⁶⁵ This problem calls for the categorical approach, assessing the where there is a match between a federal “generic” definition of a crime, and a particular state’s definition of an analogous crime. These cases spotlight the federal system of American government, and focus on

¹⁶² See, e.g., *S.E.R.L.*, 894 F.3d at 549; *Negusie*, 555 U.S. at 517.

¹⁶³ *Cuellar de Osorio*, 134 S. Ct. at 2213.

¹⁶⁴ See Matthew J. Lindsay, *Disaggregating “Immigration Law,”* 68 *Fla. L. Rev.* 179, 182–83 (2016).

¹⁶⁵ See, e.g., *Moncrieffe v. Holder*, 569 U.S. 184 (2013); *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017).

the interplay between federal law and the laws of the several states. Yet they do not implicate foreign affairs in any particularly obvious way, other than the fact that the respondent is a foreign national. All of the relevant law and facts are American. If these cases concern foreign affairs, then perhaps so do a wide variety of common contracts and torts cases that happen to involve foreign nationals. Asylum cases are different. In an asylum case, all the relevant facts are about events in a foreign country. The legal questions are about how to assess the conduct of foreign actors. These concerns may make the executive's authority over foreign affairs a more salient concern.

Foreign affairs concerns also offer a possible reason to distinguish asylum from cancellation of removal cases, like *Peireira v. Sessions*. Both cancellation and asylum are forms of relief from removal, but their substantive concerns are very different. While asylum focuses on persecution in a foreign country, cancellation of removal is exclusively domestic in orientation. One form of cancellation of removal is for long term legal residents, and is granted to eligible people as a matter of discretion.¹⁶⁶ Another form of cancellation benefits long term undocumented residents, and makes its central eligibility criteria a showing of “extreme and unusual hardship” to an American citizen or legal resident, should the respondent be removed from the country.¹⁶⁷ This focus on hardship for Americans (and US legal residents) turns the spotlight far away from foreign affairs. The typical fact finding in a cancellation of removal case will focus on the medical or educational needs of a disabled U.S. citizen child,¹⁶⁸ while an asylum case would focus on whether a police force in a foreign country is corrupt or repressive.

While there is a close conceptual fit between foreign policy concerns and asylum law, the case should not be overstated. First, asylum law is still law. It is not a matter of discretion, and if

¹⁶⁶ See 8 U.S.C. § 1229b(a).

¹⁶⁷ See 8 U.S.C. § 1229b(b).

¹⁶⁸ See, e.g., *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002) (educational opportunities for children); *Matter of Monreal*, 23 I&N Dec. 56, 63 (BIA 2001) (caring for elderly parents may qualify, or “a qualifying child with very serious health issues, or compelling special needs in school.”).

Congress had meant it to be tied directly to the foreign policy concerns of the day it might have made asylum more discretionary. We have an example of such an immigration status in the form of Temporary Protected Status, which is declared by the Secretary of Homeland Security for particular groups of immigrants, but it not something for which an individual can petition. Asylum law is drawn directly from an international treaty, the 1951 Refugee Convention.¹⁶⁹ In a sense, the key foreign policy choice was to incorporate this treaty into enforceable domestic immigration law. Once Congress did this, it is debatable whether shifting foreign policy concerns remained an interpretive concern. Moreover, as we have seen, this nexus to an international treaty is an argument for invoking the *Charming Betsy* doctrine, which would constrain the executive branch's interpretive leeway, and may narrow the scope of deference available.¹⁷⁰

Another problem with connecting foreign affairs interests with asylum is the administrative means by which asylum law is interpreted and administered. It is not handled by the State Department. Instead, it is interpreted through adjudication, primarily by the Board of Immigration Appeals, which is supposed to exercise independent judgment.¹⁷¹ It is not particularly clear why the BIA should be regarded as having any foreign affairs expertise, nor why its adjudications should be seen as a vehicle for foreign policy. Arguably, decisions by the Attorney General (who can overrule the BIA) may be more clearly tied to the President's agenda. But this system of adjudication would be put under considerable strain if the Attorney General appears to be implementing a policy agenda rather than engaging in neutral adjudication.¹⁷² I will explore this problem more *infra*. If anything, the history of asylum law indicates a desire to insulate these cases from foreign policy concerns.

¹⁶⁹ 8 C.F.R. § 1003.1(d)(ii) (2008) (““Board members shall exercise their independent judgment and discretion in considering and determining the cases.””).

¹⁷⁰ See discussion, *supra*, at Part V.

¹⁷¹ 8 C.F.R. § 1003.1(d)(ii) (2008).

¹⁷² 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).

D. Policy Choice and Political Accountability

The theory of *Chevron's* Step Two is that when there are two (or more) reasonable interpretations of a statute, the question depends at least partly on a policy choice.

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.¹⁷³

The Third Circuit eluded to such a policy choice in explaining why the Board of Immigration Appeals abandoned an interpretation of “particular social group” that had been widely accepted by the courts:

Eventually, the BIA determined that the *Acosta* test had proven to be over-inclusive and unworkable, in part because it encompassed virtually any past acts or experiences, since the past cannot be changed and is, by definition, immutable. Thus, in 1999, the BIA began supplementing the *Acosta* test with additional requirements.¹⁷⁴

The lynchpin of this shift was the assessment that the prior test had been over-inclusive. That is at its core a policy judgment. A reasonable person could just as easily conclude that the asylum definition is meant to be inclusive.

¹⁷³ *Chevron*, 467 U.S. at 865–66.

¹⁷⁴ *S.E.R.L.*, 894 F.3d at 545.

It is worth noting that there are a number of possible objections to applying this rationale to ambiguities in asylum law, among other topics. For one thing, just because a statute is difficult to interpret does not mean that the right answer cannot be found, nor that all interpretations are equally valid. Also, as with foreign affairs, the peculiar structure of immigration adjudication adds complexity to the policy choice rationale. It is supposed to be insulated from politics, and the election of a new president does not immediately change its membership. This severely weakens the argument for direct political accountability as a reason for deference *to the BIA*. The BIA made this particular policy shift over four presidential administrations. But here again the fact that the Attorney General has preeminence becomes very important. As I will return to *infra*, this political accountability is very real, and potentially quite responsive to political shifts in that a new Administration, through the Attorney General, can significantly transform asylum law. Indeed, the Trump Administration is using this power aggressively. But it is an open question whether greater politicization of asylum adjudication in the end strengthens or weakens deference, and whether it creates as many problems as it solves. Nevertheless, political accountability may be the single best argument for deference in asylum cases, especially to Attorney General decisions. Asylum is clearly a policy topic on which the country is divided. If the congressionally-enacted statute is not clear, it may make sense to leave the decision to a politically-appointed cabinet member, which in turn empowers voters to change course in the next presidential election. But this virtue is also a vice, as I will explain in the next section.

VI. The Dilemma of Politicized Adjudication

One of *Chevron's* key virtues is that it constrains political partisanship in the federal courts.¹⁷⁵ One way that *Chevron* arguably depoliticizes the courts by focusing on the political accountability of the other branches of government and shifting responsibility for the difficult choices to them. So far,

¹⁷⁵ See Kent Barnett, Christina L. Boyd, and Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1467 (2018).

my analysis has been that *Chevron* deference in refugee cases may be justified by judicial respect for the executive branch prerogatives over foreign affairs and more broadly by a desire to leave policy choices to the branches of government that are politically accountable to the electorate. However, there is an elephant in the room. The interpretations of statutory law that are typical in refugee cases are promulgated through adjudication of individual cases, in which certain cases are designated as precedents. This is an awkward mechanism by which to set foreign policy or to establish political accountability. Moreover, immigration adjudication in particular has been the source of considerable critique and controversy.¹⁷⁶

Administrative adjudication is always a strange animal, especially when adjudication is entrusted to a law enforcement agency, as it is in immigration cases with the Department of Justice. This puts an agency, and potentially a single official like the Attorney General, in a position where he must serve “as both judge and civil servant.”¹⁷⁷ Among administrative adjudicators, Immigration Judges stand out in that they work for a prosecuting agency, in the sense that the Attorney General defends orders of removal in federal appellate courts, much as a district attorney would defend criminal convictions on appeal.¹⁷⁸ When agencies act as adjudicators, they often appear to be mirroring the procedures of the judiciary. This is certainly the case in immigration adjudication, where the adjudicative body is called a “court,” although it is part of the Department of Justice, and it used an adversarial process with motions, briefs and judge-issued decisions that in function look much like a trial level court.¹⁷⁹ The BIA and the Attorney General designate certain decisions as precedent, much

¹⁷⁶ See Daniel E. Chand, *Protecting Agency Judges in an Age of Politicization: Evaluating Judicial Independence and Decisional Confidence in Administrative Adjudications*, 49 AMER. REV. PUB. ADMIN 395, 398 (2019) (“Controversy over independence of non-APA judges is most notable in immigration court, overseen by immigration judges (IJs), who make up the largest population of non-APA judges.”).

¹⁷⁷ *Id.* at 395.

¹⁷⁸ *Id.* at 399.

¹⁷⁹ Cf. Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 999-1000 (2011) (arguing that the appellate review model for agency rulemaking may invite too much judicial intervention, on the theory that the adjudication looks much like the judicial trial system).

the same way as circuit courts of appeal choose to “publish” some of their opinions to be binding precedent. Courts do this to constrain themselves through the rule of *stare decisis*, on the theory that a judicial decision is an application of rules of law, not political discretion.¹⁸⁰

If the virtue of executive branch decision-making is political accountability, then imitating the judiciary through the use of precedent would seem counterproductive. Just as respect for precedent promotes stability and consistency in the judicial branch, reliance on precedent in the executive branch constrains the President’s agenda.¹⁸¹ However, a new Administration that wants to change policy through adjudication does have options, as President Trump’s Attorney Generals have shown. The most straight forward mechanism would be for a new Attorney General to refer a new case to him or herself, and to use a new precedent decision, reversing the old precedent. That is what Attorney General Barr did with *Matter of L-E-A-*. But there is another potential route. A new administration might be able to discard an old rule with which it disagrees by simply declining to ask a reviewing court to apply *Chevron* deference.¹⁸² Some scholars have questioned whether agencies should actually be allowed to waive *Chevron* deference because this can become a means to circumvent regular decision-making processes.¹⁸³ However, for now this appears to be a potentially viable route.

The constitutional appropriateness of non-Article III adjudication rests on the Supreme Court’s longstanding view that Congress may delegate to the Executive Branch adjudication of “public rights” cases that deal with the relationship between the government and individuals subject

¹⁸⁰ See Michael Kagan, Rebecca Gill & Fatma Marouf, *Invisible Adjudication in the U.S. Courts of Appeals*, 106 GEO. L.J. 683, 701 (2018).

¹⁸¹ Amy Semet, *An Empirical Examination of Agency Statutory Interpretation*, 103 MINN. L. REV. 2255, 2260 (2019) (“When agencies rely on precedent to the exclusion of other tools, agencies may abdicate their responsibility to be democratically accountable by failing to fully consider [policy concerns].”)

¹⁸² See James Durling and E. Garrett West, *May Chevron be Waived?* 71 STAN. L. REV. ONLINE 183, 184 (2019); 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>.

¹⁸³ See Durling and West, at 184.

to its authority.¹⁸⁴ Christopher J. Walker notes that “political control over agency adjudication that implicates core life, liberty, or property interests potentially raises due process concerns.”¹⁸⁵ One response to this problem would be to transfer as much adjudication as possible to Article III courts, but this is an ambitious proposition.¹⁸⁶ Walker suggests that a more modest solution might be to strip adjudicatory decisions of *Chevron* deference, which would in effect mean that agency heads (like the Attorney General) would be restrained from using adjudication of individual cases to make major policy decisions.¹⁸⁷ Walker observes that this might be a way of implementing Chief Justice Roberts’ view that the public rights doctrine should be limited to administrative adjudicators who are “adjuncts” to the federal courts, in that their role would be limited mostly to findings of fact.¹⁸⁸ Yet, this approach would seem to reverse the rule in *Chenery II* that adjudication can be a means of establishing generally applicable rules.¹⁸⁹

Much seems to depend on whether politicization of adjudication is really a good thing. In theory, a benefit of having an agency head closely supervise adjudication is that it encourages consistency and control across disparate adjudicators.¹⁹⁰ However, in the immigration context the Attorney General’s personal involvement in adjudication is not necessary to establish consistent rules, since the Board of Immigration Appeals can issue precedent decisions of its own that are binding on all Immigration Courts. What the Attorney General’s involvement adds is politics. The Attorney General is a cabinet-level appointee of the President. By contrast, the BIA is actually designed to be explicitly insulated from politics.¹⁹¹ If political accountability is a good reason for courts to defer to an

¹⁸⁴ See *Crowell v. Benson*, 285 U.S. 22 (1932).

¹⁸⁵ Christopher J. Walker, *Constitutional Tensions in Agency Adjudication*, 104 IOWA L. REV. 2679, 2680 (2019).

¹⁸⁶ *Id.* at 2688.

¹⁸⁷ *Id.* at 2691.

¹⁸⁸ *Id.* at 2691-2692, discussing *Stern v. Marshall*, 564 U.S. 462, 489 n.6 (2011). See also Kim, *infra* n. 198, at 41-42 (noting the distinction between adjudicative and legislative facts); *Heckler v. Campbell*, 461 U.S. 458, 467-68 (1983).

¹⁸⁹ *S.E.C. v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 201-202 (1947).

¹⁹⁰ See Christopher J. Walker and Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. 141, 175-176 (2019).

¹⁹¹ See Kagan, *supra* n. 5, at 516-517.

agency, then the intervention of the Attorney General should make the argument for deference stronger. But that is a controversial proposition.

Recent interventions by the Attorney General in the Immigration Courts have made this question increasingly urgent. In addition to narrowing asylum eligibility criteria, President Trump's Attorneys General have asserted control over the way Immigration Judges manage their dockets procedurally. They have curtailed Immigration Judges' leeway to grant continuances.¹⁹² They have limited their authority to terminate cases,¹⁹³ and to administratively close them.¹⁹⁴ Attorney General Jeff Sessions spoke of the immigration courts as a tool of the Trump Administration's overall enforcement strategy.¹⁹⁵ There have been claims that the Administration is using ideology as a factor in hiring new immigration judges.¹⁹⁶ Catherine Kim and Amy Semet's empirical study of immigration court adjudication suggests that IJs are more likely to order removal under the Trump Administration than in prior administrations, regardless which President originally appointed the IJ.¹⁹⁷

These interventions have attracted considerable criticism.¹⁹⁸ Some scholars have argued that there was a longstanding assumption that presidents would not assert political control over adjudication.¹⁹⁹ Kim has noted that even advocates of presidential control over administration agencies have often seen adjudication as distinct.²⁰⁰ Rationales that favor political intervention in immigration cases bump against a competing concern: Should the respondent have a right to a neutral adjudicator?

¹⁹² Matter of L-A-B-R-, 27 I&N Dec. 405, 412-13 (A.G. 2018).

¹⁹³ Matter of S-O-G- and F-D-B, 27 I&N Dec. 462, 463 (A.G. 2018).

¹⁹⁴ Matter of Castro-Tum, 27 I&N Dec. 271 (A.G. 2018).

¹⁹⁵ U.S. Att'y Gen., Remarks Announcing the Department of Justice's Renewed Commitment to Criminal Immigration Enforcement (Apr. 11, 2017) ("We will secure this border and bring the full weight of both the immigration courts and federal criminal enforcement to combat this attack on our national security and sovereignty.").

¹⁹⁶ See Fatma Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TULANE L. REV. 707, 729 (2019).

¹⁹⁷ Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control Over Immigration Adjudication*, __ GEO. L. J. __ (forthcoming 2019).

¹⁹⁸ See, e.g., Marouf, *supra* n. 196; Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1 (2018).

¹⁹⁹ See Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1211 (2013).

²⁰⁰ Kim, *supra* n. 198, at 75 (noting that Elena Kagan's oft-cited arguments for presidential control over administration treated adjudication as distinct).

The idea that deference is warranted because it leaves space for policy choice, and thus for political accountability, suggests that it is actually a good thing for immigration adjudication to be driven by partisan or policy preferences. But such tendencies are rarely treated as a good thing.²⁰¹ Kim argues that political interference in immigration adjudication may be in tension with the rule in the canonical cases of *Londoner v. City of Denver* and *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado*.²⁰² These cases highlight the importance of a fair hearing when an individual is singled out for hardship by a government action, which is certainly the case in a deportation proceeding.²⁰³ Full and fair hearings are seen as essential in deportation and asylum cases; courts have criticized Immigration Judges who have indicated otherwise.²⁰⁴ Lower courts have said that in deportation proceedings “a neutral judge is one of the most basic due process protections.”²⁰⁵ But if policy choice is actually a virtue in interpretation of asylum law, what is the interplay between this concern and the demand for fair adjudication, which is itself rooted in constitutional due process? Why was the BIA established with explicit norms shielding it from political interference if politicization is actually desirable?

The history of the American asylum system indicates substantial efforts to shield asylum adjudication from policy concerns.²⁰⁶ A key innovation of the 1980 Refugee Act, which is the foundation of our asylum system, was the elimination of ideological limitations on refugee policy.²⁰⁷ The new Act made questions of law, not foreign policy, the central eligibility criteria, and eliminated

²⁰¹ See, e.g., *Colmenar v. I.N.S.*, 210 F.3d 967, 971 (9th Cir. 2000) (“the IJ behaved not as a neutral fact-finder interested in hearing the petitioner's evidence, but as a partisan adjudicator”).

²⁰² 210 U.S. 373 (1908) and 239 U.S. 441 (1915). See Kim, *supra* n. 198, at 37

²⁰³ *Id.* at 37.

²⁰⁴ See, e.g., *Shoaira v. Ashcroft*, 377 F.3d 837, 842–43 (8th Cir. 2004) (“near the beginning of the hearing, the IJ said, ‘I am one of those judges that is not the least bit interested with the process. I don't care about the procedure. I don't care about the process here. It's all for show.’ Taken in isolation and coming from a judge, this language is deplorable.”).

²⁰⁵ *Sanchez-Cruz v. I.N.S.*, 255 F.3d 775, 779 (9th Cir. 2001) (internal quotations omitted).

²⁰⁶ See Robert M. Cannon, *A Reevaluation of the Relationship of the Administrative Procedure Act to Asylum Hearings: The Ramifications of the American Baptist Churches' Settlement*, 5 ADMIN. L.J. 713, 722–23 (1991) (“The determination of whether an individual fits within the definition of a refugee is meant to be free of considerations of ideology, foreign policy, and geographic origin.”).

²⁰⁷ See Shane M. Sorenson, *Immigration and Naturalization Service v. Cardoza-Fonseca: Two Steps in the Right Direction*, 3 ADMIN. L.J. 95, 99 (1989).

the Attorney General's discretion about whether to withhold removal when a person had shown she is in danger of persecution under international law.²⁰⁸ Subsequent reforms to the asylum system Circuit courts have at times criticized the BIA if it appears overly dependent on State Department assessments.²⁰⁹ The asylum system was reshaped in 1990 by the settlement in *American Baptist Churches v. Thornburgh* (known as the "ABC settlement"), in which the government agreed to issue new regulations making clear that

foreign policy and border enforcement considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution [and] the fact that an individual is from a country whose government the United States supports or with which it has favorable relations is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution.²¹⁰

The ensuing regulations established a specialized asylum corps, broadened the evidence that should be consisted in asylum adjudication, and reduced the role of the State Department.²¹¹ The Supreme Court has since avoided deciding whether the United States can deny a refugee claim solely on foreign policy grounds.²¹² All of these measures, with the ABC Settlement being most explicit, seem to suggest that political interference in asylum adjudication is not a good thing – and thus not a good reason to defer to the outcomes.

During the Trump Administration, aggressive interventions in immigration and asylum adjudication by the Attorney General put new pressure on the already difficult question about the role

²⁰⁸ *Id.* at 104 ("the Refugee Act removed the words "in his opinion" from section 243(h). This eliminated the Attorney General's discretionary power to withhold deportation. The Act mandates relief if the statutory requirements of that section are satisfied.").

²⁰⁹ See Eliot Walker, *Asylees in Wonderland: A New Procedural Perspective on America's Asylum System*, 2 NW. J. L. & SOC. POL'Y 1, 11 (2007).

²¹⁰ *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991)

²¹¹ See Joan Fitzpatrick & Robert Pauw, *Foreign Policy, Asylum and Discretion*, 28 WILLAMETTE L. REV. 751, 758 (1992).

²¹² See *Id.* at 751 (discussing *I.N.S. v. Doherty*, 502 U.S. 314 (1992)).

of policy preferences in asylum cases. While the Attorney General has long had the power to adjudicate high stakes cases rather than leave them to the BIA, not every Attorney General has done so to the same degree, and there is considerable debate about whether it is a good thing.²¹³ It is clear that President Trump's Attorney Generals are using this authority to its fullest extent.²¹⁴ It has long been clear that immigration judges are mere "employees" of the Department of Justice, but the trappings and procedures of the Immigration Courts blurred this classification, allowing the Immigration Courts to look and function much like a regular court.²¹⁵ But recent changes have challenged that, including a number of new requirements that immigration judges manage their dockets in particular ways and decision to remove tools that the judges had to delay of close cases without issuing a removal order. These interventions have raised public concern about the neutrality of the immigration courts.²¹⁶

Of particular relevance here are the interventions of Attorney General Jeff Sessions in asylum law, which were both rhetorical and substantive. While he was Attorney General, Sessions made two speeches to immigration judges in the Executive Office for Immigration Review (EOIR) in which he used rhetoric deriding asylum claims, and asylum-seekers' attorneys, in terms that are difficult to imagine coming from an Article III judge in Article III. In one, he said that "case law that has expanded the concept of asylum well beyond Congressional intent" and that "we also have dirty immigration lawyers who are encouraging their otherwise unlawfully present clients to make false claims."²¹⁷ In another, he spoke to a group of new immigration judges, complaining that

²¹³ 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).

²¹⁴ See Dara Lind, *Jeff Sessions is Exerting Unprecedented Control Over Immigration Courts—by Ruling on Cases Himself*, VOX (May 21, 2018), <https://www.vox.com/policy-and-politics/2018/5/14/17311314/immigration-jeff-sessions-court-judge-ruling>.

²¹⁵ 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).

²¹⁶ See, e.g., Emma Platoff, *Immigration judges are expected to be impartial. But they work for Jeff Sessions*, THE TEXAS TRIBUNE (Aug. 15, 2018) <https://www.texastribune.org/2018/08/15/immigration-judges-report-prosecutors-jeff-sessions-justice-department/>; Priscilla Alvarez, *Jeff Sessions is Quietly Transforming the Nation's Immigration Courts*, THE ATLANTIC (Oct. 17, 2018), <https://www.theatlantic.com/politics/archive/2018/10/jeff-sessions-carrying-out-trumps-immigration-agenda/573151/>.

²¹⁷ ATTORNEY GENERAL, REMARKS TO THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (Oct. 12, 2017).

[g]ood lawyers, using all of their talents and skill, work every day – like water seeping through an earthen dam – to get around the plain words of the INA to advance their clients’ interests. Theirs is not the duty to uphold the integrity of the act.²¹⁸

Part of these remarks is a view that asylum law had been interpreted too broadly is the same as the reason the BIA began narrowing the definition of a particular social group. But while this may be a defensible legal view, the assertion that lawyers who argue the opposite position are acting against the “integrity” of the law and may be “dirty” is a step beyond the collegiality normally expected in the legal profession. If this were said by a judge in another context – if for instance a judge hearing criminal cases said that defense lawyers are “dirty” and that arguments favoring defendants endangered the integrity of the law – there would be clear arguments that due process was violated. Circuit courts have reminded immigration judges that they “must assiduously refrain from becoming advocates for either party.”²¹⁹ Due process is violated when an immigration judge appears to have prejudged the merits of asylum claims.²²⁰ It certainly seems that Attorney General Sessions did that.

Before the election of Donald Trump, Alberto Gonzales and Patrick Glen argued that the President should make greater use of the Attorney General’s authority to reshape immigration law by issuing precedential decisions.²²¹ They argued that this mechanism was more legitimate than executive actions such as President Obama’s Deferred Action for Childhood Arrivals program (DACA), “thus may be a less controversial method by which to advance immigration policy.”²²² The Trump Administration has followed their recommendations, and has successfully illustrated the potential reach of the Attorney General’s power to change the law, if courts do not intervene. But

²¹⁸ ATTORNEY GENERAL, REMARKS TO THE LARGEST CLASS OF IMMIGRATION JUDGES IN HISTORY FOR THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (Sept. 10, 2018).

²¹⁹ *Aguilar-Solis v. I.N.S.*, 168 F.3d 565, 569 (1st Cir. 1999).

²²⁰ *See Cano-Merida v. I.N.S.*, 311 F.3d 960, 964 (9th Cir. 2002).

²²¹ Alberto R. Gonzales and Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority*, 101 IOWA L. REV. 841 (2016).

²²² *Id.* at 847.

the promise that this mechanism would defuse controversy has not been borne out. Instead, asylum adjudication has been inserted into the realm of presidential immigration law, where key policies are no more stable than the political fortunes of a particular president or presidential candidate.²²³ In September 2019, more than a year before the next presidential election, at least one prominent Democratic candidate for president had promised to reverse Attorney General Jeff Sessions' decision in *Matter of A-B*.²²⁴ This is not necessarily a bad thing, if the political accountability theory of Chevron is taken as face value. However, the most likely result is instability and inconsistency, as policies shift with the election cycles. Given that we are talking here about interpretation of statutory texts that have not in fact changed, this instability might unsettle some judges and make some more hesitant to defer the legal interpretations of an ever more volatile executive branch.

VII. Conclusion

So long as *Chevron* survives, and so long as it applies at least some of the time, asylum cases seem offer a unique challenge. *Chevron* has been at the height of its powers in these cases. The stakes are incredibly high in these cases; claimants are typically at risk for physical harm of the gravest kind. Circuit courts have signaled that they might not always affirm limitations on asylum eligibility were they not required to apply deference. And, while the Supreme Court decides few of these cases, it has seemed much more comfortable invoking *Chevron* deference in asylum cases than in other kinds of immigration cases, especially compared to cases concerning grounds of removal and detention.

There are compelling reasons to see asylum cases as more amenable to deference than other legal questions that determine whether a person will be deported. These focus on the nexus to foreign affairs, and the important role asylum policy plays migration policy generally. Certainly, in a

²²³ See Michael Kagan, *The New Era of Presidential Immigration Law*, 55 WASHBURN L. J. 117 (2015).

²²⁴ Read the full transcript of ABC News' 3rd Democratic debate, ABCNews.com (Sept. 13, 2019) (Fmr. Vice President Biden: "I would change the order that the president just changed, saying women who were being beaten and abused could no longer claim that as a reason for asylum.").

democracy there is value in giving voters a greater say in policy choices. If political accountability is indeed a good reason for courts to defer, than politicization of asylum adjudication is not really a problem. But that seems far too simplistic. Courts are thus likely to be torn between their inclination to allow space for policy-making, and a well-established commitment to neutral adjudication. There are statutory and historical reasons to think that politics is actually not meant to play a major role in asylum cases. The central problem is that political accountability and neutral adjudication are both potentially positive virtues in an administrative system, but it is difficult to bring them both to bear at the same time.

As the executive's policy preferences appear to become more and more determinative, concerns about the neutrality of asylum adjudication are likely to increase with equal and proportional force. Moreover, while asylum policy is certainly a hot political issue, the refugee definition is a pure question of law. While congress has indeed delegated legal interpretation of immigration law to the Attorney General overall, the specific history of the U.S. asylum system have been to insulate the process from politics and to disavow migration policy concerns as an influence on the legal interpretation of asylum eligibility. Politicizing this process, and then deferring to political choices, would insert considerable instability into a high stakes area of law, and would make resolution of a question of law depended ultimately on who won the last presidential election.

Courts have many ways to defuse this dilemma. The Supreme Court could certainly disavow *Chevron* entirely, or in any cases touching on asylum. But that would be the most for reaching approach. Courts can also continue to recognize *Chevron's* role in asylum cases, while at the same time applying their own interpretive analysis to the refugee definition at *Chevron* Step One so as to limit the space for the executive branch to change asylum policy abruptly. But courts have often been willing to grant considerable deference to the Attorney General on asylum law in the past. If

that continues, then *Chevron* deference may, ironically, come to the rescue of President Trump's reshaping of the immigration system.