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The Case Against Chevron Deference in Immigration Adjudication

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THE CASE AGAINST *CHEVRON* DEFERENCE IN IMMIGRATION ADJUDICATION

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The Duke Law Journal*'s fifty-first annual administrative law symposium examines the future of* Chevron *deference—the command that a reviewing court defer to an agency's reasonable interpretation of an ambiguous statute the agency administers. In the lead article, Kristin Hickman and Aaron Nielson argue that the Supreme Court should narrow* Chevron*'s domain to exclude interpretations made via administrative adjudication. Building on their framing, this Article presents an in-depth case study of immigration adjudication and argues that the case against* Chevron *has perhaps its greatest force in this immigration context. That is because much of* Chevron*'s theory for congressional delegation and judicial deference—including agency expertise, deliberative process, and even political accountability—collapses in the immigration adjudication context.*

As for potential reform, Hickman and Nielson understandably focus on the Supreme Court. We too explore that judicial option, but we argue that it is a mistake to focus just on courts when it comes to immigration law and policy. The political branches can and should act to narrow Chevron*'s domain. First, our proposal should be part of any comprehensive immigration reform legislation, which may well become a key legislative initiative after the presidential election. Second, the Executive Branch can and should embrace this reform internally—by not seeking* Chevron *deference for immigration adjudication and by turning to rulemaking instead of adjudication to make major immigration policy. Shifting the default from adjudication to rulemaking for immigration policymaking is more consistent with* Chevron*'s theoretical foundations—to leverage agency expertise, to engage in a deliberative process, and to increase political accountability.*

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INTRODUCTION

Over the last decade, we have seen a growing call, largely from those right of center, to eliminate *Chevron* deference—the command that federal courts defer to an agency's interpretation of a statute it administers so long as the statutory provision is ambiguous and the agency's interpretation is reasonable.[1] Those calls to eliminate *Chevron* deference arrived center stage during the March 2017 Senate Judiciary Committee hearing on then-Judge Gorsuch's nomination to the Supreme Court. That is because Gorsuch had penned a concurring opinion, while serving on the Tenth Circuit, that questioned the constitutionality and wisdom of *Chevron* deference and suggested that "[m]aybe the time has come to face the [*Chevron*] behemoth."[2]

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[1] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). One of us has collected these criticisms elsewhere. *See* Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J. L. & PUB. POL'Y 103 (2018). It is worth noting that scholarly criticisms of *Chevron* predate the current wave and have been lodged by scholars across the ideological spectrum. *See, e.g.*, Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989).

[2] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

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Chevron deference was mentioned nearly one-hundred times at Gorsuch's confirmation hearing.[3] The Senators' opening statements are illustrative. Senator Feinstein proclaimed that Gorsuch's apparent call to eliminate *Chevron* deference was an attack on science and "would dramatically affect how laws passed by Congress can be properly carried out" by federal agencies.[4] Senator Klobuchar asserted that *Chevron*'s demise "would have titanic real-world implications on all aspects of our everyday lives. Countless rules could be in jeopardy, protections that matter to the American people would be compromised, and there would be widespread uncertainty."[5] And Senator Franken declared that "*Chevron* is the only thing standing between them and what the President's chief strategist Steve Bannon called the 'deconstruction of the administrative state,' which is shorthand for gutting any environmental or consumer protection measure that gets in the way of corporate profit margins."[6] In total, eight Senators questioned Gorsuch regarding his views on *Chevron* deference.[7] Simply put, the potential demise of *Chevron* deference was a core talking point against Gorsuch's elevation to the Supreme Court.

Justice Gorsuch has finished his third full year on the Supreme Court. Yet the *Chevron* revolution the Senators feared has not materialized. To the contrary, last year in *Kisor v. Wilkie*, the Court rejected a challenge to eliminate *Auer* deference—a sibling doctrine regarding judicial deference to agency regulatory interpretations.[8] Despite Chief Justice Roberts's suggestion that *Kisor*'s reaffirmance of *Auer* did not "touch upon the [] question" of *Chevron* deference,[9] we do not expect the Court to overturn *Chevron* any time soon. To our mind, *Auer* was more susceptible to a legal challenge than *Chevron*. Yet the Court did not overturn *Auer* when it had the chance. *Chevron* should be similarly safe. Nor do we expect Congress

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[3] *See Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch To Be an Associate Justice of the Supreme Court of the United States*, S. HRG. 115–208, 115th Cong. (Mar. 20–23, 2017). The word "*Chevron*" turns up 94 times in the transcript.

[4] *Id.* at 6–7.

[5] *Id.* at 30.

[6] *Id.* at 36.

[7] *See id.* at 86–87 (Feinstein); *id.* at 90–91, 271–74 (Hatch); *id.* at 128–29 (Cornyn); *id.* at 153–55 (Klobuchar); *id.* at 159, 302–303 (Grassley); *id.* at 174–76 (Franken); *id.* at 201–202, 331–32 (Flake); *id.* at 216–217 (Crapo).

[8] Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019) (refusing to overturn Auer v. Robbins, 519 U.S. 452 (1997)). To be sure, Justice Gorsuch disagreed with the 5-4 majority and penned the principal concurring opinion, in which he argued that *Auer* should be replaced with the less-deferential *Skidmore* standard. *Id.* at 2447 (Gorsuch, J., concurring) (citing Skidmore v. Swift & Co., 323 U.S. 134 (1944)).

[9] *Id.* at 2425 (Roberts, C.J.) (concurring in part and casting the deciding vote to uphold *Auer* deference).

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to eliminate *Chevron* deference by statute—despite various legislative proposals to do so in recent years.[10]

Although a wholesale reconsideration of *Chevron* deference is unlikely in the near future, this Article returns to the context that caused Gorsuch to express concerns about *Chevron* in the first place: immigration adjudication. In *Gutierrez-Brizuela v. Lynch*, the Tenth Circuit confronted and rejected an agency statutory interpretation of the Immigration and Nationality Act that the Board of Immigration Appeals had embraced via agency adjudication.[11] Gorsuch authored the opinion for the Tenth Circuit as well as published a separate concurrence to observe that "[t]here's an elephant in the room": *Chevron* deference.[12]

That elephant remains in the immigration courtroom. In our contribution to this Symposium, we seek to return the debate about *Chevron* deference back to this immigration context. To do so, we build on the lead article in the Symposium, in which Kristin Hickman and Aaron Nielson argue that the Supreme Court should consider narrowing *Chevron*'s domain to exclude judicial deference to agency statutory interpretations established in an administrative adjudication.[13] We also draw from important scholarship on immigration adjudication to reassess the empirical and theoretical underpinnings of *Chevron*'s domain in immigration adjudication. We conclude that the case against *Chevron* deference in administrative adjudication has perhaps its greatest force when it comes to the immigration adjudication.[14]

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[10] *See, e.g.*, Separation of Powers Restoration Act, S. 2724, § 2, 114th Cong. (2016) (amending the Administrative Procedure Act (APA) to eliminate *Auer* and *Chevron* deference). *Cf.* Regulatory Accountability Act of 2017, H.R. 5, Title II, 115th Cong. (2017) (amending the APA to eliminate *Auer* but preserve *Chevron*). *See generally* Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 667–69 (2017) (discussing legislative efforts to eliminate or narrow *Auer* and *Chevron* deference).

[11] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1144–46 (10th Cir. 2016).

[12] *Id.* at 1149 (Gorsuch, J., concurring).

[13] Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. (forthcoming 2021), https://ssrn.com/abstract=3546076.

[14] Throughout this Article and unless otherwise noted, we use "agency adjudication" or "administrative adjudication" as shorthand for any agency adjudication where a hearing is required by statute or regulation. In other words, we are grouping together what in the literature are referred to as Type A (APA-governed formal adjudication) and Type B (formal-like agency adjudication where a hearing is required by another statute or regulation), and we are expressly not discussing or comparing less-formal, Type C adjudications where no hearing is required. *See* Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 153–57 (2019) (discussing the Type A, B, and C categorizations of agency adjudication embraced by the Administrative Conference of the United States in Adoption of Recommendations, 81 Fed. Reg. 94,312, 94,314–15 (Dec. 23, 2016)).

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Indeed, on closer examination, the theoretical foundations for *Chevron* deference crumble in the immigration adjudication context. *Chevron*'s core rationale for congressional delegation and judicial deference—agency expertise—is particularly weak when it comes to immigration adjudication. Unlike in other regulatory contexts, the statutory ambiguities immigration adjudicators address seldom implicate scientific or other technical expertise. The second leading and related rationale—deliberative process—is even weaker here than in other adjudicative contexts. After all, immigration adjudication is on the fringe of the "new world of agency adjudication."[15] It is not formal adjudication under the Administrative Procedure Act (APA), lacking many of the signature procedural protections afforded in APA-governed formal adjudication.[16] The third central rationale—political accountability—may at first blush seem compelling in immigration adjudication, due to the Attorney General's final decision-making authority. Building on Hickman and Nielson's framing, however, we argue that agency-head review is necessary yet insufficient for *Chevron*'s accountability theory. The theory should encompass a robust public engagement component, with public notice and an opportunity to be heard for those—beyond the parties in the adjudication itself—who would be affected by the agency's statutory interpretation. Agency adjudication seldom provides that, and perhaps even less so when it comes to immigration adjudication.

To be sure, we do not make the case here to eliminate *Chevron* deference entirely in the immigration context. Others have advanced largely substantive arguments against *Chevron* when it comes to interpretations that infringe on liberty, including in the refuge and asylum context.[17] Our argument against *Chevron*, by contrast, is largely procedural, not substantive. We argue that *Chevron* deference should apply in the immigration context *only* to agency statutory interpretations promulgated through notice-and-comment rulemaking. The less-deferential *Skidmore* standard should govern interpretations advanced in immigration adjudication.[18] As one of us has explored in calling for

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[15] *See* Walker & Wasserman, *supra* note 14, at 143 ("The vast majority of agency adjudications today, however, do not look like APA formal adjudication. Instead, agencies regulate using adjudicatory means that still require evidentiary hearings but do not embrace all of the features set forth in the APA.").

[16] *See* 5 U.S.C. §§ 554–557 (setting forth the APA's formal adjudication procedures); *see also* Walker & Wasserman, *supra* note 14, at 148–53 & tbl.1 (providing overview of APA-governed formal adjudication procedures).

[17] *See, e.g.*, Michael Kagan, Chevron*'s Liberty Exception*, 104 IOWA L. REV. 491 (2019); Maureen Sweeney, *Enforcing/Protection: The Danger of Chevron in Refugee Act Cases*, 71 ADMIN. L. REV. 127 (2019).

[18] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (instructing courts to give "weight" to an agency's statutory interpretation based "upon the thoroughness evident in its consideration, the validity of its reasoning, its

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rulemaking for deferred action in immigration, there is tremendous value in national uniformity and in public-facing deliberative process when crafting immigration law and policy—both of which would be inhibited if courts (as opposed to agencies) take the leading role.[19] In other words, rulemaking should be the predominant administrative tool for implementing Congress's immigration laws and for making immigration policy at the agency level.

There remains the issue of how to effectuate this reform. Hickman and Nielson understandably focus on the Supreme Court, and we too discuss stare decisis and judicial action. But when it comes to immigration law and policy, it is a mistake to focus on just federal courts. The political branches can and should act to narrow *Chevron*'s domain. First, our proposal should be part of any comprehensive immigration reform legislation, which may well become a key legislative initiative after the presidential election. As Kent Barnett has detailed, Congress can and has codified lesser deference standards for certain agency actions.[20] Second, the Executive Branch can and should embrace this reform internally—by not seeking *Chevron* deference in immigration adjudication and by turning to rulemaking instead of adjudication to make major immigration policy. This reform should be part of any presidential candidate's immigration platform, and Senators of both parties should extract this commitment from the next Attorney General nominee as part of the confirmation process.

In other words, the political branches should both work to shift the default from adjudication to rulemaking when it comes to immigration policymaking at the agency level. Legislatively eliminating *Chevron* deference for immigration adjudication should encourage more notice-and-comment rulemaking. But to successfully flip the default to rulemaking, the Executive Branch likely will also need to commit to the reform internally. As detailed in this Article, this shift from adjudication to rulemaking would be more consistent with the theoretical foundations of the *Chevron* doctrine—to better leverage agency expertise, to engage in a more deliberative process, and to increase political accountability.

This Article proceeds as follows: Part I provides a brief overview of immigration adjudication, including how the Supreme Court has applied *Chevron* deference in the immigration adjudication context. Part II critically examines *Chevron*'s theoretical foundation in the immigration adjudication context. Part III explores the mechanics of narrowing *Chevron*'s domain to exclude agency statutory interpretations advanced

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consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

[19] *See* SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (2015).

[20] Kent H. Barnett, *Codifying* Chevmore, 90 N.Y.U. L. REV. 1 (2015).

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via immigration adjudication—looking at potential reforms by all three branches of government.

I. AN OVERVIEW OF IMMIGRATION ADJUDICATION

Immigration decisions are made every day by a universe of people and agencies. An officer employed by the Department of State and situated in a U.S. consulate or embassy abroad may decide if a foreign national is eligible for immigration status and entitled to a visa.[21] A line officer from Immigration Customs and Enforcement (ICE) may issue a supervision order to an immigrant during a routine check-in.[22] An adjudicator in U.S. Citizenship and Immigration Services (USCIS) may interview a couple and grant adjustment of status (a "green card") to the immigrant beneficiary.[23] An inspector at Customs and Border Protection (CBP) may deport a father who arrives at a land border without papers.[24] ICE, CBP, and USCIS are units in the Department of Homeland Security (DHS), and their employees are responsible for making a range of immigration enforcement and benefits decisions with significant impacts on immigrants and their families.[25]

In fact, the majority of removal (deportation) orders issued each year are made by officers in DHS through what one of us has coined a "speedy deportation."[26] Speedy deportation refers to three programs under the INA that authorize DHS to remove noncitizens without a hearing or review before an immigration judge. These programs are formally called administrative removal, expedited removal, and reinstatement of removal.[27] Last Term the Supreme Court upheld the statutory bars to habeas review of one of these programs, expedited removal, against a Suspension Clause constitutional challenge—with Justice Sotomayor declaring in dissent that the "decision handcuffs the Judiciary's ability to

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[21] *What Is a U.S. Visa?,* U.S. Dep't of State, Bureau of Consular Affairs, https://travel.state.gov/content/travel/en/us-visas.html.

[22] *Detention Management*, U.S. Immigration & Customs Enf't, https://www.ice.gov/.

[23] *Green Card*, U.S. Citizenship & Immigration Serv., https://www.uscis.gov/.

[24] *Along U.S. Borders*, U.S. Customs & Border Prot., https://www.cbp.gov/.

[25] *Operational and Support Components*, U.S. Dep't of Homeland Sec., https://www.dhs.gov.

[26] SHOBA SIVAPRASAD WADHIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP ch.5 (2019); *see also, e.g.*, Jennifer Lee Koh & Shoba Sivaprasad Wadhia, *Op-Ed: Deport, Not Court? The U.S. Is Already Doing That*, L.A. TIMES (June 30, 2018); Jennifer Lee Koh, *When Shadow Removals Collide: Searching for Solutions to the Legal Black Holes Created by Expedited Removal and Reinstatement*, 96 WASH. U. L. REV. 337 (2018); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1 (2014).

[27] *See* WADHIA, *supra* note 26, at ch. 5.

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perform its constitutional duty to safeguard individual liberty and dismantles a critical component of the separation of powers."[28] Immigration adjudications are also made by employees of the Department of Justice (DOJ). DOJ houses the immigration court system known as the Executive Office for Immigration Review (EOIR).[29] Immigration judges preside over removal hearings at which a noncitizen (known as the "respondent") is charged with a violation of immigration law and a number of other hearings, such as bond hearings and reviews of fear determinations made by DHS.[30] As detailed in Part I.A, the Attorney General and the Board of Immigration Appeals (BIA) exercise appellate review over immigration-judge decisions.

This Article focuses on one strand of immigration adjudication: removal proceedings before DOJ's immigration courts, the BIA, and the Attorney General. Part I.A provides an overview of that system, with Part I.B detailing how *Chevron* deference has been applied to statutory interpretations embraced via immigration adjudication.

A. Immigration Adjudication Process

Most immigration cases at EOIR involve people in removal proceedings.[31] Removal proceedings are triggered when a charging document called the Notice to Appear (NTA) is filed with the immigration court in EOIR.[33] The NTA can be issued by a number of DHS employees—attorneys and non-attorneys alike.[34] The NTA contains information that includes notice about the location and time of a court proceeding, the

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[28] DHS v. Thuraissigiam, 140 S. Ct. 1959, 1993 (2020) (Sotomayor, J., dissenting).

[29] *Executive Office of Immigration Review, About the Office,* U.S. Dep't of Justice, https://www.justice.gov/eoir.

[30] *Statistics Yearbook Fiscal Year 2018*, 4–5 U.S. Dep't of Justice EOIR, https://www.justice.gov/eoir/file/1198896/download.

[31] In fiscal year 2018, 182,010 of the 195,213 cases (92.3 %) completed by EOIR involved removal proceedings. *Id.* at 12 tbl.5.

[33] 8 C.F.R. § 1003.14 (2020); *see also Practice Advisory, Notices to Appear: Legal Challenges and Strategies*, American Immigration Council & Penn State Law Center for Immigrants' Rights Clinic (Feb. 27, 2019), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/notices_to_appear_practice_advisory.pdf.

[34] *See*, e.g., 8 C.F.R. § 239.1 (listing the types of immigration officers with authority to issue a Notice to Appear); *see also* CENTER FOR IMMIGRANTS' RIGHTS, PENNSYLVANIA STATE UNIVERSITY'S DICKINSON SCHOOL OF LAW, TO FILE OR NOT TO FILE A NOTICE OF APPEAL: IMPROVING THE GOVERNMENT'S USE OF PROSECUTORIAL DISCRETION (Oct. 2013), https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/NTAReportFinal.pdf

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reasons a person is alleged to be in violation of the immigration law, and the manner in which the person entered the United States.[36]

In removal proceedings, trial attorneys from ICE represent the government and act as "prosecutors."[37] Respondents or noncitizens represent themselves "pro se" or are represented by an attorney or accredited representative.[38] Removal hearings are adversarial, but the proceedings themselves are "civil," not "criminal."[39] Unlike the criminal justice system, in removal proceedings, there is no right to a grand jury, speedy trial, court appointed counsel, or mandated timeframe during which an immigrant can see a judge.[40]

The immigration court has two dockets: one for respondents outside of detention and a second for those detained.[41] The adjudicative process begins with the "master calendar hearing," when an immigration judge may ask the respondent if she needs more time to find counsel, or to respond to the charges of the NTA.[42] If the respondent concedes to removability or the immigration judge finds the same, the next stage of removal proceedings often involves applications by the respondent for relief from removal. Relief is sought at a stage in the removal process known as the "individual calendar hearing," or the "merits hearing." These hearings are evidentiary hearings at which witnesses and evidence

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[36] *See* Immigration and Nationality Act (INA) § 239, 8 U.S.C. § 1229; 8 C.F.R § 239.

[37] *Attorney*, U.S. Immigration & Customs Enf't, https://www.ice.gov/careers/attorney.

[38] 8 C.F.R § 292.5.

[39] *See, e.g.*, Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature Immigration Removal Proceedings,* 43 HARV. C.R.-C.L. L. REV. 289 (2008); Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011); *see also* AMERICAN IMMIGRATION COUNCIL, TWO SYSTEMS OF JUSTICE: HOW THE IMMIGRATION SYSTEM FALLS SHORT OF AMERICAN IDEALS OF JUSTICE (Mar. 2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/aic_twosystemsofjustice.pdf.

[40] *See e.g.*, AMERICAN IMMIGRATION COUNCIL, *supra* note 39; WADHIA, *supra* note 19, ch. 3; Legomsky, *supra* note 39, at 469.

[41] *Detention Management*, U.S. Immigration & Customs Enf't, https://www.ice.gov/detention-management.

[42] *Immigration Judge Master Calendar Checklist for Pro Se Respondents*, U.S. Dep't of Justice EOIR, https://www.justice.gov/eoir/page/file/924091/download; ILRC Attorneys, *Representing Clients at the Master Calendar Hearing: How to Prepare for an Initial Hearing with Quick-Reference Checklist, Immigrant Legal Resource Center* (Dec. 2018), https://www.ilrc.org/sites/default/files/resources/rep_clnts_mstr_cal_hearing-20181220.pdf.

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are presented and where the testimony of the respondent and their witnesses may be heard.[43] When the respondent seeks relief, these forms of relief act as "defenses" to removal, such as asylum, cancellation of removal, or waivers from inadmissibility.[45] In removal proceedings, the respondent has the burden of providing eligibility for relief.[46] For example, an asylum seeker must prove to an immigration judge that she has suffered persecution or has a fear of persecution in the future because of race, religion, nationality, political opinion, or membership in a particular social group.[47] While immigrants in removal proceedings speak multiple languages, all forms they must fill out are available in English only.

The Immigration and Nationality Act (INA) provides a statutory right to counsel in removal proceedings at no expense to the government.[48] Many immigrants in removal proceedings navigate the process without a lawyer because of the inability to pay or limited access.[49] The number of immigrants facing immigration court alone increases exponentially if they are detained.[50] While there is no Sixth Amendment right to counsel, the Fifth Amendment right to due process applies, such that removal proceedings must be fundamentally fair.[51] The INA contains additional rights during removal proceedings, including the right to present evidence, call witnesses, and cross-examine witnesses and evidence.[53] In removal proceedings, respondents also have the right to an interpreter.[54]

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[43] *See* INA § 240(b), 8 USC § 1229a; *see also* EOIR, IMMIGRATION COURT PRACTICE MANUAL 76 (2008) https://www.justice.gov/sites/default/files/eoir/legacy/2012/11/08/Chap%204.pdf.

[45] INA § 240, 8 U.S.C. § 1229a.

[46] *Id.*

[47] INA § 101(a)(42), 8 U.S.C. § 1101(a)(42); 8 C.F.R § 208.

[48] INA § 292, 8 U.S.C. § 1362.

[49] Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court,* 164 U. PA. L. REV. 1 (2015); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42 (2010) (citing Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647 (1997)).

[50] *Who Is Represented in Immigration Court*, TRAC Immigration (2017), https://trac.syr.edu/immigration/reports/485/.

[51] *See, e.g.*, Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); Note, *A Second Chance: The Right to Effective Assistance of Counsel in Immigration Removal Proceedings*, 120 Harv. L. Rev. 1544, 1548–49 (2007) (collecting cases on the lack of a Sixth Amendment right to counsel in removal proceedings).

[53] INA § 240, 8 U.S.C. § 1229a.

[54] INA § 240, 8 U.S.C. § 1229a; U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL (2008), https://www.justice.gov/sites/default/files/eoir/legacy/2012/11/08/Chap%204.pdf.

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Immigration judges play a significant role during removal proceedings. They ask questions of the respondent (or their counsel) or to the ICE trial attorney. They make decisions about whether to continue, terminate, or close a proceeding.[55] They also decide a respondent's eligibility for relief from removal, which may be delivered in writing or orally.[56] Once a decision is made, the respondent or ICE trial attorney may appeal to another body in DOJ known as the Board of Immigration Appeals (BIA).[57] Unlike immigration courts, which are sprinkled throughout the country, the BIA is housed in one building in Falls Church, Virginia.[58] Importantly, appeals must be made within 30 days of the immigration judge's decision.[59] Because a formal transcript of the hearing is mailed far later than 30 days after the decision, the respondent and counsel (if any) must pay close attention during the oral hearing.[60]

It is common for the respondent or ICE to reserve or file an appeal to the BIA. And yet, the number of appeals made by either party is far less than the number of removal proceedings.[61] For respondents, filing an appeal can be expensive or could mean that they remain in detention pending appeal. If no appeal is filed, the decision by an immigration judge is "final" and may result in the immigrant obtaining relief or a formal order of removal.[62] If an appeal is filed, a decision by the BIA to affirm a removal order constitutes the final order of removal.[64] At this point, the BIA may publish its decision as precedential, which means it is legally binding on other immigration adjudications.[65] More often, BIA decisions are unpublished and thus non-precedential—and issued by a single judge or panel without the same binding nature.[66] When making decisions, BIA

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[55] INA § 240, 8 U.S.C. § 1229a; 8 C.F.R § 1240.

[56] 8 C.F.R. § 1240.12.

[57] *See generally*, 8 C.F.R. § 1003.1–8.

[58] *Board of Immigration Appeals*, U.S. Dep't of Justice, https://www.justice.gov/eoir/board-of-immigration-appeals.

[59] 8 C.F.R. §§ 1292.13(e), 1292.16(f), 1292.17(d).

[60] 8 C.F.R. § 1240.15; *see also Board of Immigration Appeals*, U.S. Dep't of Justice, https://www.justice.gov/eoir/board-of-immigration-appeals.

[61] *Volume 27*, U.S. Dep't of Justice, EOIR, https://www.justice.gov/eoir/volume-27.

[62] INA § 101(a)(47), 8 U.S.C. § 1101(a)(47); *see also* 8 C.F.R. § 1241.1.

[64] 8 C.F.R. § 1003.1(d)(7).

[65] 8 C.F.R. § 103.10(b) ("Selected decisions designated by the Board, decisions of the Attorney General, and decisions of the Secretary of Homeland Security . . . shall serve as precedents in all proceedings involving the same issue or issues.").

[66] *See, e.g.*, David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177, 1205–07 (2016); *see also* note 159 *supra* (discussing number of precedential decisions issued in Trump Administration).

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members are required by regulation to exercise "independent judgement and discretion."[67]

The regulations allow an Attorney General to certify a decision by the BIA and issue a new decision.[68] The reality is that Attorney General decisions are legally binding, with little to no regard about the stature of precedent. To illustrate, in *Matter of L-E-A*, Attorney General William Barr announced a new position for asylum claims based on family relationships. Asylum applicants must show that they have suffered persecution in the past or have a well-founded fear of future persecution for one of five reasons: race, religion, nationality, political opinion, or membership in a particular social group.[69] Historically, the federal government and federal courts have recognized family as particular social group.[71] Barr was critical of the BIA decision from 2017 because it "improperly recognized the respondent's father's immediate family as a 'particular social group.'"[73] The case involved a Mexican national and citizen who feared persecution from a criminal gang because of his relationship to his father. His father operated a neighborhood general store that was the target of a drug cartel. The respondent's father refused to allow the drug cartel to operate out of his general store, which the respondent believed to be the reason he became a target.[74] Barr did not agree that respondent's family relationship qualified as a "social group" and held that "most nuclear families are not inherently socially distinct and therefore do not qualify as "particular social groups."[75] Critics of *Matter of L-E-A* argued that Barr issued a decision that undermines the body of caselaw that recognizes individuals like the respondent.[76] And yet, the Attorney General decision is now legally binding and informs and limits the ability for asylum seekers to seek protection based on a family relationship.

Attorney General certification rulings have pervaded decisionmaking during the Trump Administration. As of this writing, there have been ten Attorney General certification rulings.[77] Ten might appear like a small

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[67] *Id.* § 1003.1(d)(1)(2).

[68] *Id.* § 103.10(c).

[69] INA § 101(a)(42) , 8 U.S.C. § 1101(a)(42).

[71] *See e.g.*, Matter of Acosta, 27 I&N Dec. 211 (BIA 1985), In Matter of H-, 21 I&N Dec. 337, 343 (BIA 1996), Gebremichael v. INS, 10 F.3d 28, 36 (1st Cir. 1993); Crespin-Valladares v. Holder, 632 F.3d 117, 125 (4th Cir. 2011).

[73] Matter of L-E-A, 27 I&N Dec. 581 (Att'y Gen. 2019).

[74] *Id.*

[75] *Id.*

[76] See cases cited in note 71 *supra*; *see also* Jeffery S. Chase, *L-E-A: How Much Did the AG Change?*, JEFFERY S. CHASE BLOG (Aug. 11, 2019), https://www.jeffreyschase.com/blog/2019/8/11/l-e-a-how-much-did-the-ag-change.

[77] Matter of Castro-Tum, 27 I&N Dec. 271 (Att'y Gen. 2018); Matter of A-B-, 27, I&N Dec. 316 (Att'y Gen. 2018); Matter of L-A-B-R-, 27 I&N Dec. 405 (Att'y

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number, but equally important to the number of certifications is the scope of the decisions and erosion of BIA precedent, which in the current administration have been profound. Richard Frankel showcases how certification has spiked during the Trump administration and argues these decisions should not receive *Chevron* deference.[78] Says Frankel:

> [The Attorney General] has imposed new restrictions to deprive victims of domestic violence and gang threats from seeking asylum, revoked authority of immigration judges to put deportation cases on hold or grant continuances while non-citizens await decisions on applications for relief from deportation, and ordered increased imprisonment of non-citizens and reduces immigration judges' authority to grant bond, among other rulings.[79]

Similarly, Jaclyn Kelley-Widmer and Hillary Rich have argued against *Chevron* deference in connection with *Matter of A-B-,* a 2018 decision by then Attorney General Jeff Sessions involving an asylum seeker who claimed she was persecuted on account of her membership in the purported particular social group of "El Salvadoran women who are unable to leave their domestic relationships where they have children in common."[80] In adopting *Matter of A-B-*, Sessions also overruled *Matter of A-R-C-G-*, a precedential decision from 2014. Building on more than one decade of jurisprudence, *Matter of A-R-C-G-* was a signature precedential decision that clearly recognized domestic violence as a basis for asylum.[81] Kelly-Widmer and Rich have argued, for instance, that *Matter of A-B-* fails *Chevron* step one due to its focus on the potential size of the social group and the role of private actors as the source of persecution—in ways that undermine unambiguous congressional intent.[82] They also argue how the

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Gen. 2018); Matter of S-O-G-& F-D-B-, 27 I&N Dec. 462 (Att'y Gen. 2018); Matter of M-S-, 27 I&N Dec. 509 (Att'y Gen. 2018); Matter of L-E-A-, 27 I&N Dec. 581 (Att'y Gen. 2019); Matter of Castillo-Perez, 27 I&N Dec. 664 (Att'y Gen. 2019); Matter of Thomas & Thompson, 27 I&N Dec. 674 (A.G. 2019); Matter of R-A-F-, 27 I&N Dec. 778 (Att'y Gen. 2020); Matter of O-F-A-S-, 28 I&N Dec. 35 (A.G. 2020).

[78] Richard Frankel, *Deporting* Chevron*: Why the Attorney General's Immigration Decisions Should Not Receive* Chevron *Deference* (working draft), https://ssrn.com/abstract=3492115; *see also* SHOBA SIVAPRASAD WADHIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP 58–59 (2019); Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. ONLINE 129 (2017). We return to Frankel's arguments against *Chevron* deference to Attorney General decisions in Part II.

[79] Frankel, *supra* note 78, at *16.

[80] Jaclyn Kelley-Widmer & Hillary Rich, *A Step Too Far:* Matter of A-B-*, 'Particular Social Group,' and* Chevron, 29 CORNELL J.L. & PUB. POL'Y 345, 351–53 (2019).

[81] Matter of A-R-C-G-. 26 I&N Dec. 388 (B.I.A 2014).

[82] Kelley-Widmer & Rich, *supra* note 80, at 394–99.

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decision fails *Chevron* step two "because it contravenes Congressional intent regarding flexibility."[83]

B. Judicial Review and *Chevron* Deference

With respect to final removal decisions from the BIA or the Attorney General, immigrants can file a petition for review in a federal circuit court. But there is a catch. The INA categorically bars certain cases from federal court review.[84] Judicial review is precluded for those with removal orders stemming from certain criminal activity or the denial of relief from removal the INA has categorized as discretionary.[85] Similar to the trend in administrative appeals to the BIA, the number of immigrants who *could* seek for federal court review far exceeds the number of immigrants who actually *do* seek such review.[86] Again, the expense in filing a petition, access to legal counsel, and the limited window (30 days) to file the petition are some of the barriers that limit federal court review.[87] Thus, the scope of any project seeking to assess the intra-agency effects of *Chevron* deference in immigration adjudication is limited by the fact that most cases never make it to federal court. Notably, cases involving asylum, legal questions, or constitutional claims are among those accepted by federal courts, with federal circuit courts having exclusive jurisdiction over removal orders.[88]

Just three years after *Chevron* was decided, the Supreme Court in *INS v. Cardoza-Fonseca* applied the *Chevron* deference framework to a BIA statutory interpretation.[89] Yet the Court ultimately did not defer to the agency statutory interpretation, finding instead that the statutory text unambiguously foreclosed the BIA's interpretation.[90] In his concurring opinion, Justice Scalia argued that "there is simply no need and thus no justification for a discussion of whether the interpretation is entitled to [*Chevron*] deference."[91] Since *Cardoza-Fonseca* was decided, as Hickman

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[83] *Id.* at 399–403.

[84] INA § 242(a), 8 U.S.C § 1252 (2020).

[85] *Id.*

[86] *See, e.g.*, Hausman, *supra* note 66, at 1196 ("Petitions for review of final removal orders are rare events, and reversal of the BIA's decisions is even rarer. Before the 2002 streamlining at the BIA, fewer than 5% of all cases resulted in a petition for review [in a federal circuit court], and of those, fewer than 1 in 10 resulted in a remand." (footnotes omitted)).

[87] AMERICAN IMMIGRATION COUNCIL, PRACTICE ADVISORY: HOW TO FILE A PETITION FOR REVIEW 5 (2015), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/how_to_file_a_petition_for_review_2015_update.pdf.

[88] INA § 242(a), 8 U.S.C § 1252 (2020).

[89] INS v. Cardoza-Fonseca, 480 U.S. 421, 446–48 (1987).

[90] *Id.* at 448–49.

[91] *Id.* at 543 (Scalia, J., concurring).

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and Nielson document,[92] the Supreme Court has applied the *Chevron* deference framework to seven BIA statutory interpretations—with the agency winning because of *Chevron* deference in three cases,[93] being refused deference in four because the statute was unambiguous[94] and in a fifth because the agency asserted it had no discretion to interpret the statute differently.[95]

In one case, some two decades after *Cardozo-Fonseca*, the Supreme Court reaffirmed that "[i]t is clear that principles of *Chevron* deference are applicable to this statutory scheme."[96] In other words, the Court has not treated immigration adjudication as exceptional when it comes to *Chevron* deference. Instead, it insists that the same doctrinal framework applicable to other agency statutory interpretations applies with equal force to BIA statutory interpretations. The story among the federal courts of appeals is similar. In a recent study covering roughly a decade of *Chevron* decisions, the circuit courts reviewed 386 BIA statutory interpretations, upholding the BIA's interpretation 70.2% of the time.[97]

II. *CHEVRON*'S PRECARIOUS FOUNDATION IN IMMIGRATION ADJUDICATION

Despite the *Chevron* decision being on the books for more than 35 years and being cited by more than 90,000 sources on Westlaw, *Chevron*'s theoretical underpinnings remain disputed and underdeveloped.[98] To be sure, the Supreme Court has grounded *Chevron* in congressional delegation—"a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of

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[92] Hickman & Nielsen, *supra* note 13, at *[appendix].

[93] Scialabba v. De Osorio, 573 U.S. 41, 56–58 (2014); Holder v. Martinez Gutierrez, 566 U.S. 583, 591 (2012); INS v. Aguirre-Aguirre, 526 U.S. 415, 424–45 (1999).

[94] Pereira v. Sessions, 138 S. Ct. 2105, 2113–14 (2018); Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1572 (2017); Mellouli v. Lynch, 135 S. Ct. 1980, 1989 (2015).

[95] Negusie v. Holder, 555 U.S. 511, 521 (2009).

[96] *Aguirre-Aguirre*, 526 U.S. at 424.

[97] Kent H. Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 36 (2017).

[98] *See generally* Kent H. Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 72 VAND. L. REV. 1463, 1475–82 (2018) (providing overview of the theory of *Chevron* deference); *see also* Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1283–91 (2008) (surveying literature).

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discretion the ambiguity allows."[99] And this delegation theory, which the Court has suggested though never fully developed, is grounded in the four rationales of expertise, deliberative process, political accountability, and national uniformity of law.[100] In other words, in the Court's view, these are the four core reasons why Congress delegates—or at least should delegate—policymaking or law-implementation authority to federal agencies (rather than courts) and why federal agencies should receive judicial deference, within the bounds of reasonableness, for how they interpret these delegation-conferring statutory ambiguities.

In this Part, we interrogate these four delegation values in the context of immigration adjudication. As the *Chevron* Court instructs, this analysis is necessarily comparative. That is, we must assess whether these values are better realized by agencies or courts. Indeed, because our argument is that immigration agencies should receive *Chevron* deference in rulemaking but not adjudication, the comparison must also be made between these two modes of agency action. We begin with, and focus most on, the values of comparative expertise and deliberative process, as they are particularly lacking on the agency side in the context of immigration adjudication. We then turn more briefly to the other two other rationales of political accountability and uniformity in law.

A. Expertise

The predominant delegation theory that motivates *Chevron* deference is the comparative expertise held by federal agencies (compared to courts) to fill statutory gaps in statutes the agencies administer. Concluding that "[j]udges are not experts in the field," the *Chevron* Court distinguished the role of judges from the expertise held by federal agencies.[101] As Adam Cox explains in the immigration context, "*Chevron* deference is often defended on the ground that administrative agencies have greater expertise and more democratic accountability than courts."[102]

Although the *Chevron* Court itself did not engage in a robust discussion of this expertise theory, it did surmise that Congress perhaps "consciously desired the [agency] to strike the balance at this level, thinking that those with great expertise and charged with responsibility

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

[100] *See* Barnett et al., *supra* note 98, at 1475–82 (exploring further).

[101] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984); s*ee also* Sidney Shapiro & Elizabeth Fisher, *Chevron and the Legitimacy of "Expert" Public Administration*, 22 WM. & MARY BILL RTS. J. 465 (2013) (conceptualizing expertise and accountability based on institutional perspectives and the behavior of public administrations).

[102] Adam B. Cox, *Deference, Delegation, and Immigration Law,* 74 U. CHI. L. REV. 1671, 1682 (2007). We return to the accountability rationale in Part II.C.

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for administering the provision would be in a better position to do so."[103] In other words, expertise seems to refer to comparative policy expertise, including the scientific, technical, economic, or other subject-matter expertise relevant to filling gaps in statutes the particular agency administers.[104] As Paul Chaffin puts it, "When agencies answer technical questions dealing with scientific or economic subject matter, courts are poorly positioned to second-guess those determinations. Judges typically do not have the extensive scientific background possessed by appointed experts in specialty agencies."[105] In describing the importance of agency expertise, Joel Cohen employs truck driving as an example: "Do we really want judges who have never driven a truck and know nothing much about truck driving making decisions about truck driving safety?"[106] This conception of expertise as a rationale for congressional delegation finds empirical support from congressional drafters.[107]

Expertise may also come from the agency's familiarity with the legislative process and purposes that led to the statutory ambiguities at issue. As Justice Scalia has noted, "[t]he cases, old and new, that accept administrative interpretations, often refer to the 'expertise' of the agencies in question, their intense familiarity with the history and purposes of the legislation at issue, their practical knowledge of what will best effectuate those purposes."[108] Justice Breyer has made a similar observation, noting that "[t]he agency that enforces the statute may have had a hand in drafting its provisions," "may possess an internal history in the form of documents or 'handed-down oral tradition' that casts light on the meaning of a difficult phrase or provision," and, with "its staff, in close contact with relevant legislators and staffs, likely understands current

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[103] *Chevron,* 467 U.S. at 865.

[104] *See, e.g.,* Paul Chaffin, *Expertise and Immigration Administration: When Does* Chevron *Apply to the BIA Interpretations of the INA?*, 69 N.Y.U. ANN. SURV. AM. L. 504 (2013); Sweeney, *supra* note 17.

[105] Chaffin, *supra* note 104, at 532.

[106] Joel Cohen, Richard A. Posner & Jed S. Rakoff, *Judges v. Bureaucrats: Who Should Defer to Whom?,* Slate (Oct. 18, 2017), https://slate.com/news-and-politics/2017/10/two-judges-explain-why-they-dont-buy-the-logic-of-chevron-deference.html.

[107] *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside-an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 1005 fig.11 (2013) (reporting that 93% of congressional drafters surveyed indicated an agency's area of expertise mattered as to whether Congress intends for an agency to resolve a statutory ambiguity); *accord* Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1053 fig.10 (2015) (reporting similar findings from agency rule drafters).

[108] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514.

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congressional views, which, in turn, may, through institutional history, reflect prior understandings."[109]

Part II.A explores these dual conceptions of agency expertise in turn, finding both clearly lacking in the immigration adjudication context.

1. Scientific or Technical Expertise

In many regulatory contexts, it is quite easy to discern the scientific or technical expertise an agency can leverage to fill the gaps in their statutory mandates. Environmental, energy, infrastructure, financial services, and food and drug law come immediately to mind. Yet, as Hickman observes, "other areas of administrative law where *Chevron* regularly applies, *such as immigration* . . . , do not require scientific or other technical training."[110]

Indeed, Maureen Sweeney effectively contrasts the role of technical or scientific expertise at the EPA (the agency at issue in *Chevron* itself) from the lack of any such expertise required in immigration adjudication:

> The expertise required to interpret the INA, however, does not require familiarity with technical or scientific information, nor with the workings of an industry, nor even, for the most part, with the mechanics of immigration enforcement. And though immigration decisions are sometimes said to implicate delicate matters of foreign relations, the truth of the matter is that it is the very unusual case that affects anyone or anything other than the parties themselves. The vast majority of immigration cases require expertise, not in foreign affairs, but rather in the legal interpretation of a complex statutory and regulatory scheme. This demands expertise in legal analysis and the application of law to facts—precisely the sort of expertise that federal courts have.[111]

Sweeney extensively explores the lack of scientific or technical expertise implicated by the statutory ambiguities the BIA resolves,[112] such that we need not regurgitate that analysis here. With that said, our position is not that interpreting the INA would *never* benefit from expertise in immigration, human rights, foreign affairs, or related substantive fields. It just turns out, as Sweeney documents, that the vast majority of

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[109] Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 368 (1986); *see also* Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1382–97 (2017) (documenting the role of federal agencies in the legislative process).

[110] Kristen E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*. 90 MINN. L. REV 1537. 1599 (2006) (emphasis added).

[111] Sweeney, *supra* note 17, at 174–75; *accord* Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*. 71 TUL. L. REV. 703. 806 (1997).

[112] *See* Sweeney, *supra* note 17, at 174–78.

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ambiguities in the INA deal with purely legal questions, as opposed to those implicating some sort of substantive expertise.

Indeed, the agency's own hiring requirements for adjudicators reveal the agency's determination that such substantive experience is not required. For example, a typical announcement for a BIA member position from 2018 describes the required experience as follows:

> Applicants must have a full seven (7) years of post-bar experience as a licensed attorney preparing for, participating in, and/or appealing formal hearings or trials involving litigation and/or administrative law at the Federal, State or local level. Qualifying litigation experience involves cases in which a complaint was filed with a court, or a charging document (e.g., indictment or information) was issued by a court, a grand jury, or appropriate military authority. Qualifying administrative law experience involves cases in which a formal procedure was initiated by a governmental administrative body.[113]

Job announcements for immigration judges similarly do not require any legal or policy expertise in immigration or foreign relations, or any other scientific or technical expertise.[114] Either litigation or administrative law experience is required, but neither is the type of expertise that courts or scholars have recognized as grounds for *Chevron* deference.[115]

Another way to assess if statutory interpretation via immigration adjudication requires some sort of technical or scientific expertise is to examine the circuit court cases in which the courts refused to apply *Chevron* deference. One of us (Wadhia) represents immigrants before agency adjudicators and federal courts and has followed a body of significant cases in the Third Circuit where she regularly practices. Those immigration adjudication cases reveal the lack of expertise at the agency level. [116] To illustrate how a court's rejection of deference plays into

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[113] *Executive Office of Immigration Review, Appellate Immigration Judge (Board Member)*, U.S. Dep't of Justice (closing Oct. 4, 2018), https://www.justice.gov/legal-careers/job/appellate-immigration-judge-board-member.

[114] *Executive Office of Immigration Review, Immigration Judge*, U.S. Dep't of Justice (closing June 26, 2020), https://www.usajobs.gov/GetJob/ViewDetails/570894500; *Executive Office of Immigration Review, Immigration Judge*, U.S. Dep't of Justice (closing Nov. 21, 2015), https://www.justice.gov/legal-careers/job/immigration-judge-elizabeth-0.

[115] By pointing out the absence of immigration experience in job descriptions, we do not intend to suggest that all individuals who hold these positions lack immigration law experience or otherwise are not qualified to serve in these roles. Indeed, many former and sitting immigration judges and BIA members have extensive immigration expertise.

[116] *See, e.g.*, Valdiviezo-Galdamez v. Attorney General, 663 F.3d 582 (3d Cir. 2011) (holding that the BIA requirements of "social visibility" and "particularity"

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agency expertise, consider the case of *Da Silva v. Attorney General*.[117] Ludimilla Ramos Da Silva is a native of Brazil who was admitted to the United States in 1994 and married Aziim Leach, a U.S. citizen, in 2012.[118] As the Third Circuit recounted, Leach "subjected Da Silva to emotional, psychological, and physical abuse throughout their marriage."[119] During one of Leach's numerous extramarital affairs, Da Silva twice struck Leach's mistress in the nose and pleaded guilty to two counts of assault.[120]

The INA prohibits VAWA cancellation of removal for an immigrant imprisoned for 180 or more days unless the "act or conviction was connected to the alien's having been battered or subjected to extreme cruelty."[121] Despite the qualifying criminal offense, Da Silva argued she was entitled to protection under "VAWA cancellation" because her assault was "connected to" Leach's abuse of her.[122] The Third Circuit agreed with Da Silva and took the extraordinary step of refusing to remand to the agency.[123] After all, the BIA decision in this case was nonprecedential and thus not entitled to *Chevron* deference; on remand, the BIA could have taken another look at the statutory question and issued a *Chevron*-eligible, precedential decision.

But the Third Circuit refused to remand because it found the statutory language "connected to" unambiguous at *Chevron* step one, leaving the agency with no discretion.[124] Importantly for our purposes, the Third Circuit also stated that it was "not convinced that the *Chevron* framework applies here because interpreting 'connected to' does not implicate the BIA's 'expertise in a meaningful way'"—not the first time the Third Circuit has noted the BIA's lack of expertise in interpreting the INA.[125] This case illustrates how technical expertise in immigration law (or any other technical or scientific expertise) is not required to interpret most provisions of the INA in the context of adjudicating immigration removal cases. In the particular case of *Da Silva,* as in many others, the circuit

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are not entitled to *Chevron* deference due to inconsistencies between the BIA requirement and past BIA decisions); Orozco-Velasquez v. Attorney General, 817 F.3d 78 (3d Cir. 2016) (declining to use *Chevron* deference because the BIA's conclusion that "failure to include the specific date, time, or place of a hearing in a NTA has no bearing on a notice recipient's removability" conflicted with the INA's plain text).

[117] Da Silva v. Attorney General, 948 F.3d 629, 635 (3d Cir. 2020).

[118] *Id.* at 631.

[119] *Id.*

[120] *Id.* at 632.

[121] *Id.* at 633 (quoting 8 U.S.C. § 1229b(b)(2)(C)).

[122] *Id.* at 632–33.

[123] *Id.* at 638.

[124] *Id.* at 634–35.

[125] *Id.* at 635 (quoting Sandoval v. Reno, 166 F.3d 225, 239 (3d Cir. 1999)).

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court does not even rely on immigration sources to determine the definition of a statutory term.

This observation is not merely anecdotal, nor limited to the Third Circuit. For example, one of us has reviewed every circuit-court decision that cites *Chevron* deference during an eleven-year period. A main takeaway from that empirical study is that circuit courts are less deferential to agency statutory interpretations made via immigration adjudication than in other adjudicative contexts. In particular, the BIA's win rate (70.2%) was nearly fifteen percentage points less than the agency-win rate for statutory interpretations embraced in all other hearing-based agency adjudications in the dataset (84.7%).[126] Indeed, it's not just about agency-win rates, but whether the circuit court refuses to apply the *Chevron* deference framework at all: "if the 386 immigration adjudications were removed from the formal adjudication category, the frequency of applying *Chevron* deference to formal adjudications would rise nearly ten percentage points to 85.2% and bring the formal formats into closer parity."[127]

2. Legislative Expertise

There is another type of expertise that merits attention: the expertise derived from the principal-agent relationship between the Congress and the agency. As Peter Strauss has explained, "[t]he enduring and multifaceted character of the agency's relationship with Congress" is that the agency has comparative expertise "to distinguish reliably those considerations that served to shape the legislation, the legislative history wheat, from the more manipulative chaff."[128] If the goal of statutory interpretation is to be a faithful agent of Congress, agencies may have more expertise than courts, as they are more familiar with their statutory schemes and the legislative process that led to the ambiguities in those statutory mandates. As Ganesh Sitaraman observes, the agency may well "have special insight into what the goals and intentions behind the legislation actually were, what the political and practical compromises were, and how [the members of Congress] thought about specific problems

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[126] Barnett & Walker, *supra* note 97, at 36.

[127] *Id.* at 39 (footnote omitted). We cite these findings to suggest that federal courts perhaps share our skepticism about the BIA's substantive expertise in interpreting the INA. To be sure, one could argue that these findings also suggest that at least the circuit courts have already recalibrated the *Chevron* standard in the immigration adjudication context. Although assessing that argument exceeds this Article's ambitions, we do not think courts "simply ignoring *Chevron*," Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Alito, J. dissenting), is a viable long-term solution in the immigration adjudication context.

[128] 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).

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throughout the legislative process."[129] As one of us explores elsewhere, federal agencies are substantially involved in the legislative drafting process and, indeed, play a role in drafting and reviewing just about every legislative action that may affect them.[130]

An agency, however, is a "they," not an "it." This specialized knowledge of legislative purpose and process should only matter, from a *Chevron* expertise perspective, if the agency statutory interpreter possesses that expertise—either directly because the interpreter helped draft the statute or indirectly because the interpreter interacts with the agency personnel who possess that expertise—"the relevant agency rule drafters, the policy and legislative affairs teams, the scientists and economists where applicable, and so forth."[131] As one of us has explored empirically, the interaction between relevant agency legislative experts and agency rule drafters who interpret statutes via rulemaking is often quite strong at many agencies, supporting the agency expertise rationale for *Chevron* deference in the rulemaking context.[132]

With respect to agency adjudication, it is far less clear that the agency statutory interpreters have any access to the agency's deep expertise in the legislative history, purposes, and processes. Indeed, most agency adjudicators, by statute or regulation, are prohibited from engaging in ex parte communications and have a strong separation of adjudicatory and prosecutorial functions at the agency—though Michael Asimow observes that "ex parte advice to decisionmakers by non-adversarial agency staff members is customary and appropriate, so long as it does not violate the exclusive record principle by introducing new factual material."[133] In the immigration adjudication context we are not aware of the BIA consulting with agency legislative experts when interpreting the INA. We are doubtful any such expertise-sharing activity takes place, which severely undercuts this second type of comparative agency expertise argument for *Chevron* deference.

Unlike the BIA, where such expertise-sharing would be difficult in light of the agency's current structure, the Attorney General, at least in theory, should be able to leverage that expertise if desired. After all, the

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[129] Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79, 128 (2015).

[130] *See* Walker, *supra* note 109, at 1382–97 (reporting findings from empirical study of the role of federal agencies in the legislative process).

[131] Walker, *supra* note 107, at 1048.

[132] *See* Walker, *supra* note 109, at 1398–1405; Walker, *supra* note 107, at 1034–48.

[133] MICHAEL ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 66 (Admin. Conf. of U.S. ed., 2019) (footnote omitted); *see also id.* at 63–67 (detailing adjudicator prohibitions on intra- and extra-agency ex parte communications).

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Attorney General is the head of the agency and could structure the agency in such a way to interact with those legislative experts when exercising final decisionmaking authority in immigration adjudication. Yet, as far as we are aware, the Attorney General does not consult with the agency's legislative experts when exercising adjudicative authority. Indeed, our review of the Attorney General's referral adjudication decisions during the Trump Administration reveals no reliance on the agency's legislative experts when interpreting the INA.[134]

Perhaps more importantly, the comparative analysis here is not just between the expertise of agencies and courts. Because we recommend narrowing *Chevron*'s immigration domain to exclude such deference in adjudication yet preserve it for rulemaking, we must also assess the comparative expertise exercised in those two modes of agency action. Due to organizational structure, the BIA is likely unable to exercise the agency's collective expertise when adjudicating. In both adjudication and rulemaking, by contrast, the Attorney General theoretically has the ability to leverage the agency's collective expertise—whether that's technical and scientific or legislative—when interpreting statutes. So at most, when it comes to the Attorney General as agency adjudicator, *Chevron*'s agency expertise comparative value is a wash between adjudication and rulemaking.

Indeed, in reality and as detailed in Part II, because the notice-and-comment rulemaking process is designed to leverage agency and public expertise, we would expect the Attorney General to utilize agency expertise in rulemaking than adjudication. When assessing the agency's (or court's) ability to leverage expertise, it is not just important whether the agency interpreters have access to the agency's relevant expertise. It should matter whether the agency process is structured to leverage the agency's expertise and, ideally, also the experience of outside experts, stakeholders, and the public generally. In other words, the deliberativeness of the process matters. We turn to this second theory for *Chevron* in Part II.B.

B. Deliberative Process

The *Chevron* decision itself did not focus on the value of the deliberative process in developing statutory interpretations, but subsequent decisions have underscored this comparative value for agencies—rather than courts—being the primary interpreters of statutes the agencies administer.[135] As detailed in this Part, the deliberative

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[134] *See* note 77 *supra* (citing the ten Attorney General certification rulings issued to date during the Trump Administration).

[135] *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 229 (2001) (holding that not all agency interpretations of statutory ambiguities merit *Chevron* deference, but "a very good indicator of delegation meriting *Chevron* treatment

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process theory for *Chevron* deference is interrelated to the expertise theory, and, indeed, it may just be another form of comparative expertise. After all, agencies, as opposed to courts, have much more flexibility to engage in a process that incorporates all stakeholders, considers the various regulatory alternatives, and leverages the agency's and public's expertise on the subject. Courts can only consider the cases before them, perhaps with limited amicus curiae input from those who are not parties to the litigation.

But, as Hickman and Nielson underscore, most of the comparative value agencies possess when it comes to deliberative process lies in rulemaking, not adjudication.[136] After all, for informal rulemaking, the APA requires that the agency provide the public with notice of the proposed rule and an opportunity to public comment.[137] The proposed rule has to reflect considered judgment, weighing regulatory alternatives, assessing the intended and unintended consequences, and making the data supporting its proposed rule publicly available.[138] Before issuing the final rule, the agency must also respond to material comments and may well end up adjusting the final rule in light of those comments.[139] Because this notice-and-comment process is public, Congress, the President, the media, and other interested groups can see what the agency is considering

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[is] express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed"); City of Arlington v. FCC, 569 U.S. 290, 307 (2013) ("[T]he preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority.").

[136] *See* Hickman & Nielsen, *supra* note 13, at *[Part II.A.i].

[137] 5 U.S.C. §§ 551–559.

[138] *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 392 (D.C. Cir. 1973) (holding that agencies are required under the APA to disclose the technical data and studies on which they relied to draft the proposed rule).

[139] *See, e.g.*, Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015) (reiterating that under the APA "[a]n agency must consider and respond to significant comments received during the period for public comment").

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and raise concerns before the agency's rule is finalized.[140] This is, of course, nothing like the judicial process.

More importantly, notice-and-comment rulemaking is nothing like the administrative adjudication process. As Hickman and Nielson observe, "a process that solicits comments and forces agencies to engage with the views of the public should generally result in better policy outcomes," such that the agency's comparative expertise at least partly "comes from the procedures that agencies are required to use."[141] By contrast, they argue, "by the nature of an adjudication, often only a narrow group of parties may appear before the agency."[142] At the end of the day, as a matter of deliberative process it is difficult to see any meaningful daylight between the judicial and administrative adjudicative process.

As Hickman and Nielson argue, moreover, judicial deference-imbued policymaking through agency adjudication can raise due process concerns that rulemaking does not necessarily implicate.[143] The problem is one of unfair notice by the retroactive application of the policy created in the adjudication itself. To be sure, the Supreme Court held long ago in *SEC v. Chenery Corp.* that agencies, if permitted under their organic statutes, can choose to make policy through adjudication or rulemaking.[144] But that does not mean *Chevron* deference must apply to retroactive policies made through adjudication. Retroactivity could caution against such deference. Rulemaking, by contrast, is usually prospective in nature.[145] And even when it is not, the agency still provides public notice of the proposed rule and must consider public comments before the rule becomes final—thus lessening the chance of unfair surprise to regulated parties.

In fact, in *Kisor v. Wilkie*, the Court expressly reaffirmed a narrowing of *Auer*'s domain in a similar fashion to exclude deference where the regulatory interpretation lacked fair notice, such as "an interpretation that would have imposed retroactive liability on parties for longstanding

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[140] *See, e.g.*, Paul Rose & Christopher J. Walker, *Dodd-Frank Regulators, Cost-Benefit Analysis, and Cost-Benefit Analysis*, 66 STAN. L. REV. ONLINE 9, 14–16 (2013).

[141] Hickman & Nielsen, *supra* note 13, at *[Part II.A.i].

[142] *Id.*

[143] *See id.* at *[Part II.A.ii].

[144] SEC v. Chenery Corp. (Chenery II), 332 U.S. 194 (1947).

[145] *See, e.g.*, Nat'l Min. Ass'n v. Dep't of Labor, 292 F.3d 849, 859 (D.C. Cir. 2002) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.").

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conduct that the agency had never before addressed."[146] These due process concerns may be even more pronounced in the immigration adjudication context where liberty (from detention and removal) is implicated, which may explain—as Michael Kagan argues—why the Court has refused *Chevron* deference in the immigration adjudication context when the agency interpretations address detention or removal.[147] Although beyond the scope of this Article, it is worth noting the unique harms that can flow from the immediate and retroactive application of immigration adjudication decisions—an application that may well precede a federal court ruling on whether the agency has it wrong or if *Chevron* deference is unwarranted.

Indeed, in the immigration adjudication context, there may even be less deliberative and fair process than in traditional APA-governed formal adjudication or Article III judicial review. That is because immigration adjudication, as detailed in Part I.A, does not happen before an administrative law judge (ALJ), but before an immigration judge, with fewer procedural protections for the immigrants than in contexts where an ALJ presides.[148] The decisional independence of members of the BIA may also be affected by the history in their political hiring, firing, and reassignment. In June 2020, for example, BIA members appointed before the Trump Administration were told they would be "reassigned" to other roles at DOJ after they rejected offers to leave the agency altogether.[149] The practice of ridding BIA members with differing political views is not new, but traces back to at least 2003 when the Attorney General shrunk the BIA from 16 to 11 members, firing the most "liberal" members on the Board.[150] As one former BIA chair has put it, the BIA is "not a court anymore. It's an enforcement mechanism. They're taking predetermined policy and just disguising it as judicial opinions, when the results have all

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[146] Kisor v. Wilkie, 139 S. Ct. 2400, 2418 (2019) (citing Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155–56 (2012)).

[147] Kagan, *supra* note 17, at 495.

[148] *See* Walker & Wasserman, *supra* note 14, at 148–57 (comparing APA-governed formal adjudication with other administrative adjudications where a hearing is required by statue or regulation).

[149] Tanvi Misra, *DOJ 'Reassigned' Career Members of Board of Immigration Appeals*, ROLL CALL (June 9, 2020), https://www.rollcall.com/2020/06/09/doj-reassigned-career-members-of-board-of-immigration-appeals/.

[150] Ricardo Alonso-Zaldivar & Jonathan Peterson, *5 on Immigration Board Asked to Leave; Critics Call It a 'Purge,'* L.A TIMES (Mar. 12, 2003); *see also* DORSEY & WHITNEY LLP, STUDY CONDUCTED FOR ABA COMMISSION ON IMMIGRATION POLICY, PRACTICE & PRO BONO RE: BOARD OF IMMIGRATION APPEALS (2003), http://www.dorsey.com/files/upload/DorseyStudyABA8mgPDF.pdf (presenting findings regarding the 2002 "Procedural Reforms" at the BIA and including information garnered from interviews with past and present agency officials and individual immigration lawyers and groups).

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been predetermined and it has nothing to do or little to do with the merits of the cases."[151] These kinds of hiring practices and the shift in adjudication from impartiality to predetermined policy hardly encourage a deliberative and fair process or an effective leveraging of agency expertise. Rather, they expose the predominant role of politics in immigration adjudication. We return to the proper role of politics in Part II.C.

Another way to gauge the deliberative process is to assess its outputs. And the outputs in immigration adjudication do not portray a well-functioning process, at least when it comes to consistency across similar cases. For example, grant rates vary widely among immigration judges. Empirical work by Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip Schrag reveals that asylum cases involving similarly relevant facts still create a "refugee roulette" depending on factors that include but are not limited to nationality, location, and judge.[152] To illustrate, they found that "in one regional asylum office, 60% of the officers decided in favor of Chinese applicants at rates that deviated by more than 50% from that region's mean grant rate for Chinese applicants, with some officers granting asylum to no Chinese nationals, while other officers granted asylum in as many as 68% of their cases."[153] TRAC Immigration has also produced empirical data that reveals the degree to which outcomes in asylum cases depend on the immigration judge assigned to the case.[154]

This agency disorder has not gone unnoticed by federal judges. Consider, for instance, then-Judge Richard Posner's dissent in a case involving an immigration judge's denial of a continuance to allow a key witness to appear: "Judges are not just umpires. Nor are the judicial officers of the Immigration Court and the Board of Immigration Appeals. Judicial activism is deplored but there is such a thing as excessive judicial passivity, which has been present at all levels of adjudication of Bouras's case."[155] When interviewed about the logic of *Chevron* deference and the

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[151] Felipe de la Hoz, *The Shadow Court Cementing Trump's Immigration Policy*, NATION (June 30, 2020) (quoting Paul Wickham Schmidt, who chaired the BIA between 1995 and 2001), https://www.thenation.com/article/society/trump-immigration-bia/.

[152] Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2010).

[153] *Id.* at 296.

[154] *Immigration Judge Reports*, TRAC, https://trac.syr.edu/immigration/reports/judgereports/ (noting the difference in outcome depending on what immigration judge was presiding in a given case; in Newark Immigration Court, denial rates ranged between 10.9% up to 98.7% depending on the judge that an asylum seeker appeared before).

[155] Bouras v. Holder, 779 F.3d 665, 673 (7th Cir. 2015); *see also* Cox, *supra* note 102, at 1679 (discussing Judge Posner's various opinions concerning the

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importance of federal courts, Judge Posner remarked: "Board of Immigration Appeals is frequently appalling, and likewise in Social Security disability cases . . . . It would be a disaster to eliminate judicial review in immigration and Social Security disability cases, and I imagine likewise in the cases decided by other federal administrative agencies."[156]

External factors contribute to this lack of deliberative process, and thus the agency's inability to leverage expertise via immigration adjudication. As discussed in Part I.A, immigrants placed in removal proceedings have no right to court-appointed counsel and might face an immigration judge alone. In turn, access to counsel is influenced greatly by geography.[157] The Ramji-Nogales, Schoenholtz, and Schrag study found: "[T]he chance of winning asylum was strongly affected not only by the random assignment of a case to a particular immigration judge, but also in very large measure by the quality of an applicant's legal representation, by the gender of the immigration judge, and by the immigration judge's work experience prior to appointment."[158] The ability to ensure a deliberative process is also undermined by the sheer volume of cases in the nation's immigration courts, which at the time of this writing exceeds one million.[159] And by the fact that immigration judges and BIA members face pressure to meet quotas and follow guidelines set

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ineptitude in the BIA, labeling the immigration courts' decisions "arbitrary, unreasoned, irrational, inconsistent, and uninformed.").

[156] Cohen et al., *supra* note 106.

[157] *See generally* Eagly & Shafer, *supra* 49; *Detained Immigrants and Access to Counsel in Pennsylvania,* Penn State Law Center for Immigrants' Rights Clinic (Oct. 2019), https://pennstatelaw.psu.edu/sites/default/files/PAFIUP%20Report%20Final.pdf.

[158] Ramji-Nogales et al., *supra* note 153.

[159] *Pending Cases*, *Executive Office for Immigration Review Adjudication Statistics*, U.S. Dep't of Justice (Apr. 15, 2020), https://www.justice.gov/eoir/page/file/1242166/download; s*ee also* Sweeney, *supra* note 17, at 176 ("The immigration court system suffers from serious institutional capacity challenges that compromise its decision making and limit the time and consideration it can give to any single case. The history of this dysfunction is longstanding."). To be sure, we do not advocate shifting these one-million agency actions from adjudication to rulemaking. The number of cases designated as BIA precedent or a decision by the Attorney General for which the *Chevron* framework applies is much lower. As noted in Part I.A, the Attorney General has issued ten certification rulings during the Trump Administration, *see* note 77 supra (citing decisions), and the BIA has issued fewer than one-hundred precedential decisions during that same time period. *See Agency Decisions Vols. 26–28*, EOIR, Dep't of Justice, https://www.justice.gov/eoir/ag-bia-decisions. We anticipate even fewer of these roughly thirty agency adjudication decisions per year shifting to rulemaking, as the agency would understandably decide to pursue *Chevron*-less case-by-case adjudication for some policymaking.

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by the Attorney General.[160] Insofar as adjudicative decisionmaking is influenced by these factors, deliberative process and agency expertise are undermined if not abandoned.

Notice-and-comment rulemaking, by comparison, contains many of the procedural features worthy of *Chevron* deference that immigration adjudication lacks. Even if rulemaking is imperfect, drafting the rule, explaining the background, and soliciting input from the public creates a space for a rule to be finalized with much more technical or other expertise than what might flow from a BIA or Attorney General adjudication. Indeed, intra-agency coordination among various agency experts is commonplace in the rule-drafting process,[161] followed by the opportunity for robust public input during the notice-and comment process. Further, as one of us (Wadhia) has argued at length, notice-and-comment rulemaking to establish immigration policy at the agency level—in contrast to adjudication—advances important values of public acceptability or buy in, greater consistency in outcomes, and widened transparency.[162] We return to these values when we discuss *Chevron*'s political accountability theory in Part II.C.

C. Political Accountability

In addition to expertise, the *Chevron* Court itself advanced the value of comparative political accountability as a reason for judicial deference. As the *Chevron* Court noted, "Judges are not experts in the field, and are not part of either political branch of the Government."[163] Agencies, by contrast, are part of a political branch (the executive) and report back to another political branch (Congress). As the Court noted, "Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences."[164] A federal agency, on the other hand, "may, within the limits of that [congressional] delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments."[165]

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[160] *EOIR Performance Plan, Adjudicative Employees,* U.S. Dep't of Justice, (2018), https://www.abajournal.com/images/main_images/03-30-2018_EOIR__PWP_Element_3_new.pdf. (outlining new quotas for immigration judges and the number of cleared cases and decisions overturned on appeal rates to acquire a "satisfactory" rating).

[161] *See, e.g.*, Walker, *supra* note 107, at 1034–48 (documenting role of legislative history and various agency actors in agency statutory interpretation).

[162] Shoba S. Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U. N.H. L. REV. 1, 27–32, 51–55; WADHIA, *supra* note 19.

[163] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

[164] *Id.*

[165] *Id.*

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Under the conventional account of *Chevron*'s political accountability theory, immigration adjudication might have a very strong claim to deference. After all, as noted in Parts I.A and II.A, the Attorney General has final decisionmaking authority over decisions from immigration judges and the BIA. And the Attorney General has exercised that authority, especially in recent years, to shape immigration policy at the agency level.[166] It seems hard to argue against the conventional account, in that the Attorney General is indisputably more politically accountable to the President (and Congress) than an Article III federal court could ever be. And deferring to the BIA and Attorney General would no doubt advance "the *Chevron* Court's express objective to reduce partisanship in judicial decisionmaking."[167]

This conventional account, however, is incomplete on two related grounds. First, as discussed above, our inquiry here is not just about the comparative political accountability between agencies and courts, but also between the modes of agency action (adjudication versus rulemaking). Policymaking through adjudication may not be an adequate substitute for rulemaking under an "elections matter" accountability theory. Second, and related, political accountability should be viewed in broader terms of democratic accountability and legitimacy. Hickman and Nielson nicely capture this point: "A process that requires an agency to interact with broad segments of society and explain why it has acted in view of the concerns that general public raises, all else being equal, should result in more legitimate outcomes."[168] In other words, *Chevron*'s political accountability theory "presumably also comes from the procedures that agencies must use, in addition to the fact that elections have consequences"[169] As Richard Frankel has recently explored at length, the Attorney General's referral and final decisionmaking process lacks the hallmarks of public engagement and transparency that is commonplace in notice-and-comment rulemaking.[170]

In sum, if the choice is between rulemaking and administrative adjudication in the immigration context, it does not strike us as a close

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[166] *See generally* Alberto Gonzales & Patrick James Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 Iowa L. Rev. 841 (2016); Parts I.A and II.A *supra*.

[167] Barnett et al., *supra* note 98, at 1524. One of us (Walker) has advocated, and continues to believe, that *Chevron*'s critics "should more closely consider one significant and overlooked cost: such reform could result in partisanship playing a larger role in judicial review of agency statutory interpretations." *Id.* at 1524. It just turns out, as discussed in Part II.D, that the overall benefits of eliminating *Chevron* in the immigration adjudication context outweigh these costs, especially when immigration rulemaking would still receive *Chevron* deference.

[168] *See* Hickman & Nielsen, *supra* note 13, at *[Part II.A.i].

[169] *Id.*

[170] *See* Frankel, *supra* note 78, at *[Part III.C].

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call which mode of agency action garners more public accountability and thus legitimacy.

D. Uniformity in Law and the Overall Cost-Benefit Analysis

A final, more recently developed rationale for *Chevron* deference is that it promotes national uniformity in federal law. It does so by limiting courts' responsibility for determining the best reading of a statute. Peter Strauss is arguably the moving force behind this deference theory, arguing that because courts need only assess the reasonableness of an agency's interpretation, it is more likely that lower federal courts across the country will agree in accepting or rejecting the agency's interpretation.[171] In *City of Arlington v. FCC*, the Supreme Court recognized this "stabilizing purpose of *Chevron*": unlike "[t]hirteen Courts of Appeals applying a totality-of-the-circumstances test," *Chevron* deference engenders predictability to agency statutory interpretations and thus more uniformity in federal law.[172] As an empirical matter, this uniformity rationale for *Chevron* deference seems to find strong support in the federal courts of appeals.[173]

The importance of uniformity in law may be at its apex in federal immigration law, and uniformity is indisputably not better advanced through judicial interpretation than agency statutory interpretation—particularly in the modern era when the Supreme Court decides fewer than one hundred cases per year.[174] But, again, for our purposes the comparison isn't just between courts and agencies, but between rulemaking and agency adjudication. On the latter front, the question is a closer call. Adjudication may allow the agency to move more swiftly to bring uniformity to federal immigration law, especially when the circuit courts have created inter-circuit disuniformity and the agency has a

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[171] Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121–22 (1987).

[172] City of Arlington v. FCC, 569 U.S. 290, 307 (2013).

[173] *See, e.g.*, Barnett et al., *supra* note 98, at 1525 (concluding that "our findings do suggest that *Chevron* creates a more favorable climate for nationwide uniformity that de novo or *Skidmore* review cannot match").

[174] *See* Strauss, *supra* note 171, at 1121 (arguing "that it is helpful to view *Chevron* through the lens of the Supreme Court's severely restricted capacity directly to enforce uniformity upon the courts of appeals in those courts' review of agency decisionmaking"). Last Term, the Supreme Court issued just 53 signed decisions—the fewest since 1862. Adam Feldman, *Final Stat Pack for October Term 2019 (updated)*, SCOTUSBLOG (July 10 2020), https://www.scotusblog.com/2020/07/final-stat-pack-for-october-term-2019/.

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suitable case to decide the issue.[175] Notice-and-comment rulemaking generally takes more time, so perhaps administrative adjudication—at least at the margins—better advances *Chevron*'s uniformity theory. This may be particularly true in the immigration adjudication context, where the Attorney General can expeditiously exercise her referral and review authority to make the final decision for the agency.[176]

That administrative adjudication may better advance uniformity in federal law than judicial review or even agency rulemaking, however, should not be overemphasized. We doubt that any judge, member of Congress, or scholar views national uniformity as the exclusive theory for *Chevron* deference. Instead, it is just one of at least four core rationales. Some may not even value uniformity as a reason for deference. At the very least, the costs and benefits of all relevant values should be weighed together. As discussed in Part II.A and further elaborated by Hickman and Nielson, it is not a close question whether agency adjudication or notice-and-comment rulemaking best leverages expertise. This case study underscores how immigration rulemaking (as opposed to adjudication) better leverages agency and public expertise, utilizes a more deliberative process, and (albeit perhaps to a lesser extent) better promotes political accountability and public legitimacy.

Indeed, if we were pressed to weigh just the last two values—accountability and uniformity—agency rulemaking would come out ahead over administrative adjudication in the immigration context. When the first two values are considered, the case against *Chevron* deference in immigration adjudication becomes so clear as to justify some course correction to narrow *Chevron*'s domain. Part III turns to how to go about that reform.

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[175] *See, e.g.*, Nat'l Cable & Telecomm'ns Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005) ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.").

[176] To be sure, that policymaking via rulemaking often takes more time and resources than policymaking via adjudication could result in immigration policy at the agency level regulating less conduct than the INA permits. *Cf.* Daniel E. Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. (forthcoming 2020) (criticizing calls to eliminate *Chevron* deference as imposing an anti-regulatory asymmetry in administrative law), https://ssrn.com/abstract=3539595. At least in the immigration context, we don't view the costs of this potential under-regulation to outweigh the various important benefits of narrowing *Chevron*'s domain to rulemaking that are detailed in Part II.

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III. HOW TO NARROW *CHEVRON*'S IMMIGRATION DOMAIN

In Part II, we demonstrated how *Chevron*'s theoretical foundation is particularly weak in the immigration adjudication context, arguably weaker there than in other administrative adjudications where a hearing is required by statute or regulation. The case to narrow *Chevron*'s domain in the immigration context to just notice-and-comment rulemaking seems quite compelling as a normative and theoretical matter. The resulting question is how to bring about this reform. We focus on three paths: the Supreme Court, Congress, and the Executive itself.

A. The Supreme Court and Stare Decisis

In their contribution to this Symposium, Hickman and Nielson powerfully argue how the Supreme Court should narrow *Chevron*'s domain to exclude judicial deference for some if not all agency statutory interpretations created via administrative adjudication.[177] Assuming the Court agrees that *Chevron*'s foundation is unsound in the immigration adjudication context, stare decisis is still a potent constraint. Hickman and Nielson argue, however, that stare decisis should not control here—for three reasons.

First, they argue that the stare decisis claim is particularly weak in the adjudication context because the Supreme Court has seldom applied *Chevron* deference to adjudication (as opposed to rulemaking). Second, the other traditional factors—the low reliance interests, the judge-made nature of the doctrine, and the doctrine's incorrectness in the adjudication context—do not support keeping the precedent. Third, they argue various changed circumstances in the Court's administrative law jurisprudence—*i.e.*, that an agency statutory interpretation can now trump a prior judicial interpretation and that the Court has reiterated fair notice principles and retroactivity concerns in administrative law—counsel revisiting *Chevron* deference in the adjudication context.[178]

Fully assessing Hickman and Nielson's stare decisis arguments exceeds this Article's scope (and word limit). But they present a compelling case—one that seems to apply with similar force in the immigration adjudication context. Their argument will surely be further developed by litigants, scholars, and lowers courts, and it merits serious

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[177] *See* Hickman & Nielsen, *supra* note 13, at *[Part III].

[178] In his contribution to this Symposium, Randy Kozel advances a different argument for why stare decisis should pose no barrier to overruling the *Chevron* decision if the doctrine is based on a theory of congressional delegation: the precedent's "combination of exceptional breadth and intrusion upon interpretive choice places *Chevron* (as currently theorized) beyond the domain of stare decisis." Randy J. Kozel, *Retheorizing Precedent*, 70 DUKE L.J. (forthcoming 2021).

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attention from the Supreme Court in the appropriate case.[179] For the reasons we detail in this Article, immigration adjudication is arguably the best context within which courts and litigants can build the case against *Chevron* deference.

B. Congress and Comprehensive Immigration Reform

The Supreme Court, of course, is not the only actor with the power to narrow *Chevron*'s domain. As the Court has emphasized, "[a]ll our interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change."[180] As noted in the Introduction, Republicans in recent years have proposed legislation to amend the APA to eliminate *Chevron* deference entirely.[181] We highly doubt such sweeping legislative proposals will

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[179] One of us (Walker) is not convinced that the Court should overturn *Chevron* deference—even in the immigration adjudication context—in light of statutory stare decisis. To be sure, as a matter of first principles, *Chevron* deference does not strike either of us as a proper interpretation of Section 706 of the APA, for many of the reasons articulated by Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 985–94 (2016). *But see* Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1641–57 (2019) (defending *Chevron* as a statutory precedent). And, as we argue in Part II, the normative case against *Chevron* in immigration adjudication is compelling. Despite these considerations, *Chevron* has been our law generally since 1984 and in the immigration adjudication context specifically since at least 1987, with the Court reaffirming the precedent numerous times. *See* Part I.B *supra*. Importantly, moreover, there is strong evidence that Congress legislates against the backdrop of the *Chevron* Court's interpretation of the APA. *See, e.g.*, Gluck & Bressman, *supra* note 107, at 995 (finding that the congressional staffers surveyed "displayed a greater awareness of *Chevron* by name than of any other canon in our study"). And the Court has recognized a strong presumption against administrative law exceptionalism when interpreting the APA. *See, e.g.*, Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221, 243–50 (2014) (arguing that the APA sets the default standards for judicial review of agency action when an agency's organic statute does not provide its own standard of review); *cf.* David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 585–92 (2017) (detailing how immigration law is already exceptional at the constitutional law level). Although scholars and judges may well reasonably disagree about the pull of statutory stare decisis in this context, one of us (Walker) is not convinced that overturning this statutory precedent would be consistent with the doctrine of stare decisis. *Cf.* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853 (2018) (similarly defending qualified immunity for actions brought under 42 U.S.C. § 1983 on statutory stare decisis grounds).

[180] Kimble v. Marvel Entm't, LLC, 576 U.S. 446, 456 (2015).

[181] *See, e.g.*, Separation of Powers Restoration Act, S. 2724, § 2, 114th Cong. (2016).

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garner the requisite bipartisan support any time soon. And, perhaps more importantly for our purposes, we are not convinced that eliminating *Chevron* deference for all agency statutory interpretations would make for good policy.

But what Congress should do is surgically remove *Chevron* deference for agency statutory interpretations made in immigration adjudications, while preserving it for immigration interpretations promulgated via notice-and-comment rulemaking. For the former category of agency action, Congress should not command de novo review, but instead replace *Chevron* with the less-deferential *Skidmore* standard, which instructs courts to give weight to administrative interpretations of law based on the "thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[182] This shift from *Chevron* to *Skidmore*, as Strauss has explained, is an important move from a binding policymaking "space" where the agency's reasoning does not matter as much, to a non-binding "weight" where the agency's position prevails to the extent it reflects special expertise.[183]

This legislative change, moreover, would not be made to the APA "super-statute" that governs the entire regulatory state.[184] Instead, Congress should amend the judicial review provisions of the INA. Indeed, regardless of the outcome of the upcoming presidential election, both candidates have argued for comprehensive immigration reform.[185] A provision that narrows *Chevron*'s domain to just rulemaking under the INA would be a minor detail in a comprehensive reform bill. And it should garner at least some bipartisan support—from Republicans who have long called for the elimination of *Chevron* generally and from Democrats and Republicans who appreciate the normative case against *Chevron* deference in immigration adjudication in particular.

Such legislative reform would not be unprecedented. As Kent Barnett details, Congress similarly "codified *Chevmore*" when it enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[186] There, Congress targeted the judicial deference the Office of the Comptroller of the Currency (OCC) receives for its decisions that federal

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

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

[184] Kathryn E. Kovacs, *Superstatute Theory and the Administrative Procedure Act*, 90 IND. L.J. 1207, 1209 (2015).

[185] *See, e.g.*, Anita Kumar, *Trump Looks to Dreamers for an Immigration Deal*, POLITICO (June 7, 2020); Paul Waldman, *If Joe Biden Wins, Immigration Reform May Actually Be Possible*, WASH. POST (May 19, 2020).

[186] Barnett, *supra* note 20, at 22–33.

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law preempts state consumer financial laws. For OCC interpretations preempting state law, Congress replaced *Chevron* with *Skidmore*.[187] And it included a savings clause to make clear that the OCC should continue to receive *Chevron* deference for all other statutory interpretations.[188] Congress could similarly codify *Chevmore* in the immigration adjudication context by, for instance, amending the INA's standard of review provisions of removal orders.[189]

As Barnett explores in greater detail, through *Chevmore* codification "Congress can provide a '*Chevron* reward' or a '*Skidmore* penalty' in light of agency behavior."[190] By shifting to the less-deferential *Skidmore* standard for immigration adjudication, the BIA and Attorney General will face greater incentives to exercise expertise, engage in reasoned decisionmaking, and perhaps "play it safer" when interpreting the INA via adjudication.[191] After all, as *Skidmore* commands, the agency statutory interpretation only receives weight based on the "thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."[192] Failure to do so would risk judicial invalidation of the agency statutory interpretation. To provide one empirical snapshot, in a study of all circuit-court decisions citing *Chevron* during an eleven-year period, agency interpretations were significantly more likely to prevail under *Chevron* (77.4%) than *Skidmore* (56.0%).[193]

Because an agency is more likely to prevail in court under *Chevron* than *Skidmore*, the Justice Department will also face incentives to move major policymaking out of adjudication and into notice-and-comment rulemaking, where the agency would still receive the *Chevron* reward. Not only does this channel immigration policymaking at the agency level to the more publicly transparent and accountable rulemaking process, but it also allows Congress to play a larger role in the development of immigration law and policy. As Barnett astutely concludes, "*Chevmore* codification, like appropriations, congressional oversight, sunset

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[187] 12 U.S.C. § 25b(b)(5)(A).

[188] *Id.* § 25b(b)(5)(B).

[189] *See* INA § 242(b)(4), 8 U.S.C. § 1252(b)(4) (detailing scope and standard of review for judicial review of removal orders).

[190] Barnett, *supra* note 20, at 51.

[191] *Cf.* Jud Mathews, *Deference Lotteries*, 91 TEX. L. REV. 1349, 1384 (2013) (asserting that when *Skidmore* deference is the definitive standard of review, "increasing the stringency of review under *Skidmore*—that is, decreasing the deference owed to agency constructions—would always induce agencies to 'play it safer' when interpreting statutes").

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

[193] Barnett & Walker, *supra* note 97, at 30 fig.1.

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provisions, and confirmation for agency officers, becomes another tool for congressional oversight of agency action."[194]

C. The Executive Branch and Internal Administrative Law

Narrowing *Chevron*'s domain in the immigration context does not require judicial or congressional action. The Executive Branch can do so unilaterally. As the Supreme Court famously held in *SEC v. Chenery* in 1947, "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."[195] To be sure, there may well be in certain circumstances "a very definite place for the case-by-case evolution of statutory standards."[196] The *Chenery* Court identified three: (1) "problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule"; (2) "the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule"; or (3) "the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule."[197]

As highlighted in Part II.A, we are not convinced these circumstances will present themselves often in the immigration context. And when they do, we do not argue that the BIA and Attorney General should never utilize adjudication to engage in "case-by-case evolution of statutory standards." Instead, our argument is that the Executive Branch—through the Attorney General and DHS Secretary—should shift the default to rulemaking for immigration policymaking.[198] And when necessary to engage in adjudicative policymaking, the Attorney General should not

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[194] Barnett, *supra* note 20, at 56.

[195] SEC v. Chenery Corp., 332 U.S. 194, 203 (1947); *see also* Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 524 (1978) ("Even apart from the Administrative Procedure Act this Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments.").

[196] *Chenery*, 332 U.S. at 203.

[197] *Id.* at 202–03.

[198] *See* INA § 103(g)(2), 8 U.S.C. § 1103(g)(2) ("The Attorney General shall establish such regulations, . . . review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section."); *id.* § 1103(a)(1) (charging the DHS Secretary "with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization," but providing "[t]hat determination and ruling by the Attorney General with respect to all questions of law shall be controlling").

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seek *Chevron* deference for those statutory interpretations, but instead ask the court to review the agency's interpretation under the less-deferential *Skidmore* standard—or perhaps seek no deference at all.

To be sure, whether an agency can waive *Chevron* deference is hotly contested, with Justices Breyer and Gorsuch both suggesting earlier this year that *Chevron* is waivable.[199] Even if a court will not honor *Chevron* waiver, an agency can still choose to adjudicate with the assumption that *Chevron* does not apply. There is some, albeit limited, empirical support for the idea that agencies are less aggressive and/or more faithful to their statutory mandates if they believe their statutory interpretations will *not* receive *Chevron* deference.[200] And, as one of us has counseled elsewhere, when waiving *Chevron* deference, the agency "should not hold back on its *Skidmore* analysis" but "utilize its 'full panoply of *Skidmore* reasoning.'"[201] In other words, the agency should not only waive *Chevron* deference; it should adjudicate in a way that would be more likely to withstand judicial scrutiny under *Skidmore*.

Indeed, the Executive Branch should go further than just reforming how it makes policy via immigration adjudication. It should commit to shifting major immigration policymaking away from adjudication and into the realm of notice-and-comment rulemaking. The agency can commit to this new process without a congressional or judicial command,

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[199] Cty. of Maui, Hawaii v. Hawaii Wildlife Fund, 140 S. Ct. 1462, 1474 (2020) ("Neither the Solicitor General nor any party has asked us to give what the Court has referred to as *Chevron* deference to EPA's interpretation of the statute."); Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement regarding the denial of certiorari) (arguing that the D.C. Circuit was "mistaken" to hold that *Chevron* is not waivable and observing that "[t]his Court has often declined to apply *Chevron* deference when the government fails to invoke it"). *See, e.g.*, James Durling & E. Garrett West, *May* Chevron *Be Waived?*, 71 STAN. L. REV. ONLINE 183, 184 (2019) (arguing against waiver); Jeremy D. Rozansky, Comment, *Waiving* Chevron, 85 U. CHI. L. REV. 1927, 1930 (2018) (same); Note, *Waiving* Chevron *Deference*, 132 HARV. L. REV. 1520 (2019) (same). *See generally* Kristen E. Hickman, County of Maui *&* Chevron *Waiver—Let's Not Get Carried Away*, YALE J. ON REG: NOTICE & COMMENT (Apr. 27, 2020) (summarizing the *Chevron* deference waiver debate), https://www.yalejreg.com/nc/county-of-maui-chevron-waiver-lets-not-get-carried-away/.

[200] *See* Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 722–24, 722 fig.3 (2014) (reporting that two in five rule drafters surveyed agreed or strongly agreed—with another two in five somewhat agreeing—that a federal agency is more "aggressive" in its interpretive efforts if confident *Chevron* deference applies, as opposed to the less-deferential *Skidmore* standard or de novo review).

[201] Christopher J. Walker, *How to Win the Deference Lottery*, 91 TEX. L. REV. SEE ALSO 73, 80 (2013).

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via its discretion to create internal administrative law.[202] Indeed, the Justice Department recently codified a similar procedural-channeling and deference-limiting internal law in the context of agency guidance and *Auer* deference to agency regulatory interpretations. In an interim final rule promulgated in August 2020, the Justice Department set forth of number of rules and procedures for creating agency guidance documents and then instructed that "[t]he Department shall not seek deference [in litigation] to any guidance document issued by the Department or any component after the effective date of this rule that does not substantially comply with the[se] requirements."[203]

At the same time, the President and Congress need not just stand by, waiting for this internal administrative law to develop organically. The President should insist this internal reform of anyone he nominates to serve as Attorney General, and members of the Senate Judiciary Committee can and should extract this commitment from the Attorney General nominee as part of the confirmation process. An early commitment by the Attorney General to shift major immigration policy to informal rulemaking will encourage a shift internally. (Legislating *Chevmore* for immigration adjudication would create additional "*Chevron* rewards" for the Executive Branch to make major immigration policy made through rulemaking.)

As Gillian Metzger and Kevin Stack have observed, "[t]he constraints imposed by internal administrative law will be critical in resisting unlawful or excessive assertions of administrative power now, just as they have been in the past."[204] Shifting from adjudication to rulemaking for immigration policymaking at the agency level is just one more example of the virtues of internal administrative law.[205]

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[202] Internal administrative law broadly includes all "measures governing agency functioning that are created within the agency or the executive branch and that speak primarily to government personnel," Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1251 (2017), all of which "share the fundamental characteristic of being implemented from inside of agencies to control their actions and operations." Christopher J. Walker & Rebecca Turnbull, *Operationalizing Internal Administrative Law*, 71 HASTINGS L.J. 1225, 1231 (2020).

[203] 28 C.F.R. § 50.27(b)(2), https://www.justice.gov/file/1308736/download.

[204] Metzger & Stack, *supra* note 202, at 1248 (2017).

[205] This shift to rulemaking in the immigration context should not be interpreted as granting a blank check to the agency. *Chevron* deference still requires a court to find the statute "genuinely ambiguous" and the agency's interpretation "reasonable"—inquiries the Court has emphasized are exacting. Kisor v. Wilkie, 139 S. Ct. 2400, 2415–16 (2019). Moreover, the rulemaking must withstand arbitrary-and-capricious review under the APA, which the Court in recent years has suggested is a much "harder look" than those APA terms may suggest. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S.

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CONCLUSION

When then-Judge Gorsuch remarked that *Chevron* deference is the elephant in the room,[206] virtually all of us read that as Gorsuch joining the call to eliminate *Chevron* deference entirely. That was certainly the mood, at least from the Democrats on the Senate Judiciary Committee at Gorsuch's confirmation hearing to the Supreme Court. But if we actually look at the immigration context in which Gorsuch expressed those concerns, we discover that the theoretical foundations for *Chevron* deference are perhaps most precarious with respect to immigration adjudication. And narrowing *Chevron*'s immigration domain to just rulemaking would not have the "titanic real-world implications on all aspects of our everyday lives" that the Senators worried about at Gorsuch's confirmation.[207] To the contrary, shifting the default from adjudication to rulemaking to establish federal immigration policy would be more consistent with *Chevron*'s theoretical foundations—to leverage agency expertise, to engage in a deliberative process, and to increase political accountability.

In the lead article in this Symposium, Hickman and Nielson call on the Supreme Court to reconsider *Chevron*'s domain when it comes to administrative adjudication, and we agree that judicial attention is merited, especially with respect to immigration adjudication where the lack of agency expertise and deliberative process is glaring. But it is a mistake to focus only on courts when it comes to immigration law and policy. The political branches can and should act. Comprehensive immigration reform should be a legislative priority after the presidential election, and *Chevmore* codification in the INA should garner bipartisan support as part of any such proposal. But the Executive Branch need not wait for Congress. The Attorney General, under the President's direction if necessary, can and should embrace this reform internally—by waiving *Chevron* deference in immigration adjudication and by turning to rulemaking instead of adjudication to make major changes to immigration law and policy at the agency level.

29, 43–44 (1983) (articulating the APA's reasoned decisionmaking requirement); *see also* DHS v. Regents of Univ. of Cal., 140 S. Ct. 1891, 1911–13 (2020) (holding that APA requires the agency to consider regulatory alternatives and reliance interests); Dep't of Commerce v. New York, 139 S. Ct. 2551, 2575–76 (2019) (holding that per the APA's "reasoned explanation requirement," an agency must "offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public").

[206] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

[207] *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch To Be an Associate Justice of the Supreme Court of the United States*, S. HRG. 115–208, 115th Cong., at 30 (Mar. 20–23, 2017).

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