

# THE CASE AGAINST *CHEVRON* DEFERENCE IN IMMIGRATION ADJUDICATION

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## ABSTRACT

*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, Professors 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 this case against Chevron has perhaps its greatest force when it comes to immigration. 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, Professors Hickman and Nielson understandably focus on the Supreme Court. This Article also explores that judicial option but argues 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, this proposal should be part of any comprehensive immigration reform legislation. 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. Shifting the immigration*

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*policymaking default from adjudication to rulemaking is more consistent with Chevron's theoretical foundations—to leverage agency expertise, to engage in a deliberative process, and to increase political accountability.*

## TABLE OF CONTENTS

Introduction .....	1198
I. An Overview of Immigration Adjudication .....	1204
A. Immigration Adjudication Process .....	1206
B. Judicial Review and <i>Chevron</i> Deference .....	1212
II. <i>Chevron's</i> Precarious Foundation in Immigration	
Adjudication .....	1214
A. Expertise .....	1215
1. <i>Scientific or Technical Expertise</i> .....	1217
2. <i>Legislative Expertise</i> .....	1221
3. <i>Craft Expertise</i> .....	1223
B. Deliberative Process .....	1224
C. Political Accountability .....	1231
D. Uniformity in Law and the Overall Cost-Benefit	
Analysis .....	1233
III. How to Narrow <i>Chevron's</i> Immigration Domain .....	1235
A. The Supreme Court and <i>Stare Decisis</i> .....	1235
B. Congress and Comprehensive Immigration Reform .....	1236
C. The Executive Branch and Internal Administrative	
Law.....	1239
Conclusion.....	1242

## INTRODUCTION

Over the last decade, we have seen a growing call, largely from those right of center, to eliminate *Chevron*<sup>1</sup> 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.<sup>2</sup> Those calls arrived center stage

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1. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

2. *Id.* at 842–43. For a collection of these criticisms, see generally Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 *GEO. J.L. & PUB. POL'Y* 103 (2018). Notably, 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.*

during the March 2017 Senate Judiciary Committee hearing on then-Judge Neil Gorsuch’s nomination to the Supreme Court. While serving on the Tenth Circuit, Gorsuch had penned a concurring opinion that questioned the constitutionality and wisdom of *Chevron* deference and suggested that “[m]aybe the time has come to face the [*Chevron*] behemoth.”<sup>3</sup>

*Chevron* deference garnered nearly one hundred mentions at Gorsuch’s confirmation hearing.<sup>4</sup> The senators’ opening statements are illustrative. Senator Dianne 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.<sup>5</sup> Senator Amy 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.”<sup>6</sup> “[T]o those who subscribe to President Trump’s extreme view,” Senator Al Franken declared, “*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.”<sup>7</sup> In total, eight senators mentioned Gorsuch’s views on *Chevron* deference during their questioning.<sup>8</sup> Simply put, the potential demise of *Chevron* deference

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L. REV. 779, 782–84 (2010) (outlining ten reasons why *Chevron* should be overruled); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989) (“The danger of *Chevron*’s song lies in its apparent obliviousness to the fundamental alterations it makes in our constitutional conception of the administrative state.”).

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

4. *See Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. *passim* (2017) [hereinafter *Gorsuch Confirmation Hearing*] (mentioning the word “*Chevron*” ninety-four times).

5. *Id.* at 6–7 (statement of Sen. Dianne Feinstein, Ranking Member, S. Comm. on the Judiciary).

6. *Id.* at 30 (statement of Sen. Amy Klobuchar, Member, S. Comm. on the Judiciary).

7. *Id.* at 36 (statement of Sen. Al Franken, Member, S. Comm. on the Judiciary).

8. *See id.* at 86–87 (statement of Sen. Feinstein); *id.* at 90–91, 271–73 (statement of Sen. Orrin Hatch, Member, S. Comm. on the Judiciary); *id.* at 127–29 (statement of Sen. John Cornyn, Member, S. Comm. on the Judiciary); *id.* at 153–55, 302–03 (statement of Sen. Klobuchar); *id.* at 159 (statement of Sen. Chuck Grassley, Chairman, S. Comm. on the Judiciary); *id.* at 174–76 (statement of Sen. Franken); *id.* at 201–02, 331–32 (statement of Sen. Jeff Flake, Member, S.

was a core talking point against Gorsuch's elevation to the Supreme Court.

Justice Gorsuch has since finished his third full year on the Supreme Court. Yet the *Chevron* revolution the senators feared has not materialized. To the contrary, in *Kisor v. Wilkie*,<sup>9</sup> the Court rejected a challenge to eliminate *Auer*<sup>10</sup> deference—a sibling doctrine regarding judicial deference to agency regulatory interpretations.<sup>11</sup> Despite Chief Justice John Roberts's suggestion that *Kisor*'s reaffirmance of *Auer* did not “touch upon the . . . question” of *Chevron* deference,<sup>12</sup> we do not expect the Court to overturn *Chevron* any time soon. In our view, *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 to eliminate *Chevron* deference—despite various legislative proposals to do so in recent years.<sup>13</sup>

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*,<sup>14</sup> the Tenth Circuit confronted and rejected an agency statutory interpretation of the Immigration and Nationality Act (“INA”) that the Board of Immigration Appeals (“BIA”) had embraced via agency adjudication.<sup>15</sup> Gorsuch authored the opinion for the Tenth Circuit<sup>16</sup>

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Comm. on the Judiciary); *id.* at 216–17 (statement of Sen. Mike Crapo, Member, S. Comm. on the Judiciary).

9. *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

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

11. *Kisor*, 139 S. Ct. at 2422–23. 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) (preferring the standard set out in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

12. *Id.* at 2425 (Roberts, C.J., concurring in part) (casting the deciding vote to uphold *Auer* deference under *stare decisis*).

13. *See, e.g.*, Separation of Powers Restoration Act of 2016, S. 2724, 114th Cong. § 2 (amending the Administrative Procedure Act (“APA”) to eliminate *Auer* and *Chevron* deference); Separation of Powers Restoration Act, H.R. 5, 115th Cong. tit. II, § 202 (2017) (same); *see also* 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).

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

15. *Id.* at 1144–46.

16. *Id.* at 1143.

and published a separate concurrence to observe that “[t]here’s an elephant in the room”: *Chevron* deference.<sup>17</sup>

That elephant remains in the immigration courtroom. This Article seeks to return the debate about *Chevron* deference to this immigration context. To do so, it builds on the lead article in this Symposium, in which Professors Kristin Hickman and Aaron Nielson argue that the Supreme Court should narrow *Chevron*’s domain to exclude, or at a minimum reduce, judicial deference to agency statutory interpretations established in an administrative adjudication.<sup>18</sup> Further, this Article draws from important scholarship on immigration adjudication to reassess the empirical and theoretical underpinnings of *Chevron*’s domain in immigration adjudication. Ultimately, the case against *Chevron* deference in administrative adjudication has perhaps its greatest force when it comes to immigration adjudication.<sup>19</sup>

On closer examination, the theoretical foundations for *Chevron* deference crumble in this context. *Chevron*’s core rationale for congressional delegation and judicial deference—agency expertise—is particularly weak in 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.”<sup>20</sup> It is not formal adjudication under the Administrative Procedure Act (“APA”) and therefore lacks many of the signature procedural protections afforded in APA-governed

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17. *Id.* at 1149 (Gorsuch, J., concurring).

18. Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron’s Domain*, 70 DUKE L.J. 931, 938 (2021).

19. 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 agency adjudication) and Type B (formal-like agency adjudication where a hearing is required by another statute or regulation) adjudications, 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)).

20. *See* Walker & Wasserman, *supra* note 19, at 154; *id.* 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.”).

formal adjudication.<sup>21</sup> The third central rationale—political accountability—may at first blush seem compelling in immigration adjudication, due to the attorney general’s final decisionmaking authority.<sup>22</sup> Building on Professors 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 in immigration adjudication.

To be sure, this is not an argument for eliminating *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 refugee and asylum context.<sup>23</sup> Here, the argument against *Chevron*, by contrast, is largely procedural, not substantive. *Chevron* deference should apply in the immigration context *only* to agency statutory interpretations promulgated through notice-and-comment rulemaking. The lessdeferential *Skidmore*<sup>24</sup> standard should govern interpretations advanced in immigration adjudication.<sup>25</sup> As one of us (Wadhia) has explored in calling for 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

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21. *See id.* at 172. For the APA’s formal procedural requirements, see 5 U.S.C. §§ 554–557 (2018), and Walker & Wasserman, *supra* note 19, at 148–53, 150 tbl.1. For more on how immigration adjudication differs from APA-governed formal adjudication, see MICHAEL ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 151–58 (2019).

22. *But see* Walker & Wasserman, *supra* note 19, at 173 (“[T]he Attorney General only reviews cases on a discretionary basis.”).

23. *See, e.g.*, Michael Kagan, *Chevron’s Liberty Exception*, 104 IOWA L. REV. 491, 495, 532–33 (2019) (arguing for “a physical liberty exception to *Chevron*” in the immigration context); Maureen A. Sweeney, *Enforcing/Protection: The Danger of Chevron in Refugee Act Cases*, 71 ADMIN. L. REV. 127, 135, 189–92 (2019) (discouraging application of *Chevron* deference to withholding and asylum decisions).

24. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

25. *See id.* at 140 (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 consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control”).

leading role.<sup>26</sup> 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. Professors Hickman and Nielson understandably focus on the Supreme Court,<sup>27</sup> and this Article also discusses *stare decisis* and judicial action. But for 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, the proposal presented here should be part of any comprehensive immigration reform legislation. As Professor Kent Barnett details, Congress has codified lesser deference standards for certain agency actions<sup>28</sup>—it should do so in immigration adjudication, too. 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. The Biden administration should embrace this reform, and senators of both parties should extract this commitment from the next attorney general nominee as part of the confirmation process.

In other words, both political branches should work to shift the default from adjudication to rulemaking for 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 must also 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 an overview of immigration adjudication, including how the Supreme Court has applied *Chevron* deference in the immigration context. Part II critically examines *Chevron's* theoretical foundations as applied to the immigration adjudication context. Part III explores the mechanics of narrowing *Chevron's* domain to exclude agency statutory

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26. See SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 85–87, 152–55 (2015) [hereinafter WADHIA, BEYOND DEPORTATION].

27. Hickman & Nielson, *supra* note 18, at 938.

28. Kent Barnett, *Codifying Chevmore*, 90 N.Y.U. L. REV. 1, 3–5 (2015).

interpretations advanced via immigration adjudication—suggesting potential reforms by all three branches of the federal 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.<sup>29</sup> A line officer from Immigration Customs and Enforcement (“ICE”) may issue a supervision order to an immigrant during a routine check-in.<sup>30</sup> 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.<sup>31</sup> An inspector at Customs and Border Protection (“CBP”) may deport a father who arrives at a land border without papers.<sup>32</sup> 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.<sup>33</sup>

In fact, the majority of removal (deportation) orders issued each year are made by DHS officers through what one of us (Wadhia) has coined a “speedy deportation.”<sup>34</sup> Speedy deportation refers to three

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29. *Consular Affairs by the Numbers*, U.S. DEP’T STATE (2020), <https://travel.state.gov/content/dam/travel/CA-By-the-Number-2020.pdf> [<https://perma.cc/94EW-LFYU>]; see also *U.S. Visas*, U.S. DEP’T STATE, BUREAU CONSULAR AFFS., <https://travel.state.gov/content/travel/en/us-visas.html> [<https://perma.cc/U47F-PSNR>].

30. See SHOBA SIVAPRASAD WADHIA, *BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP 48* (2019) [hereinafter WADHIA, *BANNED*]; *Detention Management*, U.S. IMMIGR. & CUSTOMS ENF’T (last updated Dec. 29, 2020), <https://www.ice.gov/detention-management> [<https://perma.cc/L9KZ-VV92>].

31. See *Adjustment of Status*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 25, 2020), <https://www.uscis.gov/green-card/green-card-processes-and-procedures/adjustment-of-status> [<https://perma.cc/XJP6-WBEB>]; *Green Card*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card> [<https://perma.cc/S6LG-RQ8L>].

32. See *Along U.S. Borders*, U.S. CUSTOMS & BORDER PROT. (Jan. 17, 2018), <https://www.cbp.gov/border-security/along-us-borders> [<https://perma.cc/L33U-3TVU>] (describing detection of undocumented immigrants as a duty of the U.S. Customs and Border Protection’s Border Patrol).

33. See *Operational and Support Components*, U.S. DEP’T HOMELAND SEC. (last updated Dec. 3, 2020), <https://www.dhs.gov/operational-and-support-components> [<https://perma.cc/YC87-6TBJ>].

34. See WADHIA, *BANNED*, *supra* note 30, at 80; Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1 *passim* (2014). For another scholar’s discussion of expedited deportations, see Jennifer Lee Koh, *When Shadow Removals Collide: Searching for Solutions to the Legal Black Holes Created by Expedited Removal*

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.<sup>35</sup> Last year, 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 Sonia Sotomayor declaring in dissent that the “decision handcuffs the Judiciary’s ability to perform its constitutional duty to safeguard individual liberty and dismantles a critical component of the separation of powers.”<sup>36</sup>

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”).<sup>37</sup> Immigration judges at EOIR 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.<sup>38</sup> As Part I.A details, the attorney general and the BIA exercise agency 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, and Part I.B explains how federal courts have applied *Chevron* deference to statutory interpretations embraced via immigration adjudication.

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*and Reinstatement*, 96 WASH. U. L. REV. 337, 341 (2018), and Jennifer Lee Koh & Shoba Sivaprasad Wadhia, Opinion, *Deport, Not Court? The U.S. Is Already Doing That*, L.A. TIMES (June 30, 2018, 11:10 AM), <https://www.latimes.com/opinion/op-ed/la-oe-koh-wadhia-deportations-20180630-story.html> [<https://perma.cc/UK7K-Q4K4>].

35. See WADHIA, BANNED, *supra* note 30, at 79.

36. *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1993 (2020) (Sotomayor, J., dissenting).

37. *About the Office*, U.S. DEP’T JUST. EXEC. OFF. FOR IMMIGR. REV. (Aug. 14, 2018), <https://www.justice.gov/eoir/about-office> [<https://perma.cc/TNZ3-WTG7>].

38. PLANNING, ANALYSIS & STAT. DIV. OF THE EXEC. OFF. FOR IMMIGR. REV., U.S. DEP’T JUST., STATISTICS YEARBOOK: FISCAL YEAR 2018, at 4–6, 15 tbl.6 (2018) [hereinafter 2018 STATISTICS YEARBOOK], <https://www.justice.gov/eoir/file/1198896/download> [<https://perma.cc/6UN5-4WJ2>].

### A. *Immigration Adjudication Process*

Most immigration cases at EOIR involve people in removal proceedings,<sup>39</sup> which are triggered when a charging document called the Notice to Appear (“NTA”) is filed with the immigration court.<sup>40</sup> A number of DHS employees—attorneys and nonattorneys alike—can issue an NTA.<sup>41</sup> The NTA contains information that includes notice about the location and time of a court proceeding and the reasons a person is alleged to be in violation of immigration law.<sup>42</sup>

In removal proceedings, trial attorneys from ICE represent the government and act as “prosecutors.”<sup>43</sup> Respondent noncitizens represent themselves pro se or are represented by an attorney or accredited representative.<sup>44</sup> Removal hearings are adversarial, but the proceedings themselves are “civil,” not “criminal.”<sup>45</sup> Unlike the

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39. In fiscal year 2018, 182,010 of the 195,213 cases (93.2 percent) completed by the EOIR involved removal proceedings. *Id.* at 12 tbl.5.

40. 8 C.F.R. §§ 1003.13–1003.15 (2020); *see also* AM. IMMIGR. COUNCIL & CTR. FOR IMMIGRANTS’ RIGHTS AT THE PA. STATE UNIV. DICKINSON SCH. OF L., NOTICES TO APPEAR: LEGAL CHALLENGES AND STRATEGIES 2 (2019), [https://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/notices\\_to\\_appear\\_practice\\_advisory.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/notices_to_appear_practice_advisory.pdf) [<https://perma.cc/76BC-Y3KM>].

41. *See, e.g.*, 8 C.F.R. § 239.1 (listing the types of immigration officers with authority to issue a Notice to Appear); CTR. FOR IMMIGRANTS’ RIGHTS AT THE PA. STATE UNIV. DICKINSON SCH. OF L. & COMM’N ON IMMIGR. OF THE AM. BAR ASS’N, TO FILE OR NOT TO FILE A NOTICE TO APPEAR: IMPROVING THE GOVERNMENT’S USE OF PROSECUTORIAL DISCRETION 13–18 (2013), <https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/NTAReportFinal.pdf> [<https://perma.cc/96FH-ZWMZ>].

42. *See* Immigration and Nationality Act (“INA”) § 239(a), 8 U.S.C. § 1229(a) (2018) (listing information required in a Notice to Appear); 8 C.F.R. § 1003.15.

43. *See* Attorney, U.S. IMMIGR. & CUSTOMS ENF’T (last updated Aug. 5, 2020), <https://www.ice.gov/careers/attorney> [<https://perma.cc/5HYT-FF84>].

44. 8 C.F.R. § 292.5.

45. This technical distinction is the subject of much criticism. *See, e.g.*, Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472 (2007) (noting the displacement of “the civil regulatory model of immigration law” with a “criminal justice model”); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 289 (2008) (“[R]emoval and traditional criminal proceedings . . . can be indistinguishable but for the relative lack of procedural protections and the often graver liberty interest at stake in the former.”); Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1822, 1824–26 (2011) (critiquing the civil–criminal line in the preemption context); *see also* AM. IMMIGR. COUNCIL, TWO SYSTEMS OF JUSTICE: HOW THE IMMIGRATION SYSTEM FALLS SHORT OF AMERICAN IDEALS OF JUSTICE 1–2 (2013), [https://www.americanimmigrationcouncil.org/sites/default/files/research/aic\\_twotwosystemsofjust.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/aic_twotwosystemsofjust.pdf) [<https://perma.cc/W6WS-RVQD>] (“Although immigration law is formally termed ‘civil,’

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 must see a judge.<sup>46</sup>

The immigration court has two dockets: one for respondents outside of detention and a second for those detained.<sup>47</sup> 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.<sup>48</sup> If the respondent concedes to removability or the immigration judge finds the same, the next stage of removal proceedings often involves the respondent applying for relief from removal. Respondents seek such relief at a stage in the removal process known as the “individual merits hearing,” or the “merits hearing.” These are evidentiary hearings at which both the government and the respondent may present evidence and witness testimony, including testimony of the respondent herself.<sup>49</sup> The various forms of relief act as “defenses” to removal and include asylum, cancellation of removal, and waivers from inadmissibility.<sup>50</sup> In removal proceedings, the respondent bears the burden of proving eligibility for relief.<sup>51</sup> For example, an asylum seeker must prove to an immigration judge that she has suffered persecution or has a fear of future persecution because of race, religion, nationality, political opinion, or membership in a particular social group.<sup>52</sup> While

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Congress has progressively expanded the number of crimes that may render an individual deportable, and immigration law violations often lead to criminal prosecutions.”).

46. AM. IMMIGR. COUNCIL, *supra* note 45, at 7–10; WADHIA, BEYOND DEPORTATION, *supra* note 26, at 52; Legomsky, *supra* note 45, at 511–18.

47. *Detention Management*, *supra* note 30.

48. IMMIGRANT LEGAL RES. CTR., REPRESENTING CLIENTS AT THE MASTER CALENDAR HEARING 1 (2018), [https://www.ilrc.org/sites/default/files/resources/rep\\_clnts\\_mstr\\_cal\\_hearing-20181220.pdf](https://www.ilrc.org/sites/default/files/resources/rep_clnts_mstr_cal_hearing-20181220.pdf) [<https://perma.cc/36TK-P3SM>]; *Immigration Judge Master Calendar Checklist for Pro Se Respondents*, U.S. DEP’T JUST. EXEC. OFF. FOR IMMIGR. REV., <https://www.justice.gov/eoir/page/file/924091/download> [<https://perma.cc/E7EF-LTC6>].

49. *See* INA § 240(b), 8 U.S.C. § 1229a (2018) (prescribing the form of these proceedings); *see also* OFF. OF THE CHIEF IMMIGR. JUDGE OF THE EXEC. OFF. FOR IMMIGR. REV., U.S. DEP’T JUST., IMMIGRATION COURT PRACTICE MANUAL 80 (2020) [hereinafter PRACTICE MANUAL], <https://www.justice.gov/eoir/page/file/1258536/download> [<https://perma.cc/9Y9F-6APZ>].

50. INA § 240, 8 U.S.C. § 1229a; *see also* Shoba Sivaprasad Wadhia, *Darkside Discretion in Immigration Cases*, 72 ADMIN. L. REV. 367, 377 (2020).

51. INA § 240, 8 U.S.C. § 1229 (c)(4)(a).

52. 8 C.F.R. § 208.13 (2020).

immigrants in removal proceedings speak multiple languages, all forms they must fill out are available in English only.<sup>53</sup>

The INA provides a statutory right to counsel in removal proceedings at no expense to the government.<sup>54</sup> Many immigrants in removal proceedings are unable to access or pay for a lawyer and so must navigate the process without one.<sup>55</sup> Detained immigrants are dramatically more likely to face immigration court alone.<sup>56</sup> Although the Sixth Amendment right to counsel does not attach in these proceedings, the Fifth Amendment right to due process applies, such that removal proceedings must be fundamentally fair.<sup>57</sup> The INA provides additional rights during removal proceedings, including the right to present evidence, call witnesses, and cross-examine witnesses and evidence.<sup>58</sup> In removal proceedings, respondents also have the right to an interpreter.<sup>59</sup>

Immigration judges play a significant role during removal proceedings. They ask questions of the parties. They make decisions about whether to continue, terminate, or close a proceeding.<sup>60</sup> They also decide a respondent's eligibility for relief from removal, which may be delivered in writing or orally.<sup>61</sup> Once the judge hands down her

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53. See, e.g., *EOIR-29, Notificación de Apelación Ante la Junta de Apelaciones de Inmigración Sobre una Decisión de un Oficial de Inmigración*, U.S. CITIZENSHIP & IMMIGR. SERVS. (last updated June 12, 2020), <https://www.uscis.gov/es/eoir-29> [<https://perma.cc/773P-EEUE>] (providing only English-language forms on the Spanish-language website).

54. INA § 292, 8 U.S.C. § 1362.

55. See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 7 (2015) (finding “that only 37% of immigrants had counsel” in immigration proceedings from 2007 to 2012); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 46 (2010) (noting detainees’ limited access to attorneys (citing Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1651–52 (1997))).

56. *Who Is Represented in Immigration Court?*, TRAC IMMIGR. (Oct. 16, 2017), <https://trac.syr.edu/immigration/reports/485> [<https://perma.cc/9AYU-74HB>].

57. 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).

58. INA § 240, 8 U.S.C. § 1229a(b)(4).

59. PRACTICE MANUAL, *supra* note 49, at 64; Cristobal Ramón & Lucas Reyes, *Language Access in the Immigration System: A Primer*, BIPARTISAN POL’Y CTR. (Sept. 18, 2020), <https://bipartisanpolicy.org/blog/language-access-in-the-immigration-system-a-primer> [<https://perma.cc/YQG5-GUR9>].

60. See 8 C.F.R. §§ 1240.10(b), 1240.12 (2020).

61. *Id.*

decision, the respondent or ICE trial attorney may appeal to the BIA.<sup>62</sup> Unlike immigration courts, which are sprinkled throughout the country, the BIA is housed in one building in Falls Church, Virginia.<sup>63</sup> Importantly, appeals must be made within thirty days of the immigration judge’s decision.<sup>64</sup> Because a formal transcript of the hearing can be mailed later than thirty days after the decision, the respondent and counsel, if any, must pay close attention during the oral hearing.

Appeals to the BIA are common. And yet, most decisions are not appealed by either party.<sup>65</sup> For respondents, filing an appeal can be expensive or could mean that they remain in detention pending appeal. Absent an appeal, the immigration judge’s decision is “final” and may result in the immigrant obtaining relief or a formal order of removal.<sup>66</sup> If an appeal is filed, a decision by the BIA to affirm a removal order constitutes the final order of removal.<sup>67</sup> At this point, the BIA may publish its decision as precedential, which means it is legally binding on other immigration adjudications.<sup>68</sup> More often, BIA decisions are unpublished and thus nonprecedential<sup>69</sup>—and issued by a single judge or panel without the same binding nature.<sup>70</sup> When making decisions,

62. See generally 8 C.F.R. §§ 1003.1–1003.8 (describing the process to appeal to the BIA from immigration judges’ decisions in removal proceedings).

63. *Board of Immigration Appeals*, U.S. DEP’T JUST. EXEC. OFF. FOR IMMIGR. REV. (last updated May 30, 2020), <https://www.justice.gov/eoir/board-of-immigration-appeals> [<https://perma.cc/DWK3-SK8N>].

64. 8 C.F.R. § 1240.15.

65. Compare 2018 STATISTICS YEARBOOK, *supra* note 38, at 7 fig.2 (indicating 195,571 matters completed in fiscal year 2018), with *id.* at 35 fig.27 (noting 49,522 appeals received by the BIA the same year).

66. 8 C.F.R. § 1241.1 (implementing INA § 101(a)(47)(B), 8 U.S.C. § 1101(a)(47)(B) (2018)).

67. 8 C.F.R. §§ 1003.1(d)(7), 1241.1.

68. *Id.* § 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.”).

69. Of the 29,788 cases completed by the BIA in 2018, only twenty-three resulted in precedential opinions. Compare 2018 STATISTICS YEARBOOK, *supra* note 38, at 35 fig.27 (indicating the number of cases completed in 2018), with *Volume 27*, U.S. DEP’T JUST. EXEC. OFF. FOR IMMIGR. REV. (last updated June 12, 2020), <https://www.justice.gov/eoir/volume-27> [<https://perma.cc/AMT9-32JF>] (listing precedential opinions).

70. See, e.g., David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177, 1205 (2016) (noting the BIA’s more recent practice of permitting single members to issue single-sentence affirmances with no reasoning and therefore no precedential value); see also *infra* note 179 (discussing number of precedential decisions issued in the Trump administration).

BIA members are required by regulation to exercise “independent judgment and discretion.”<sup>71</sup>

The regulations allow the attorney general to certify a decision by the BIA and issue a new decision.<sup>72</sup> The reality is that attorney general decisions are legally binding,<sup>73</sup> with little to no regard for the stature of precedent. To illustrate, in *Matter of L-E-A-*,<sup>74</sup> then-Attorney General William Barr announced a new position for asylum claims based on family relationships.<sup>75</sup> In general, asylum applicants must show 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.<sup>76</sup> And historically, the federal government and federal courts have recognized that family can be a particular social group.<sup>77</sup> Barr was critical of the BIA’s 2017 decision in *Matter of L-E-A-* because it “improperly recognized the respondent’s father’s immediate family as a ‘particular social group.’”<sup>78</sup>

The case involved a Mexican national and citizen who feared persecution from a criminal gang because of his relationship to his father.<sup>79</sup> His father operated a neighborhood general store targeted by a drug cartel.<sup>80</sup> 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 his father became a target.<sup>81</sup> Barr did not agree that the respondent’s family relationship qualified as a “social group,” and he

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71. 8 C.F.R. § 1003.1(d)(1)(ii).

72. *Id.* § 103.10(c).

73. *Id.* § 103.10(b).

74. *In re L-E-A-*, 27 I. & N. Dec. 581 (Att’y Gen. 2019).

75. *Id.* at 581.

76. *See supra* notes 51–52 and accompanying text.

77. *See, e.g.,* *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) (noting that “every circuit to have considered the question has held that family ties can provide a basis for asylum” and collecting BIA opinions which held the same); *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993) (“There can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family.”); *In re Acosta*, 19 I. & N. Dec. 211, 232–33 (B.I.A. 1985) (recognizing that “membership in a particular social group” can be based on “kinship ties”), *abrogated on other grounds by INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), *as recognized in In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987); *In re H-*, 21 I. & N. Dec. 337, 342–43 (B.I.A. 1985) (finding a Somalian subclan to be a “particular social group” linked by kinship ties and “identifiable as a group based upon linguistic commonalities”).

78. *L-E-A-*, 27 I. & N. Dec. at 581.

79. *Id.*

80. *Id.*

81. *Id.* at 583.

held that “most nuclear families are not inherently socially distinct and therefore do not qualify as ‘particular social groups.’”<sup>82</sup> Critics of *Matter of L-E-A-* argued that Barr’s decision undermined the body of caselaw that recognized individuals like the respondent.<sup>83</sup> And yet, Barr’s 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 pervaded decisionmaking during the Trump administration. As of this writing, there have been fourteen attorney general certification rulings.<sup>84</sup> Fourteen might appear to be a small number, but equally important to the number of certifications is the scope of the decisions and erosion of BIA precedent. Professor Richard Frankel showcases how certification spiked during the Trump administration and argues these decisions should not receive *Chevron* deference.<sup>85</sup> Says Professor Frankel:

[The Attorney General] has imposed new restrictions that deprive victims of domestic violence and gang threats from seeking asylum, revoked the 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

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82. *Id.* at 581.

83. See *supra* note 77; see also Jeffrey S. Chase, *L-E-A-: How Much Did the AG Change?*, JEFFREY S. CHASE BLOG (Aug. 11, 2019), <https://www.jeffreyschase.com/blog/2019/8/11/l-e-a-how-much-did-the-ag-change> [<https://perma.cc/SW62-AUUX>] (criticizing Barr’s attempt to overhaul decades’ worth of caselaw).

84. Since 2017, the attorney general has issued precedential decisions in fourteen certified cases: *In re Castro-Tum*, 27 I. & N. Dec. 271 (Att’y Gen. 2018); *In re A-B-*, 27 I. & N. Dec. 316 (Att’y Gen. 2018); *In re L-A-B-R-*, 27 I. & N. Dec. 405 (Att’y Gen. 2018); *In re S-O-G- & F-D-B-*, 27 I. & N. Dec. 462 (Att’y Gen. 2018); *In re M-S-*, 27 I. & N. Dec. 509 (Att’y Gen. 2019); *L-E-A-*, 27 I. & N. Dec. 581; *In re Castillo-Perez*, 27 I. & N. Dec. 664 (Att’y Gen. 2019); *In re Thomas & Thompson*, 27 I. & N. Dec. 674 (Att’y Gen. 2019); *In re R-A-F-*, 27 I. & N. Dec. 778 (Att’y Gen. 2020); *In re O-F-A-S-*, 28 I. & N. Dec. 35 (Att’y Gen. 2020); *In re Reyes*, 28 I. & N. Dec. 52 (Att’y Gen. 2020); *In re A-C-A-A-*, 28 I. & N. Dec. 84 (Att’y Gen. 2020); and *In re Negusie*, 28 I. & N. Dec. 120 (Att’y Gen. 2020).

85. Richard Frankel, *Deporting Chevron: Why the Attorney General’s Immigration Decisions Should Not Receive Chevron Deference* 5, 7, 33 (Drexel Univ. Sch. of L., Legal Stud. Rsch. Paper Series, Working Paper No. 2019-W-02), <https://ssrn.com/abstract=3492115> [<https://perma.cc/3RXT-B726>]. Professor Frankel is not alone in his concerns. See, e.g., WADHIA, BANNED, *supra* note 30, at 58–59 (discussing increased use of the certification power under the Trump administration); Bijal Shah, *The Attorney General’s Disruptive Immigration Power*, 102 IOWA L. REV. ONLINE 129, 131 (2017) (discussing the disruptive nature of the certification power and arguing that its use undermines uniformity within the law). Part II returns to Professor Frankel’s arguments against *Chevron* deference to attorney general decisions.

imprisonment of non-citizens and reduced immigration judges' authority to grant bond, among other rulings.<sup>86</sup>

Similarly, Professor Jaclyn Kelley-Widmer and attorney Hillary Rich have argued against *Chevron* deference in connection with *Matter of A-B*.<sup>87</sup> There, then-Attorney General Jeff Sessions issued a decision involving an asylum seeker who claimed she was persecuted on account of her membership in the purported particular social group of "Salvadoran women who are unable to leave their domestic relationships where they have children in common."<sup>88</sup> In adopting *Matter of A-B*, Sessions also overruled *Matter of A-R-C-G*,<sup>89</sup> a precedential decision from 2014.<sup>90</sup> Building on more than a decade of jurisprudence, *Matter of A-R-C-G* was a signature precedential decision that clearly recognized domestic violence as a basis for asylum.<sup>91</sup> Professor Kelley-Widmer and Rich argue, for instance, that *Matter of A-B* fails *Chevron*'s first step because its focus on the potential size of the social group and the role of private actors as the source of persecution are contrary to unambiguous congressional intent.<sup>92</sup> They also argue the decision fails *Chevron*'s second step "because it contravenes Congressional intent regarding flexibility."<sup>93</sup>

### B. Judicial Review and Chevron Deference

Immigrants can challenge final removal decisions from the BIA or the attorney general by filing a petition for review in a federal circuit court. But there is a catch. The INA categorically bars certain cases from federal court review.<sup>94</sup> Judicial review is precluded for those with removal orders stemming from certain criminal activity or the denial

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86. Frankel, *supra* note 85, at 16 (footnotes omitted).

87. *In re A-B*, 28 I. & N. Dec. 199 (Att'y Gen. 2021); 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, 363 (2019) (discussing *A-B*, 27 I. & N. Dec. 316).

88. *Id.* at 351–53, 363 (quoting *A-B*, 27 I. & N. Dec. at 321).

89. *In re A-R-C-G*, 26 I. & N. Dec. 388 (B.I.A. 2014), *overruled by A-B*, 27 I. & N. Dec. 316.

90. *A-B*, 27 I. & N. Dec. at 317.

91. *See A-R-C-G*, 26 I. & N. Dec. at 392–93 (holding "married women in Guatemala who are unable to leave their relationship" can be a particular social group "dependent upon the particular facts and evidence in a case").

92. Kelley-Widmer & Rich, *supra* note 87, at 394.

93. *Id.* at 399.

94. INA § 242(a)(2), 8 U.S.C. § 1252(a)(2) (2018).

of relief from removal the INA has categorized as discretionary.<sup>95</sup> Similar to the trend in administrative appeals to the BIA, the number of immigrants who *could* seek federal court review far exceeds the number of immigrants who actually *do* seek such review.<sup>96</sup> Again, the expense of filing a petition, access to legal counsel, and the narrow, thirty-day window to file the petition are some of the barriers that limit federal court review.<sup>97</sup> Thus, any project assessing 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.<sup>98</sup>

Just three years after deciding *Chevron*, the Supreme Court in *INS v. Cardoza-Fonseca*<sup>99</sup> applied the *Chevron* deference framework to a BIA statutory interpretation.<sup>100</sup> Yet the Court ultimately did not defer to the agency, finding instead that the statutory text unambiguously foreclosed the BIA's interpretation.<sup>101</sup> In his concurring opinion, Justice Antonin Scalia argued that “there is simply no need and thus no justification for a discussion of whether the interpretation is entitled to [*Chevron*] deference.”<sup>102</sup> Since *Cardoza-Fonseca* was decided, as Professors Hickman and Nielson document,<sup>103</sup> the Supreme Court has applied the *Chevron* deference framework to seven BIA statutory interpretations. The agency won because of *Chevron* deference in three cases.<sup>104</sup> And the Court refused to defer in three cases because

95. *Id.* See generally Wadhia, *supra* note 50 (surveying the various ways the government uses discretion in the immigration context).

96. See, e.g., Hausman, *supra* note 70, 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)).

97. AM. IMMIGR. 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](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/how_to_file_a_petition_for_review_2015_update.pdf) [<https://perma.cc/NA6F-XS7D>].

98. INA § 242(a), 8 U.S.C. § 1252(a).

99. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

100. *Id.* at 446–48.

101. *Id.* at 448–49.

102. *Id.* at 453 (Scalia, J., concurring in the judgment).

103. Hickman & Nielson, *supra* note 18, app. at 1000–13.

104. *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 56–58 (2014) (plurality opinion); *id.* at 76 (Roberts, C.J., concurring in the judgment); *Holder v. Martinez Gutierrez*, 566 U.S. 583, 591 (2012); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424–33 (1999).

the statute was unambiguous<sup>105</sup> and in a fourth because the agency asserted it had no discretion to interpret the statute differently.<sup>106</sup>

In one immigration adjudication case, a dozen years after *Cardoza-Fonseca*, the Supreme Court reaffirmed that “[i]t is clear that principles of *Chevron* deference are applicable to this statutory scheme.”<sup>107</sup> In other words, the Court has not treated immigration adjudication as exceptional for the purposes of *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 percent of the time.<sup>108</sup>

## II. *CHEVRON*’S PRECARIOUS FOUNDATION IN IMMIGRATION ADJUDICATION

The *Chevron* decision has been on the books for more than thirty-five years and is cited by more than 90,000 sources on Westlaw, but its theoretical underpinnings remain disputed and underdeveloped.<sup>109</sup> 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 discretion the ambiguity allows.’”<sup>110</sup> And this delegation theory,

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105. *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).

106. *Negusie v. Holder*, 555 U.S. 511, 514, 521 (2009).

107. *Aguirre-Aguirre*, 526 U.S. at 424.

108. Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 36 (2017).

109. When referencing the theory of *Chevron* deference, we refer to both the reasons the Supreme Court offered for deference in the *Chevron* decision itself and the various theoretical justifications for the *Chevron* doctrine that have since emerged in the literature and subsequent judicial decisions. See, e.g., Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law’s Political Dynamics*, 71 VAND. L. REV. 1463, 1475–82 (2018) (providing an overview of the theory of *Chevron* deference and some of its criticisms); Evan J. Criddle, *Chevron’s Consensus*, 88 B.U. L. REV. 1271, 1283–91 (2008) (surveying rationales for *Chevron* deference).

110. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (quoting *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 740–41 (1996)).

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.<sup>111</sup> 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. Likewise, these rationales are also why federal agencies should receive judicial deference, within the bounds of reasonableness, for how they interpret these delegation-conferring statutory ambiguities.

This Part interrogates these four delegation values in the context of immigration adjudication. As the *Chevron* Court instructed, this analysis is necessarily comparative—that is, it involves weighing whether these values are better realized by agencies or courts. Because the argument here is that immigration agencies should receive *Chevron* deference in rulemaking but not adjudication, the analysis must also compare these two modes of agency action. This Part begins with, and focuses 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. This Part then turns briefly to the other two 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—as compared to courts—to fill 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.<sup>112</sup> As Professor 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.”<sup>113</sup>

Although the *Chevron* Court itself did not engage in a robust discussion of this expertise theory, it did surmise that Congress perhaps

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111. See Barnett et al., *supra* note 109, at 1475–82 (exploring these four rationales of *Chevron* deference).

112. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984). See generally 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).

113. Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1682 (2007). Part II.C further discusses the accountability rationale.

“consciously desired the [agency] to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so.”<sup>114</sup> 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.<sup>115</sup> As attorney 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.”<sup>116</sup> Attorney 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?”<sup>117</sup> This conception of expertise as a rationale for congressional delegation finds empirical support from congressional drafters.<sup>118</sup>

The agency’s familiarity with the legislative process and purposes that led to the statutory ambiguities at issue may also contribute to its expertise. As Justice Scalia wrote, “The 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.”<sup>119</sup> Justice Stephen Breyer has

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

115. See, e.g., Paul Chaffin, Note, *Expertise and Immigration Administration: When Does Chevron Apply to BIA Interpretations of the INA?*, 69 N.Y.U. ANN. SURV. AM. L. 503, 525–41 (2013) (considering BIA expertise and its implications for *Chevron* deference); Sweeney, *supra* note 23, at 174–78 (arguing that agency expertise is not a strong rationale for *Chevron* deference in the immigration context).

116. Chaffin, *supra* note 115, at 532.

117. Joel Cohen, Richard A. Posner & Jed S. Rakoff, *Judges v. Bureaucrats: Who Should Defer to Whom?*, SLATE (Oct. 18, 2017, 2:12 PM), <https://slate.com/news-and-politics/2017/10/two-judges-explain-why-they-dont-buy-the-logic-of-chevron-deference.html> [<https://perma.cc/APC8-YQ5D>].

118. 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, 1004, 1005 fig.11 (2013) (reporting that 93 percent 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).

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

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 congressional views, which, in turn, may, through institutional history, reflect prior understandings.”<sup>120</sup>

In the rulemaking context, Professor Sidney Shapiro has reconceptualized agency expertise as “craft expertise”—what he presents as the unique “institutional expertise of agencies.”<sup>121</sup> This conception of expertise has two related features. First, agency officials of various backgrounds acquire through regulating certain expertise outside of their trained disciplines, which “facilitates a richer, discursive decision-making process in which persons trained in various disciplines interact with each other inside and outside of the agency to debate and dispute arguments and information put forward in the rulemaking process.”<sup>122</sup> Second, agency officials “develop expertise in reconciling and accounting for conflicting evidence and arguments, disciplinary perspectives, political demands, and legal commands.”<sup>123</sup> “This expertise is a ‘craft’ form of expertise,” Shapiro explains, “because it is learned more from experience than from formal knowledge and because it is beyond the disciplinary training of individual professionals.”<sup>124</sup>

The following Sections explore these three conceptions of agency expertise in turn, finding that all three lack salience 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

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120. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 368 (1986) (emphasis omitted); 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).

121. Sidney A. Shapiro, *The Failure To Understand Expertise in Administrative Law: The Problem and the Consequences*, 50 WAKE FOREST L. REV. 1097, 1099 (2015). Professor Shapiro borrows and expands on Professor Jerry Mashaw’s observation that some of the expertise in public administration “resides in what one might call the feel or craft of decisionmakers.” See *id.* at 1113 (quoting JERRY L. MASHAW, BUREAUCRATIC JUSTICE 67 (1983)).

122. *Id.* at 1099.

123. *Id.*

124. *Id.*

can leverage to fill the gaps in its statutory mandates. Environmental, energy, infrastructure, financial services, and food and drug law come immediately to mind. Yet, as Professor Hickman observes, “other areas of administrative law where *Chevron* regularly applies, *such as immigration . . .*, do not require scientific or other technical training.”<sup>125</sup>

Indeed, Professor Maureen Sweeney effectively contrasts the role of technical or scientific expertise at the EPA, the agency at issue in *Chevron* itself, with 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.<sup>126</sup>

Sweeney extensively explores the lack of scientific or technical expertise implicated by the statutory ambiguities the BIA resolves.<sup>127</sup> Without regurgitating that analysis here, the point 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 ambiguities in the INA concern purely legal questions, as opposed to those implicating some sort of substantive expertise.

In fact, 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:

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

126. Sweeney, *supra* note 23, at 174–75; *see also* Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 806 (1997).

127. *See* Sweeney, *supra* note 23, at 174–78.

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.<sup>128</sup>

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.<sup>129</sup> Either litigation or administrative law experience is required, but neither of those is the type of expertise that courts or scholars have recognized as grounds for *Chevron* deference.<sup>130</sup>

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.<sup>131</sup> To illustrate how a court's rejection of deference plays into agency expertise, consider the case of *Da Silva v. Attorney General*.<sup>132</sup> Ludimilla Ramos Da Silva is a native of Brazil who was

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128. *E.g.*, *Appellate Immigration Judge (Board Member)*, U.S. DEP'T JUST. (Sept. 21, 2018), <https://www.justice.gov/legal-careers/job/appellate-immigration-judge-board-member> [https://perma.cc/K5XY-ZH3S]

129. *E.g.*, *Immigration Judge*, USA JOBS, <https://www.usajobs.gov/GetJob/ViewDetails/570894500> [https://perma.cc/ZU5H-49D7]; *Immigration Judge (Elizabeth)*, U.S. DEP'T JUST. (Apr. 7, 2016), <https://www.justice.gov/legal-careers/job/immigration-judge-elizabeth-0> [https://perma.cc/H4WB-7ECX].

130. 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.

131. *See, e.g.*, *Orozco-Velasquez v. Att'y Gen.*, 817 F.3d 78, 81 (3d Cir. 2016) (declining to use *Chevron* deference because the BIA's conclusion that "failure to 'include the specific date, time, or place of hearing' in a NTA has no bearing on a notice recipient's removability" conflicted with the INA's plain text); *Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582, 603–09 (3d Cir. 2011) (holding that the BIA requirements of "social visibility" and "particularity" are not entitled to *Chevron* deference due to inconsistencies between the BIA requirement and past BIA decisions).

132. *Da Silva v. Att'y Gen.*, 948 F.3d 629 (3d Cir. 2020).

admitted to the United States in 1994 and married Aziim Leach, a U.S. citizen, in 2012.<sup>133</sup> As the Third Circuit recounted, Leach “subjected Da Silva to emotional, psychological, and physical abuse throughout their marriage.”<sup>134</sup> 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.<sup>135</sup>

The INA prohibits the cancellation of removal, under the Violence Against Women Act (“VAWA”), 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.”<sup>136</sup> 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.<sup>137</sup> The Third Circuit agreed with Da Silva and took the extraordinary step of refusing to remand to the agency.<sup>138</sup> After all, the BIA decision in this case was nonprecedential and thus not entitled to *Chevron* deference; on remand, the BIA could have reexamined 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*’s first step, leaving the agency with no discretion.<sup>139</sup> Relevant here, the Third Circuit also stated 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’”; this was not the first time the Third Circuit had noted the BIA’s lack of expertise in interpreting the INA.<sup>140</sup> *Da Silva* illustrates how technical expertise in immigration law—or any other special 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 court did not even rely on immigration sources to determine the definition of a statutory term.

This observation is not merely anecdotal, nor is it limited to the Third Circuit. For example, one of us (Walker) has reviewed every

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133. *Id.* at 631.

134. *Id.*

135. *Id.* at 632.

136. *Id.* (emphasis omitted) (quoting 8 U.S.C. § 1229b(b)(2)(C) (2018)).

137. *Id.*

138. *See id.* at 638.

139. *Id.* at 634–35.

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

circuit court decision that cites *Chevron* deference during an eleven-year period.<sup>141</sup> 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 percent—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 percent.<sup>142</sup> To be sure, it is not just about agency win rates, but whether the circuit court refuses to apply the *Chevron* deference framework at all: “[I]f 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.”<sup>143</sup>

2. *Legislative Expertise.* There is another type of expertise that merits attention—namely, the expertise derived from the principal-agent relationship between Congress and the agency. As Professor Peter Strauss explains, “The 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.”<sup>144</sup> 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 Professor 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

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141. Barnett & Walker, *supra* note 108, at 27.

142. *Id.* at 36.

143. *Id.* at 39 (footnote omitted). These findings suggest that federal courts perhaps share this skepticism about the BIA’s substantive expertise in interpreting the INA. To be sure, these findings arguably 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, courts “simply ignoring *Chevron*,” *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Alito, J., dissenting), is not a viable long-term solution in the immigration adjudication context.

144. 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).

problems throughout the legislative process.”<sup>145</sup> As one of us (Walker) explores elsewhere, federal agencies are substantially involved in the legislative drafting process and, indeed, play a role in drafting and reviewing nearly every legislative action that may affect them.<sup>146</sup>

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, such as “the relevant agency rule drafters, the policy and legislative affairs teams, the scientists and economists where applicable, and so forth.”<sup>147</sup> As one of us (Walker) 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.<sup>148</sup>

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 statute’s legislative history, purposes, and processes. Most agency adjudicators, by statute or regulation, are prohibited from engaging in *ex parte* communications as part of most agencies’ strong separation of adjudicatory and prosecutorial functions—though Professor Michael Asimow observes that “[e]x 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.”<sup>149</sup> In the immigration adjudication context, it does not appear that the BIA consults with agency legislative experts when interpreting the INA. It is doubtful that 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 sharing expertise would be difficult in light of the agency’s current structure, the attorney general, at least in

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

146. See Walker, *supra* note 120, at 1382–96 (reporting findings from an empirical study of the role of federal agencies in the legislative process).

147. Walker, *supra* note 118, at 1048.

148. See *id.* at 1034–48; Walker, *supra* note 120, at 1398–1405.

149. ASIMOW, *supra* note 21, at 66 (footnote omitted); see also *id.* at 63–67 (detailing adjudicator prohibitions on intra- and extra-agency *ex parte* communications).

theory, should be able to leverage that expertise if desired. After all, the attorney general is the head of the agency and could structure the agency so as 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, a review of the attorney general's referral-adjudication decisions during the Trump administration reveals no express reliance on the agency's legislative experts when interpreting the INA.<sup>150</sup>

3. *Craft Expertise.* Even Professor Shapiro's conception of "craft expertise" seems to be lacking in the immigration adjudication context.<sup>151</sup> To be sure, through adjudicating hundreds of cases, BIA members become specialists in interpreting the INA and immigration law and policy more generally. In that sense, compared to federal judges, these agency adjudicators may develop deeper "expertise in reconciling and accounting for conflicting evidence and arguments, disciplinary perspectives, political demands, and legal commands."<sup>152</sup>

As noted in Part I.A.1, however, most of the statutory ambiguities the BIA addresses in the INA do not implicate any technical or scientific expertise. These are not the type of questions that involve reconciling conflicting evidence or methodological approaches. They are generally legal questions. Nor, as discussed in Part I.A.2, do BIA members appear to interact with the rest of the experts at the agency. In other words, the current organizational structure for immigration adjudication does not engender "a richer, discursive decision-making process" where "persons trained in various disciplines interact with each other inside and outside of the agency to debate and dispute arguments."<sup>153</sup>

Perhaps more importantly, the comparative analysis here is not just between the expertise of agencies and courts. Because this Article recommends narrowing *Chevron's* immigration domain to exclude such deference in adjudication yet preserve it for rulemaking, evaluating the comparative expertise exercised in those two modes of agency action is important. Due to organizational structure, the BIA is

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150. See *supra* note 84 (citing the fourteen attorney general certification rulings issued during the Trump administration).

151. See *supra* notes 121–24 and accompanying text.

152. Shapiro, *supra* note 121, at 1099.

153. *Id.*

likely unable to exercise the agency's collective and diverse 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 is technical and scientific, legislative, or craft expertise—when interpreting statutes. So, at most, when it comes to the attorney general as agency adjudicator, the comparative value of the agency expertise for *Chevron* purposes is a wash as between adjudication and rulemaking.

In reality, and as Part II.B details, because the notice-and-comment rulemaking process is designed to leverage agency and public expertise, one would expect the attorney general to utilize agency expertise more 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. Rather, 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. In other words, the deliberativeness of the process matters. Part II.B turns to this second theory for *Chevron* deference.

### 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.<sup>154</sup> As this Section explains, the deliberative process theory for *Chevron* deference is interrelated to the expertise theory and may just be another form of comparative expertise. After all, agencies have flexibility to engage in a process that incorporates all stakeholders, considers the various regulatory alternatives, and leverages the agency's and the public's expertise on the subject. Courts, by contrast, can only consider the cases before

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154. See, e.g., *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.”); *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (holding that not all agency interpretations of statutory ambiguities merit *Chevron* deference, but “recogniz[ing] a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed”).

them, perhaps with limited amicus curiae input from others who are not parties to the litigation.

But, as Professors Hickman and Nielson underscore, most of the comparative value agencies possess when it comes to deliberative process lies in rulemaking, not adjudication.<sup>155</sup> For informal rulemaking, the APA requires that the agency provide the public with notice of the proposed rule and an opportunity to comment.<sup>156</sup> The proposed rule has to reflect considered judgment through weighing regulatory alternatives, assessing the intended and unintended consequences, and making the data supporting its proposed rule publicly available.<sup>157</sup> 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.<sup>158</sup> Because the notice-and-comment process is public, Congress, the president, the media, and other interested groups can see what the agency is considering and raise concerns before the agency finalizes its rule.<sup>159</sup> This is, of course, entirely different from the judicial process.

More importantly, notice-and-comment rulemaking is nothing like the administrative adjudication process. As Professors Hickman and Nielson observe, “a process that solicits comments and forces agencies to engage with the views of the public should generally lead to better policy outcomes,” such that the agency’s comparative expertise at least partly “comes from the procedures that agencies are required to use.”<sup>160</sup> In contrast, they argue, “[a]djudications typically involve only a narrow group of parties.”<sup>161</sup> So as a matter of

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155. See Hickman & Nielson, *supra* note 18, at 965–68.

156. 5 U.S.C. §§ 551–559 (2018).

157. In contrast to considered judgment,

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.

Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983); *see also* Portland Cement Ass’n v. Ruckelshaus, 486 F.2d 375, 392 (D.C. Cir. 1973) (holding the APA requires agencies to disclose the technical data and studies on which they relied to draft the proposed rule).

158. See, e.g., Perez v. Mortg. Bankers Ass’n, 575 U.S. 92, 96 (2015) (“An agency must consider and respond to significant comments received during the period for public comment.”).

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

160. Hickman & Nielson, *supra* note 18, at 966.

161. *Id.* at 967.

deliberative process, it is difficult to see any meaningful daylight between the judicial and administrative adjudicative processes.

Professors Hickman and Nielson argue, moreover, that judicial deference-imbued policymaking through agency adjudication can raise due process concerns that rulemaking does not necessarily implicate.<sup>162</sup> The problem is one of unfair notice created 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.*<sup>163</sup> that agencies, if permitted under their organic statutes, can choose to make policy through either adjudication or rulemaking.<sup>164</sup> But that does not mean *Chevron* deference must apply to retroactive policies made through adjudication. Retroactivity should caution against such deference. Rulemaking, by contrast, is usually prospective.<sup>165</sup> 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*, 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 conduct that the agency had never before addressed.”<sup>166</sup> These due process concerns may be even more pronounced in the immigration adjudication context, where liberty from detention and removal is implicated. This may explain—as Professor Michael Kagan argues—why the Supreme Court has refused to afford *Chevron* deference in the immigration adjudication context when the agency interpretations address detention or removal.<sup>167</sup> Although beyond the scope of this Article, there are unique harms that can flow from the immediate and retroactive application of immigration adjudication

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162. *See id.* at 971–77 (describing how adjudication can create policy that applies to past actions, implicating the Due Process Clause).

163. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

164. *Id.* at 202–03.

165. Any authority to enact retroactive rules is narrowly construed:

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.

*Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (citation omitted).

166. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019).

167. Kagan, *supra* note 23, at 495.

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, the immigration adjudication context may even have less deliberative and fair process than 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”). Instead, it happens before an immigration judge in a setting with fewer procedural protections for the immigrants than in contexts where an ALJ presides.<sup>168</sup> Also, the history of political hiring, firing, and reassignment of BIA members may affect their decisional independence. 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.<sup>169</sup> The practice of removing BIA members with differing political views is not new, tracing back to at least 2003 when the attorney general shrunk the BIA from sixteen to eleven members, firing the most “liberal” members on the Board.<sup>170</sup> 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 been predetermined and it has nothing to do or little to do with the merits of the cases.”<sup>171</sup> 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

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168. See Walker & Wasserman, *supra* note 19, at 148–57 (comparing APA-governed formal adjudication with other administrative adjudications where a hearing is required by statute or regulation).

169. Tanvi Misra, *DOJ ‘Reassigned’ Career Members of Board of Immigration Appeals*, ROLL CALL (June 9, 2020, 4:55 PM), <https://www.rollcall.com/2020/06/09/doj-reassigned-career-members-of-board-of-immigration-appeals> [<https://perma.cc/HJ53-CKVJ>].

170. Ricardo Alonso-Zaldivar & Jonathan Peterson, *5 on Immigration Board Asked To Leave; Critics Call It a ‘Purge,’* L.A. TIMES (Mar. 12, 2003, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2003-mar-12-na-immig12-story.html> [<https://perma.cc/S2G5-8PKU>]; see also DORSEY & WHITNEY LLP, BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT 20–47 (2003), <http://files.dorsey.com/files/Upload/DorseyStudyABA.pdf> [<https://perma.cc/XJC5-M8ZJ>] (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).

171. Felipe de la Hoz, *The Shadow Court Cementing Trump’s Immigration Policy*, NATION (June 30, 2020), <https://www.thenation.com/article/society/trump-immigration-bia> [<https://perma.cc/D28L-YLG3>] (reporting the comments of Paul Wickham Schmidt, who chaired the BIA between 1995 and 2001).

agency expertise. Rather, they expose the predominant role of politics in immigration adjudication. Part II.C examines the proper role of politics in this area.

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 Professors 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.<sup>172</sup> 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.<sup>173</sup>

TRAC Immigration has also produced empirical data that reveal the large degree to which outcomes in asylum cases depend on the immigration judge assigned to the case.<sup>174</sup>

This agency disorder has not gone unnoticed by federal judges. Consider, for instance, 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.”<sup>175</sup> When interviewed about the logic of

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172. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 372–78 (2007) (using a database of judicial decisions and cross-referencing it to publicly available biographies of judges to identify correlations).

173. *Id.* at 296.

174. To illustrate the disparity in outcome in the same court depending on the immigration judge presiding in a given case, take the case of Newark immigration court: Between 2015–2020, denial rates ranged from 20.7% to 93.1%. *Immigration Judge Reports*, TRAC IMMIGR., <https://trac.syr.edu/immigration/reports/judgereports> [<https://perma.cc/N6FG-5CLQ>].

175. *Bouras v. Holder*, 779 F.3d 665, 681 (7th Cir. 2015) (Posner, J., dissenting); *see also* Cox, *supra* note 113, at 1679–80 (discussing Judge Posner’s various opinions concerning the ineptitude in the BIA, labeling the immigration courts’ decisions “arbitrary, unreasoned, irrational, inconsistent, and uninformed” (footnotes omitted)).

*Chevron* deference and the importance of federal courts, Judge Posner remarked,

the performance of the immigration court and 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.<sup>176</sup>

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, geography greatly influences access to counsel.<sup>177</sup> Further, 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.<sup>178</sup>

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.<sup>179</sup> And it is further

176. Cohen et al., *supra* note 117.

177. See generally Eagly & Shafer, *supra* note 55 (presenting empirical disparities in attorney resources along geographic lines); YOUSRA CHATTI & SARA FIRESTONE, CTR. FOR IMMIGRANTS' RTS. AT THE PA. STATE UNIV. DICKINSON SCH. OF L., DETAINED IMMIGRANTS AND ACCESS TO COUNSEL IN PENNSYLVANIA (2019), <https://pennstatelaw.psu.edu/sites/default/files/PAFIUP%20Report%20Final.pdf> [<https://perma.cc/H5MX-CER2>] (identifying how disparities in representation can be impacted by factors such as the distance between detention facilities and city centers).

178. Ramji-Nogales et al., *supra* note 172, at 296.

179. Executive Office for Immigration Review Adjudication Statistics: Pending Cases, New Cases, and Total Completions, U.S. DEP'T JUST. EXEC. OFF. FOR IMMIGR. REV. (July 14, 2020), <https://www.justice.gov/eoir/page/file/1242166/download> [<https://perma.cc/9H5A-ESPZ>]; see also Sweeney, *supra* note 23, at 176 ("The immigration court system suffers from serious institutional capacity challenges that compromise its decisionmaking and limit the time and consideration it can give to any single case . . . . [T]he history of this dysfunction is longstanding . . . ." (footnote omitted)). To be sure, this Article does 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 issued fourteen certification rulings during the Trump administration, see *supra* note 84, and the BIA has issued fewer than one hundred precedential decisions during

exacerbated by the fact that immigration judges and BIA members face pressure to meet quotas and follow guidelines set by the attorney general.<sup>180</sup> 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, the process of 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. After all, intra-agency coordination among various agency experts is commonplace in the rule-drafting process,<sup>181</sup> followed by the opportunity for robust public input during the notice-and-comment period. Further, as one of us (Wadhia) has argued, 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.<sup>182</sup> *Chevron's* political accountability theory, which the next Section examines, further implicates these values.

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that same time period, *see Volume 26*, U.S. DEP'T JUST. EXEC. OFF. FOR IMMIGR. REV. (Apr. 6, 2018), <https://www.justice.gov/eoir/precedent-decisions-volume-26> [<https://perma.cc/KDS6-4SPW>] (reporting two precedential BIA opinions issued after January 20, 2017); *Volume 27*, *supra* note 69 (reporting seventy-four precedential BIA opinions issued between 2017–2020); *Volume 28*, U.S. DEP'T JUST. EXEC. OFF. FOR IMMIGR. REV. (last updated Jan. 8, 2021), <https://www.justice.gov/eoir/volume-28> [<https://perma.cc/4J8C-CNYU>] (reporting fifteen precedential BIA opinions issued in 2020 and January 2021). Even fewer of these roughly thirty agency adjudication decisions per year would likely shift to rulemaking, as the agency would understandably pursue *Chevron*-less case-by-case adjudication for some policymaking.

180. *See* AM. BAR ASS'N J., EOIR PERFORMANCE PLAN, ADJUDICATIVE EMPLOYEES (2018), [https://www.abajournal.com/images/main\\_images/03-30-2018\\_EOIR\\_-\\_PWP\\_Element\\_3\\_new.pdf](https://www.abajournal.com/images/main_images/03-30-2018_EOIR_-_PWP_Element_3_new.pdf) [<https://perma.cc/M68D-L55H>] (outlining new quotas for immigration judges and the number of cleared cases and decisions overturned on appeal rates to acquire a “satisfactory” rating), *discussed in* Lorelei Laird, *Justice Department Imposes Quotas on Immigration Judges, Provoking Independence Concerns*, AM. BAR ASS'N J. (Apr. 2, 2018, 6:31 PM), [https://www.abajournal.com/news/article/justice\\_department\\_imposes\\_quotas\\_on\\_immigration\\_judges\\_provoking\\_independe](https://www.abajournal.com/news/article/justice_department_imposes_quotas_on_immigration_judges_provoking_independe) [<https://perma.cc/7N3N-6P36>].

181. *See, e.g.*, Walker, *supra* note 118, at 1034–48 (documenting the roles of legislative history and various agency actors in agency statutory interpretation).

182. WADHIA, *BEYOND DEPORTATION*, *supra* note 26, at 152; Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H.L. REV. 1, 27–32, 51–55, 57–64 (2012).

### 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.”<sup>183</sup> Agencies, by contrast, are part of a political branch, the executive, and report back to another political branch, Congress. “Courts must, in some cases,” the Court continued, “reconcile competing political interests, but not on the basis of the judges’ personal policy preferences.”<sup>184</sup> 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.”<sup>185</sup>

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.<sup>186</sup> The conventional account seems to have force because 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 the attorney general would no doubt advance “the *Chevron* Court’s express objective to reduce partisanship in judicial decisionmaking.”<sup>187</sup>

This conventional account, however, is incomplete on two related grounds. First, as discussed above, the inquiry here is not just about the comparative political accountability between agencies and courts but also between the modes of agency action—adjudication versus

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183. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

184. *Id.*

185. *Id.*

186. See generally Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority*, 101 IOWA L. REV. 841 (2016) (documenting the history of the attorney general exercising powers over immigration policy); *supra* Parts I.A–II.A (describing the attorney general’s role in immigration adjudication).

187. Barnett et al., *supra* note 109, 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.* 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.

rulemaking. Policymaking through adjudication may not be an adequate substitute for rulemaking under an “elections matter” accountability theory. Second, political accountability should be viewed in broader terms of democratic accountability and legitimacy. Professor Jerry Mashaw has helpfully reframed the democratic legitimacy debate by distinguishing between two types of accountability: aggregative or electoral accountability, and deliberative accountability.<sup>188</sup> He argues that American democracy melds these two distinct visions.<sup>189</sup> Presidential administration can easily be understood as advancing aggregative or electoral accountability in the administrative state.<sup>190</sup> Yet, he argues, the administrative state can and should also advance deliberative accountability.<sup>191</sup>

When framed in terms of deliberative accountability, one quickly sees how rulemaking better advances legitimacy than administrative adjudication. Professors 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 concerns raised by the general public, all else being equal, typically should yield more legitimate outcomes.”<sup>192</sup> 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.”<sup>193</sup> As Professor Frankel explores, the attorney general’s referral and final decisionmaking process lacks the hallmarks of public engagement and transparency that are commonplace in notice-and-comment rulemaking.<sup>194</sup>

In sum, if the choice is between rulemaking and administrative adjudication in the immigration context, it is not a close call which mode of agency action garners more accountability and thus legitimacy. Both modes of agency action can advance aggregative or electoral accountability, but rulemaking is much better at advancing deliberative accountability.

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188. JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY 166–67 (2018).

189. *Id.* at 14.

190. *Id.* at 167.

191. *Id.* at 167–70.

192. Hickman & Nielson, *supra* note 18, at 967.

193. *Id.*

194. *See* Frankel, *supra* note 85, at Part III.C.

*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 by limiting courts' responsibility for determining the best reading of a statute. Professor Strauss is arguably the moving force behind this deference theory, contending 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.<sup>195</sup> In *City of Arlington v. FCC*,<sup>196</sup> 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.<sup>197</sup> As an empirical matter, this uniformity rationale for *Chevron* deference has largely been borne out by decisions in the federal courts of appeals.<sup>198</sup>

The importance of uniformity in law may be at its apex in federal immigration law. 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.<sup>199</sup> But again, the comparison is not just between courts and agencies but between rulemaking and agency adjudication. As to the latter, 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 suitable case to

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195. 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) [hereinafter Strauss, *One Hundred Fifty Cases*].

196. *City of Arlington v. FCC*, 569 U.S. 290 (2013).

197. *Id.* at 307.

198. See, e.g., Barnett et al., *supra* note 109, 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").

199. See Strauss, *One Hundred Fifty Cases*, *supra* note 195, at 1121 (suggesting "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"). In the October 2019 term, the Supreme Court issued just fifty-three signed decisions—the fewest since 1862. Adam Feldman, *Final Stat Pack for October Term 2019 (Updated)*, SCOTUSBLOG (July 10, 2020, 7:36 PM), <https://www.scotusblog.com/2020/07/final-stat-pack-for-october-term-2019> [<https://perma.cc/LN83-6JT2>].

decide the issue.<sup>200</sup> 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.<sup>201</sup>

That administrative adjudication may better advance uniformity in federal law than judicial review or even agency rulemaking, however, should not be overemphasized. No judge, member of Congress, or scholar likely views national uniformity as the exclusive theory for *Chevron* deference. Instead, it is just one of at least four core rationales. And some may not even consider uniformity to be a reason for deference at all. At the very least, the costs and benefits of all relevant values should be weighed together. As discussed in Part II.A and as Professors Hickman and Nielson further elaborate, 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, perhaps to a lesser extent, better promotes democratic 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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200. See, e.g., *Nat'l Cable & Telecomms. 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.”).

201. To be sure, the fact 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. 455, 495–97 (2020) (criticizing calls to eliminate *Chevron* deference as imposing an antiregulatory asymmetry in administrative law). At least in the immigration context, we do not view the costs of this potential underregulation to outweigh the various important benefits of narrowing *Chevron*'s domain to rulemaking that Part II details.

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

Part II demonstrated how *Chevron*'s theoretical foundation is particularly weak in the immigration adjudication context, arguably weaker there than in many 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. This Part focuses on three paths: the Supreme Court, Congress, and the Executive Branch itself.

#### A. *The Supreme Court and Stare Decisis*

In their contribution to this Symposium, Professors Hickman and Nielson powerfully argue that the Supreme Court should narrow *Chevron*'s domain to exclude judicial deference for some, if not all, agency statutory interpretations created via administrative adjudication.<sup>202</sup> 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, various changed circumstances in the Court's administrative law jurisprudence—namely, 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.<sup>203</sup>

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202. See Hickman & Nielson, *supra* note 18, at Parts II–III.

203. In his contribution to this Symposium, Professor 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. 1025, 1055 (2021).

Fully assessing Professors Hickman and Nielson's stare decisis arguments exceeds this Article's scope. But they present a compelling case—one that seems to apply with similar force in the immigration adjudication context. Litigants, scholars, and lower courts will surely develop their argument further, and it merits serious attention from the Supreme Court in an appropriate case.<sup>204</sup> For the reasons presented in this Article, immigration adjudication is arguably the best context within which courts and litigants can build the case for narrowing *Chevron's* domain in the adjudication context.

### B. Congress and Comprehensive Immigration Reform

The Supreme Court, of course, is not the only actor with the power to narrow *Chevron's* domain. The Court has emphasized that “[a]ll our interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change.”<sup>205</sup> As noted in the Introduction, Republicans in recent years have proposed legislation to amend the APA to eliminate *Chevron* deference entirely.<sup>206</sup> We highly doubt such sweeping legislative proposals will garner the requisite bipartisan support any time soon.

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204. 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, 1856–63 (2018) (defending qualified immunity for actions brought under 42 U.S.C. § 1983 on statutory stare decisis grounds). To be sure, as a matter of first principles, *Chevron* deference is likely not a proper interpretation of § 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 (2017). *But see* Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613, 1641–57 (2019) (defending *Chevron* as a statutory precedent). And, Part II argued, the normative case against *Chevron* in immigration adjudication is compelling. Despite these considerations, *Chevron* has been the law generally since 1984 and in the immigration adjudication context specifically since at least 1987, with the Court reaffirming the precedent numerous times. *See supra* Part I.B. Importantly, moreover, there is strong evidence that Congress legislates against the backdrop of the *Chevron* doctrine. *See, e.g.*, Gluck & Bressman, *supra* note 118, 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, 584–92 (2017) (detailing how immigration law is already exceptional at the constitutional law level).

205. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015).

206. *See supra* note 13 and accompanying text.

And 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 yet preserve 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.”<sup>207</sup> This shift from *Chevron* to *Skidmore*, as Professor Strauss explains, is an important move from a binding policymaking “space” where the agency’s reasoning does not matter as much, to a nonbinding “weight” where the agency’s position prevails to the extent it reflects special expertise.<sup>208</sup>

This legislative change, moreover, would not be made to the APA “superstatute” that governs the entire regulatory state.<sup>209</sup> Instead, Congress should amend the judicial review provisions of the INA. A provision that narrows *Chevron*’s domain to just rulemaking under the INA could be a minor detail as part of a larger immigration 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 Professor Barnett details, Congress similarly “codified *Chevmore*” when it enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.<sup>210</sup> There, Congress targeted the judicial deference the Office of the Comptroller of the Currency (“OCC”) receives for its decisions that federal law preempts state consumer

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

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

209. See Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1209 (2015).

210. Barnett, *supra* note 28, at 10, 22–33.

financial laws. For OCC interpretations preempting state law, Congress replaced *Chevron* with *Skidmore*.<sup>211</sup> And it included a savings clause to make clear that the OCC should continue to receive *Chevron* deference for all other statutory interpretations.<sup>212</sup> Congress could similarly codify *Chevron* in the immigration adjudication context by, for instance, amending the INA's standard-of-review provisions for removal orders.<sup>213</sup>

As Professor Barnett explores in greater detail, through *Chevron* codification “Congress can provide a ‘*Chevron* reward’ or a ‘*Skidmore* penalty’ in light of agency behavior.”<sup>214</sup> 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.<sup>215</sup> After all, *Skidmore* focuses judicial review on the agency's exercise of expertise and reasoned decisionmaking.<sup>216</sup> Failure to do so would risk judicial invalidation of the agency's statutory interpretation. To provide one empirical snapshot, a study of all circuit court decisions citing *Chevron* during an eleven-year period showed agency interpretations were significantly more likely to prevail under *Chevron* (77.4 percent) than *Skidmore* (56.0 percent).<sup>217</sup>

Because an agency is more likely to prevail in court under *Chevron* than *Skidmore*, DOJ 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 encourages Congress to play a larger role in the development of immigration law and policy. As Professor Barnett

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211. See 12 U.S.C. § 25b(b)(5)(A) (2018) (instructing the reviewing court to “assess the validity of [the OCC Comptroller's] determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, [and] the consistency with other valid determinations made by the agency”).

212. *Id.* § 25b(b)(5)(B).

213. See INA § 242(b)(4), 8 U.S.C. § 1252(b)(4) (2018) (detailing the scope and standard of review for judicial review of removal orders).

214. Barnett, *supra* note 28, at 51.

215. Cf. Jud Mathews, *Deference Lotteries*, 91 TEX. L. REV. 1349, 1384 (2013) (“The chance of receiving more stringent review gives agencies an incentive to ‘play it safer’ when interpreting statutes than they otherwise might.”).

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

217. Barnett & Walker, *supra* note 108, at 30 fig.1.

astutely concludes, “*Chevmore* codification, like appropriations, congressional oversight, sunset provisions, and confirmation for agency officers, becomes another tool for congressional oversight of agency action.”<sup>218</sup>

### 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 it unilaterally. The Supreme Court famously held in *Chenery* in 1947 that “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.”<sup>219</sup> To be sure, there may be in certain circumstances “a very definite place for the case-by-case evolution of statutory standards.”<sup>220</sup> 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.”<sup>221</sup>

As Part II.A highlights, these circumstances will likely not present themselves often in the immigration context. And when they do, the BIA and attorney general should not categorically avoid utilizing adjudication to engage in “case-by-case evolution of statutory standards.”<sup>222</sup> Instead, the argument here is that the Executive Branch—through the attorney general and DHS secretary—should shift the default to rulemaking for immigration policymaking.<sup>223</sup> And

218. Barnett, *supra* note 28, at 56.

219. SEC v. *Chenery Corp.*, 332 U.S. 194, 203 (1947); *see also* *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 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.”).

220. *Chenery*, 332 U.S. at 203.

221. *Id.* at 202–03.

222. *See id.*

223. Currently, the attorney general and the DHS secretary hold immigration policymaking authority. *See* INA § 103(g)(2), 8 U.S.C. § 1103(g)(2) (2018) (“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.”); INA 103(a)(1), 8 U.S.C. § 1103(a)(1)

when it is necessary to engage in adjudicative policymaking, the attorney general should not seek *Chevron* deference for those statutory interpretations but instead should 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 last year that *Chevron* is waivable.<sup>224</sup> 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 common-sense intuition that agencies are less aggressive or more faithful to their statutory mandates if they believe their statutory interpretations will *not* receive *Chevron* deference.<sup>225</sup> And, as one of us (Walker) 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.’”<sup>226</sup> 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*.

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(charging the DHS Secretary “with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens,” but providing “[t]hat determination and ruling by the Attorney General with respect to all questions of law shall be controlling”).

224. See *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1474 (2020) (writing for the majority, Justice Breyer noted that “[n]either 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 also, 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 Kristin E. Hickman & David Hahn, *Categorizing Chevron*, 81 OHIO ST. L.J. 405 (2020) (summarizing the current debate in the federal courts on *Chevron* deference waiver).

225. 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 it is confident *Chevron* deference applies, as opposed to the less deferential *Skidmore* standard or *de novo* review).

226. Christopher J. Walker, *How To Win the Deference Lottery*, 91 TEX. L. REV. 73, 80 (2013) (quoting William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1143 n.179 (2008)).

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, via its discretion to create internal administrative law.<sup>227</sup> Indeed, DOJ 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, DOJ set forth a number of rules and procedures for creating agency guidance documents and 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.”<sup>228</sup>

At the same time, the president and Congress need not stand by, waiting for this internal administrative law to develop organically. The president should insist on this internal reform of anyone nominated to serve as attorney general, and members of the Senate Judiciary Committee can and should extract this commitment from the nominee as part of the confirmation process.<sup>229</sup> An early commitment by the attorney general to shift major immigration policy to informal rulemaking will encourage a shift internally. Moreover, legislating *Chevron* for immigration adjudication would create additional “*Chevron* rewards” to incentivize the Executive Branch to make major immigration policy through rulemaking.

As Professors Gillian Metzger and Kevin Stack observe, “[t]he constraints imposed by internal administrative law will be critical in

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227. 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).

228. Processes and Procedures for Issuance and Use of Guidance Documents, 85 Fed. Reg. 63,200, 63,202 (Oct. 7, 2020) (to be codified at 28 C.F.R. pt. 50).

229. The president demanding this change in internal administrative law is consistent with Professor Ming Hsu Chen’s call that the president should be the administrator-in-chief. See Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 351 (2017) (“The normative theory of the Administrator-in-Chief is that the President is most justified when bolstering administrative procedure, with the effect of enhancing perceptions of legitimacy by the agency officials who implement them, and increasing their policy effectiveness.”).

resisting unlawful or excessive assertions of administrative power now, just as they have been in the past.”<sup>230</sup> Shifting from adjudication to rulemaking for immigration policymaking at the agency level is just one more example of the virtues of internal administrative law.<sup>231</sup>

### CONCLUSION

When then-Judge Gorsuch remarked that *Chevron* deference is the “elephant in the room,”<sup>232</sup> many suspected that Gorsuch was 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. But a closer look at the immigration context in which Gorsuch expressed those concerns reveals 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.<sup>233</sup> 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.

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230. Metzger & Stack, *supra* note 227, at 1248.

231. 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. Christopher J. Walker, *What the Census Case Means for Administrative Law: Harder Look Review?*, YALE J. ON REG.: NOTICE & COMMENT (June 27, 2019), <https://www.yalejreg.com/nc/what-the-census-case-means-for-administrative-law-harder-look-review> [<https://perma.cc/ZX9U-7C67>]; *see also* Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1913–16 (2020) (holding that the APA requires the agency to consider regulatory alternatives and reliance interests); Dep’t of Com. 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”); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43–44 (1983) (articulating the APA’s reasoned decisionmaking requirement).

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

233. *Gorsuch Confirmation Hearing*, *supra* note 4, at 30 (statement of Sen. Klobuchar); *see supra* notes 4–8 and accompanying text.

In the lead article in this Symposium, Professors Hickman and Nielson call on the Supreme Court to reconsider *Chevron*'s domain when it comes to administrative adjudication. Such 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, 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.