

# **CHEVRON WITHOUT THE COURTS?: THE SUPREME COURT'S RECENT CHEVRON JURISPRUDENCE THROUGH AN IMMIGRATION LENS**

SHRUTI RANA\*

*The limits of administrative law are undergoing a seismic shift in the immigration arena. Chevron divides interpretive and decision-making authority between the federal courts and agencies in each of two steps. The Supreme Court may now be transforming this division in largely unrecognized ways. These shifts, currently playing out in the immigration context, may threaten to reshape deference jurisprudence by handing more power to the immigration agency just when the agency may be least able to handle that power effectively.*

*An unprecedented surge in immigration cases—now approximately 90% of the federal administrative docket—has arrived just as the Court is whittling away the judicial role while expanding agency authority, significantly transforming traditional deference doctrine. In its immigration docket, the Court is shifting the judicial role away from questions of statutory interpretation and towards a mere evaluation of when the agency's interpretation should be granted deference. Assessment of the "reasonableness" of the agency's action has given way to marking the outer boundaries of agency action, merging the court's traditional oversight analysis into a form of "arbitrary and capriciousness" review.*

*The costs of the Court's reformulation of Chevron are particularly visible in immigration law because recent legislation and structural changes at the immigration agency have already constrained judicial review. However, the reformulation of Chevron occurring in immigration law may threaten to remake administrative law generally. Unfortunately, these developments have received little scholarly attention. Understanding this transformation is imperative as ultimately we may be heading towards "Chevron without the Courts"—wherein the judicial interpretive role is being constrained in the very instances where agencies are least able to function effectively.*

---

\* Associate Professor of Law, University of Maryland School of Law. I would like to thank Afra Afsharipour, Maxwell Chibundu, Gabriel J. Chin, Danielle Citron, David Gamage, Smriti Rana, Ediberto Roman, Robert Percival, Amanda Pustilnik, Christopher Rickerd, Rick Su, David Super, Rose Villazor, Jarrod Wong, Greg Young, and the participants in the Conference of Asian Pacific American Law Faculty (CAPALF)/Western Law Teachers of Color (WLTC) Workshop, the Southeastern Association of Law Schools (SEALS) New Scholars Workshop, and the faculty workshops of the University of Maryland and William and Mary Law Schools for their many helpful comments. I also wish to thank Christopher Gray, Dhanya John, Eric Kunimoto, and Jennifer Thompson for their excellent research assistance. © 2013, Shruti Rana.

## TABLE OF CONTENTS

INTRODUCTION . . . . .	314
I. WHY WE NEED THE COURTS . . . . .	323
II. DO WE HAVE THE COURTS? THE CONTRACTION OF THE JUDICIAL ROLE IN STATUTORY INTERPRETATION . . . . .	333
A. <i>The Evolution of the Judicial Interpretive Role: The         Courts' Authority to Say What the "Law" Is</i> . . . . .	334
B. <i>Chevron and its Impact on the Judicial Role in Statutory         Interpretation</i> . . . . .	337
III. LOOKING THROUGH AN IMMIGRATION LENS: A NEW PERSPECTIVE ON RECENT <i>CHEVRON</i> JURISPRUDENCE . . . . .	343
A. <i>What Can an Immigration Lens Contribute?</i> . . . . .	343
B. <i>What Immigration Cases Reveal About the Marginaliza-         tion of the Judicial Interpretive Role</i> . . . . .	346
1. <i>A Far From Ordinary "Remand Rule"</i> . . . . .	349
2. <i>Collapsing the Judicial Role</i> . . . . .	351
3. <i>Furthering Chevron's Collapse into a Single Step</i> . . . . .	353
C. <i>Implications for Non-Immigration Administrative Law</i> . . . . .	356
IV. CONCLUSION . . . . .	359

## INTRODUCTION

One of the primary battlegrounds in administrative law centers on the balance of powers between federal courts and agencies. Courts and agencies have long been viewed as having complementary roles in statutory interpretation that reflect their particular institutional competencies and traditional legal prerogatives.<sup>1</sup> In its seminal 1984 *Chevron* decision, the Supreme Court attempted to set forth a framework clarifying these roles, dividing interpretive and decision-making authority between the courts and agencies with a

---

1. See Kenneth A. Bamberger & Peter L. Strauss, *Chevron's Two Steps*, 95 VA. L. REV. 611, 611 (2009) (discussing *Chevron's* task allocation function and utility as a framework for circumscribing the appropriate scope of independent judicial decision making, arguing that *Chevron's* framework "is best understood as a framework for allocating interpretive authority in the administrative state" by separating "those questions of statutory implementation assigned to independent judicial judgment (Step One) from those regarding which courts' role is limited to oversight of agency decision making (Step Two)").

two-step framework.<sup>2</sup> In Step One, a reviewing court is to ask whether a statute is ambiguous, and if so, the court in Step Two is to determine whether the agency's interpretation is reasonable enough to receive deference.<sup>3</sup> Despite the apparent clarity of this framework,<sup>4</sup> the high stakes in many interpretive problems<sup>5</sup> have spawned enormous debate regarding how to apply this framework.<sup>6</sup> As a result, the boundary between agency and judicial power in statutory interpretation continues to see much contention and dissent.<sup>7</sup>

Over the last decade, these debates have taken on a new urgency and

---

2. In *Chevron*, the Supreme Court initially attempted to address this issue by explaining that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority by Congress to agencies to fill the statutory gap in a reasonable fashion. *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). It sought to delineate the areas of discretionary authority left to the agencies and to the courts by setting forth a two-step framework. In step one, *Chevron* instructed the federal courts that their role was to determine whether a statute was ambiguous; if so, and the agency's construction of that statute was reasonable, then the federal court was required to defer to and accept the agency's construction of the statute, even if the agency's interpretation differed from what the court believed to be the best statutory interpretation (step two). In this manner, *Chevron* gave both the federal courts and agencies a role in interpreting statutes. See also *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

3. See Bamberger & Strauss, *supra* note 1, at 620 (citing a recent case, *Rapanos v. United States*, 547 U.S. 715 (2006), where the Court employed language suggesting a unitary *Chevron* standard).

4. See E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 3 (2005) ("[*Chevron*] is oft-cited and provides a useful and convenient 'test' for judges and lawyers because it created a simple roadmap for analyzing the complex mysteries of how courts should defer to administrative agencies when construing statutes. *Chevron* is not merely a useful citation, rhetorical resource or codification, but instead is an important paradigm-shifting case that re-conceptualized the relative roles of courts and agencies when construing statutes over which agencies have been given interpretive rights.").

5. See, e.g., Jill E. Family, *Argument Preview: Calculating Relief from Removal*, SCOTUSBLOG (Jan. 13, 2012, 11:06 AM), <http://www.scotusblog.com/2012/01/argument-preview-calculating-relief-from-removal/> ("As always in immigration law, the interpretation of a complex statute will decide whether individuals with close connections to the United States since childhood will be forced to leave and separate from their families."); see also *Lanza v. Ashcroft*, 389 F.3d 917, 927-28 (9th Cir. 2004) (noting "[t]he liberty interests involved in removal proceedings are of the highest order. Removal 'visits a great hardship on the individual and deprives him [or her] of the right to stay and live and work in this land of freedom.' It is 'a drastic measure' and for some 'the equivalent of banishment or exile.'" (alteration in original) (citations omitted)). See also John R. Mills et al., *Death is Different and a Refugee's Right to Counsel*, 42 CORNELL INT'L L.J. 361, 385 (2009) ("Deportation, particularly if it is permanent, amounts to punishment.").

6. See, e.g., Elliott, *supra* note 4, at 3 (describing *Chevron* as "notorious"); Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why it Matters*, 59 ADMIN. L. REV. 673, 719 (2007) (discussing the "persistent doctrinal confusion" stemming from *Chevron*); Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 809 (2002) ("*Chevron*, of course, is the Court's most important decision about the most important issue in modern administrative law . . ."). See also Note, *The Two Faces of Chevron*, 120 HARV. L. REV. 1562, 1562 (2007) (describing the vast body of scholarship *Chevron* has generated).

7. See 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, 1097 (2008) (discussing recent Supreme Court decisions which "suggest that there are many issues *Chevron* left unresolved" including a number of doctrinal questions such as whether there is some kind of "super-deference [involved] when agencies are interpreting their own prior regulations or acting on foreign affairs or national security matters"); see also *id.* at 1156-57 ("[T]he Supreme Court's deference doctrine is complicated as a matter of theory and chaotic as a matter of practice . . . In short, the Supreme Court's deference jurisprudence is a mess.").

vitality as some scholars have argued that the Supreme Court has been reformulating the *Chevron* doctrine.<sup>8</sup> Regardless of whether or not the Supreme Court is actually in the process of reformulating *Chevron* generally, this article argues that the Supreme Court is clearly revising *Chevron* within the immigration context. Moreover, these revisions are occurring just as the immigration agency has fallen into crisis,<sup>9</sup> opening an interesting analytical space.

Taking the general debates over *Chevron* as a starting point, recent cases have added to, rather than detracted from, the confusion over the distinctions between *Chevron*'s two steps and how they should be applied. Some scholars argue that *Chevron*'s two steps must be sharpened to avoid agencies usurping the independent judicial role.<sup>10</sup> Others argue that *Chevron*'s two steps should be conceptually collapsed into one step alone—a single inquiry into the reasonableness of the agency's statutory interpretation.<sup>11</sup>

Amidst a torrent of cases developing and applying deference law, two themes stand out. First, in a line of cases culminating in *United States v. Mead Corp.*,<sup>12</sup> the Supreme Court has denied *Chevron* deference to low-quality agency decisions—those rendered by junior officials without going through processes that might be expected to produce thoughtful, well-reasoned decisions. This can be seen as an extension of a line of cases limiting the delegation of particularly sensitive powers to low-ranking bodies.<sup>13</sup> The demand for quality manifested in the *Mead* line of cases can be seen as shifting the limits of interpretive power in favor of the courts and against the agencies.

---

8. See generally Daniel J. Gifford, *Emerging Outlines of a Revised Chevron Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783 (2007).

9. See Eliot Walker, *Asylees in Wonderland: A New Procedural Perspective on America's Asylum System*, 2 NW. J.L. & SOC. POL'Y 1, 2 (2007) ("That the American Asylum system has fallen into disrepute is no longer a significantly contested point of debate."). See also Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 475 (2006) (noting that the brevity of agency review has led immigration lawyers and federal judges to view BIA decision making as "deeply troubled").

10. See Bamberger & Strauss, *supra* note 1.

11. See Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009). See, e.g., Eskridge & Baer, *supra* note 7, at 1088 ("Since *Cardoza-Fonseca*, there has been a doctrinal tug of war within the Supreme Court between Justices Stevens (*Chevron*'s author) and Scalia (the cheerleader for a broad reading.); see also Bamberger & Strauss, *supra* note 1, at 614-15 (discussing divergent views).

12. 533 U.S. 218 (2001). See also *Cont'l Air Lines, Inc. v. Dep't of Transp.*, 843 F.2d 1444, 1449 (D.C. Cir. 1988) ("[R]easonableness . . . is to be determined by reference both to the agency's textual analysis (broadly defined, including where appropriate resort to legislative history) and to the compatibility of that interpretation with the Congressional purposes informing the measure. The latter aspect of the reasonableness inquiry, for reasons that we shall presently state, is the more difficult and sensitive half of our *Chevron* Step Two exercise.").

13. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (denying the municipality the authority to make a finding of past racial discrimination sufficient to justify race-conscious remedies); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (refusing to extend states' plenary antitrust exemption to municipalities); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (denying the Civil Service Commission the authority to make constitutionally sensitive decisions to bar legal immigrants from government service); *Kent v. Dulles*, 357 U.S. 116 (1958) (denying the State Department authority to deny a passport to a U.S. citizen absent clear congressional authorization).

Just a few years after *Mead*, however, the Court elevated agencies' status in the process of statutory construction in the *Brand X* case.<sup>14</sup> *Brand X* entitles agencies to disregard judicial constructions of statutes and requires courts to yield to agencies' interpretations in preference to the courts' own precedents if the statute is ambiguous and the agency's interpretation is reasonable. In such cases, the Court came close to declaring that "[i]t is emphatically the province and duty of the [agency] to say what the law is."<sup>15</sup>

Although not directly contradictory, these two lines of cases certainly move in opposite directions and imply significantly different views of the relative strengths and proper powers of agencies and courts. On the one hand, we are told to suspect the quality of agencies' decision making, while on the other we are told to prefer it to that of the courts and the values of *stare decisis*. Moreover, both of the key decisions in these lines commanded large majorities on the Court (although in each case with Justice Scalia in dissent). Not surprisingly, scholars have split wildly as to what these cases tell us about the Court's trajectory on deference to administrative interpretations.<sup>16</sup>

The most straightforward synthesis of these two lines of cases is to see them as focusing on the quality of an agency's decision making. When an agency speaks through junior officials using casual procedures, the resulting decision is entitled to only as much deference as its persuasive value merits.<sup>17</sup> Thus, when the Social Security Administration failed to follow the procedures *Mead* identified as indicating the appropriateness of deference, but nevertheless issued thoughtful and consistent guidance from its central office to thousands of administrative law judges and claims representatives around the country, the Court was happy to defer only because the agency reached a clearly thoughtful decision.<sup>18</sup> Yet where an agency brings its resources fully to bear in making a decision, *Brand X* presumes that this decision will be sufficiently superior to what generalist judges can achieve so as to warrant

---

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

15. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (using the quoted language to claim that power for "the judicial department" of the federal government).

16. See, e.g., Foote, *supra* note 6; Claire R. Kelly, *The Brand X Liberation: Doing Away with Chevron's Second Step as Well as Other Doctrines of Deference*, 44 U.C. DAVIS L. REV. 151, 167-68 (2010). See also Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 66 (2008); Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105 (2001). Compare Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1254 (1997) (noting that the District of Columbia Circuit "has been especially puzzled about the relationship between step two and the traditional 'arbitrary and capricious' test prescribed in § 706(2)(A) of the Administrative Procedure Act ('APA')"), with Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 210-12 (1992) (arguing that the judicial review articulated in step two applies only when agency interpretations in question were made with a clear delegation of authority from Congress).

17. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *Mead* directs courts to apply *Skidmore* to agency interpretations that lack the procedures or clear delegations that would earn them *Chevron* deference.

18. *Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002).

overriding prior judicial constructions.<sup>19</sup> That is, a responsible agency should bring to bear “the credibility of their circumstances, [and also] contribute to an efficient, predictable, and nationally uniform understanding of the law that would be disrupted by the variable results to be expected from a geographically and politically diverse judiciary encountering the hardest (that is to say, the most likely to be litigated) issues with little experience of the overall scheme and its patterns.”<sup>20</sup>

Under this synthesis, one might presume that an agency whose decision-making processes are rapidly decaying, one that is increasingly unable to produce coherent decisions, much less high-quality ones, would receive little or no deference from the courts for its statutory constructions. Thus, as the Board of Immigration Appeals<sup>21</sup> buckles under a mammoth caseload, replacing three-judge panels with single judges, commonly issuing one-line summary affirmances of immigration judges’ decisions (decisions which are themselves coming from a geographically and politically dispersed group of immigration judges) without either endorsing those judges’ rationales or suggesting alternatives, and issuing opinions that federal appellate judges across the political and jurisprudential spectrum have found indefensible,<sup>22</sup> one might imagine that the courts would feel entitled to construe the immigration statutes virtually *de novo*.<sup>23</sup> Under the behaviorist interpretation of *Mead*, this might then prompt the Board to improve its processes, to the benefit of all concerned, so that the courts might grant it a greater say in the laws under which it operates.<sup>24</sup>

In practice, the result has been just the opposite. In its recent immigration jurisprudence, the Court has increasingly tilted the balance of power towards

---

19. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); see also *Cablevision Sys. Corp. v. F.C.C.*, 649 F.3d 695, 717 (D.C. Cir. 2011) (quoting *City of Los Angeles v. U.S. Dep’t of Transp.*, 165 F.3d 972, 977 (D.C. Cir. 1999) (“In reviewing the [Commission’s] order, we do not sit as a panel of referees on a professional economics journal, but as a panel of generalist judges obliged to defer to a reasonable judgment by an agency acting pursuant to congressionally delegated authority.”) (alteration in original)).

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

21. The Board of Immigration Appeals and Immigration Judges are located within the Department of Justice. See, e.g., EXECUTIVE OFFICE OF IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL app. C (2004) [hereinafter EOIR ORGANIZATIONAL CHART] (providing an organizational chart demonstrating the relationship between the relevant agencies).

22. See, e.g., *Kadia v. Gonzales*, 501 F.3d 817, 820-21 (7th Cir. 2007); *Benslimane v. Gonzales*, 430 F.3d 828, 829-30 (7th Cir. 2005).

23. See *Lin v. Holder*, 565 F.3d 971, 976 (6th Cir. 2009) (“Questions of law and constitutional questions are subject to *de novo* review, with deference to the BIA’s reasonable interpretation of the statutes and regulations.” (citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005))).

24. See, e.g., Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 932-33 (2008) (stating that data and analysis regarding agency rulemaking set forth in the article “provides some support for the conclusion that agencies’ use of notice-and-comment rulemaking increased after the Supreme Court’s 2001 decision in *United States v. Mead Corporation*”).

the agency by limiting judicial interpretive authority in favor of agency deference,<sup>25</sup> while the agency itself has fallen into further disrepair.<sup>26</sup>

Housed within the Department of Justice, the Executive Office for Immigration Review [hereinafter “the immigration agency”] is charged with the momentous task of adjudicating asylum claims and determining whether foreign-born individuals charged with violating immigration law “should be ordered removed from the United States or should be granted relief or protection from removal and be permitted to remain in this country.”<sup>27</sup> Yet this agency, responsible for deciding the fate of people facing deportation, is beset with so many severe problems—from overburdened courts and an enormous backlog of cases,<sup>28</sup> to charges of bias,<sup>29</sup> to endemic mistakes,<sup>30</sup> to widely inconsistent decision making<sup>31</sup>—“[t]hat the American asylum system has fallen into disrepute is no longer a significantly contested point of debate.”<sup>32</sup>

25. See, e.g., *Kucana v. Holder*, 558 U.S. 233 (2010); *Negusie v. Holder*, 555 U.S. 511 (2009); *Gonzales v. Thomas*, 547 U.S. 183 (2006); *INS v. Ventura*, 537 U.S. 12 (2002).

26. See Walker, *supra* note 9, at 2. See also Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the Real ID Act is a False Promise*, 43 HARV. J. ON LEGIS. 101, 142 (2006) (noting that the Real ID Act weakens an already “broken asylum system”).

27. See 6 U.S.C. § 521(a)(1) (2006) (“There is in the Department of Justice the Executive Office of Immigration Review, which shall be subject to the direction and regulation of the Attorney General under section 1103(g) of title 8.”). The Executive Office of Immigration review contains 59 immigration courts and the Board of Immigration Appeals responsible for adjudicating and reviewing deportation decisions. *EOIR at a Glance*, DEPARTMENT OF JUSTICE—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, <http://www.justice.gov/eoir/press/2010/EOIRataGlance09092010.htm>. See also Lenni B. Benson & Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication*, at 5-11 (Apr. 16, 2012), available at <http://www.acus.gov/sites/default/files/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf>.

28. Benson & Wheeler, *supra* note 27. The adjudicatory branch of the immigration agency is inundated with immigration appeals, severely straining its resources. *Id.* For example, the EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2011 STATISTICAL YEARBOOK, at Y1-Y2 (2012), available at <http://www.justice.gov/eoir/statspub/fy11syb.pdf>, shows that a total of 297,848 immigration court cases and 30,350 BIA cases were pending as of September 30, 2011. This represents a rise in immigration court cases pending since the previous year.

29. See *infra* note 67. Both the immigration courts and the federal courts where agency appeals are appealed have been presented with an unprecedented wave of immigration cases. Benson & Wheeler, *supra* note 27. See also the EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2010 STATISTICAL YEARBOOK, at Y1-Y2 (2011), available at <http://www.justice.gov/eoir/statspub/fy10syb.pdf> (showing that a total of 262,622 immigration court cases and 30,112 BIA cases were pending as of September 30, 2010) and Executive Office for Immigration Review, *supra* note 28, at Y1-Y2 (showing that a total of 297,848 immigration court cases and 30,350 BIA cases were pending as of September 30, 2011, a significant rise from the year before).

30. See *infra* note 104.

31. See *infra* part I. See also *Judge-by-Judge Asylum Decisions in Immigration Courts, FY 2007-2012*, TRAC IMMIGRATION, <http://trac.syr.edu/immigration/reports/306/include/denialrates.html> (last visited Feb. 8, 2013) (depicting rates of asylum denials by Immigration Judge from 2007-2012 and noting inconsistencies in decision making).

32. Walker, *supra* note 9, at 2. Significantly, these problems have now spread and possibly infected Supreme Court adjudication. In an April 2009 immigration opinion, *Nken v. Holder*, the Court relied on representations by the Justice Department, specifically by the Solicitor General’s office, that the United States had a “policy and practice” of helping deported aliens who were cleared for return and restoring them to their prior status. Jess Bravin, *Judge Suggests U.S. Misled Court on Immigration Policy*, WALL ST. J., Feb. 10, 2012, at A6. However, recently a federal judge has charged that the Solicitor General’s office had not produced documents showing this policy existed. Immigrant advocacy groups also claimed they did not know of this policy. If these charges prove true,

This article conducts an in-depth analysis of the Court's recent immigration jurisprudence, an area where the Court appears to be experimenting with *Chevron* in ways that have largely gone unrecognized. Discerning what the Court is doing in recent immigration cases may prove crucial to understanding the future course of administrative law generally. For at least four decades, environmental cases provided the platforms for many of the Court's most important decisions shaping administrative law.<sup>33</sup> Today, however, immigration cases dominate the administrative law dockets of the federal courts of appeal and are becoming increasingly prominent in the Court's own docket.<sup>34</sup> With the immigration statutes a tangled web of often contradictory edicts, often drafted hurriedly<sup>35</sup>—and with the political process deadlocked to the point that legislative clarification may be a long time coming<sup>36</sup>—these

---

this will be yet another indication that deference should not be assumed in the case of the immigration agency. See Eskridge & Baer, *supra* note 7, at 1112 (noting that the Supreme Court often relies on briefs from the Solicitor General's office).

33. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978); *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). See also Elliott, *supra* note 4 (discussing the strong impact *Chevron* has had on environmental law); Jason J. Czarnecki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 771 (2008) (“Strong synergies exist between environmental law and administrative law. While *Chevron* creates the standard for deference to administrative agencies, it also is an important case in environmental law. In addition, environmental cases play a major role in administrative law casebooks and in developing the processes under which courts review all agency decisions.”).

34. See COMMERCIAL & FED. LITIGATION SECTION, NEW YORK STATE BAR ASSOCIATION, THE CONTINUING SURGE IN IMMIGRATION APPEALS IN THE SECOND CIRCUIT: THE PAST, THE PRESENT, AND THE FUTURE 10 (2009), available at <http://www.nysba.org/Content/ContentFolders4/CommercialandFederalLitigationSection/ComFedReports/ImmigrationAppealsinthe2dCircuitFinalReport1-29-10.pdf> (“Immigration appeals have represented between 37% and 39% percent of all appeals filed within the Second Circuit between 2004 and 2008. By contrast, only 4% of the Second Circuit’s docket consisted of BIA cases in 2001.” (internal citations omitted)); Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37, 47 n.34 (2006–2007) (pointing out that immigration cases made up nearly 90% of all administrative appeals heard in the federal courts of appeals); Note, *Recent Cases: Immigration Law-Administrative Adjudication—Third and Seventh Circuits Condemn Pattern of Error in Immigration Courts—Wang v. Attorney General*, 423 F.3d 260 (3d Cir. 2005) and *Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir. 2005), 119 HARV. L. REV. 2596, 2596 (2006) (noting that immigration appeals have “swollen in the past five years from three percent to eighteen percent of all federal appeals”); James Warren, *Not Mincing Words over Asylum*, N.Y. TIMES, Aug. 21, 2011, at A21B (noting “a sharp increase in immigration caseloads and other matters winding up before appeals courts”).

35. See Darren H. Weiss, Note, *X Misses the Spot: Fernandez v. Keisler and the (Mis)Appropriation of Brand X by the Board of Immigration Appeals*, 17 GEO. MASON L. REV. 889, 890 (2010) (“Congressional decision making and resulting legislation are certainly not models of clarity. When Congress enacts legislation, it leaves out certain minutiae—sometimes purposely, other times not.”).

36. Interactions between the judiciary and Congress on immigration matters are frequently politicized. For example, a former Department of Justice liaison to the White House, Monica Goodling, testified before Congress that the Bush administration’s hiring policy of immigration judges was based on political ties and ideological beliefs, not experience in the immigration field. See OFFICE OF PROF’L RESPONSIBILITY & OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 110-11, 116 (2008), available at <http://www.justice.gov/oig/special/s0807/final.pdf>; Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635



cases have provided an attractive vehicle for the Court to experiment with new approaches to judicial review. Understanding the techniques the Court has deployed not just to evade its own *Mead* standard, but also to marginalize courts far more thoroughly than the *Chevron* two-step formula suggests, may provide a preview of changes that could affect judicial review of administrative decisions more generally.

The significance of this analysis is underscored by several simultaneously occurring phenomena. First, there is at least some evidence that federal immigration jurisprudence may be infecting non-immigration administrative law cases, as the *Chevron* analyses in immigration cases may be starting to take hold in non-immigration administrative law decisions.<sup>37</sup> Second, supplementing this trend, scholars are beginning to recognize that the Court may be dramatically shifting its treatment of immigration cases with respect to a broad range of issues—not just with respect to deference.<sup>38</sup> The Court appears to be moving away from what has been called “immigration exceptionalism”<sup>39</sup> and is instead increasingly placing immigration cases into a larger public law framework. In other words, the Court appears to be moving immigration cases more firmly into the mainstream of administrative law.<sup>40</sup> Third, all of these developments are occurring against a dramatic

---

(2010) (noting criticisms of the politicization of the immigration process are well-founded [hereinafter Legomsky, *Restructuring Immigration Adjudication*]; Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417 (2011); see also Legomsky, *supra*, at 1637 (“The labyrinth known as the Immigration and Nationality Act governs the admission . . . to [and] expulsion from the United States . . . Its five hundred pages conspire with more than one thousand pages of administrative regulations issued by a variety of federal departments, as well as precedent decisions of administrative tribunals, executive officers, and courts, to create a byzantine network of substantive and procedural areas of law.” (footnote omitted))).

37. See, e.g., *W. Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186, 1201 (9th Cir. 2008) (quoting *Gonzales v. Dep’t of Homeland Security*, 508 F.3d 1227, 1234 (9th Cir. 2007)) (energy case citing immigration case); *Fort Independence Indian Cmty. v. California*, 679 F. Supp. 2d 1159, 1170 (E.D. Cal. 2009) (citing *Marmolejo-Campos v. Holder*, 558 F.3d 903, 909 (9th Cir. 2009)) (Native American/Gaming case citing immigration case regarding *Chevron* and *Skidmore* deference); *Sash v. Zenk*, 428 F.3d 132, 135 (2d Cir. 2005) (quoting *Michel v. INS*, 206 F.3d 253, 262 (2d Cir. 2000), in discussion on the application of deference to Bureau of Prisons on the issue of time off for good behavior).

38. Traditionally, the view of scholars has been that “[f]or the most part, the Supreme Court has not applied to immigration cases the constitutional norms familiar in other areas of public law.” Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 937 (1995). However, more recently scholars have been identifying immigration law as a species of administrative law. See Lenni B. Benson, *The Search for Fair Agency Process: The Immigration Opinions of Judge Michael Daly Hawkins 1994-2010*, 43 ARIZ. ST. L.J. 7, 10 (2011); Brian R. Gallini & Elizabeth L. Young, *Car Stops, Borders, and Profiling: The Hunt for Undocumented (Illegal?) Immigrants in Border Towns*, 89 NEB. L. REV. 709, 724 n.91 (2011); see also Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 566 (2012) (“Immigration law can seem to be in its own world, divorced from the evolution of important legal concepts. But this Article finds immigration law in step with administrative law regarding a major topic: nonlegislative rules.”).

39. See Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1363 (1999) (defining immigration exceptionalism as the view that immigration and alienage law should be exempt from the usual limits on government decision making—for example, judicial review).

40. *Id.*

backdrop—that is, the Court is increasingly tilting the balance of power towards the immigration agency, by limiting judicial interpretive authority in favor of agency deference,<sup>41</sup> at the same time that the immigration agency is falling further into chaos.<sup>42</sup>

This article seeks to contribute a new doctrinal perspective on this sharply debated administrative law issue by analyzing recent *Chevron* jurisprudence, and the far-reaching implications of this jurisprudence, through an immigration lens. While many scholars have examined the impact of federal courts on immigration law,<sup>43</sup> this article reverses this often-used framework and analyzes the consequences of the recent unprecedented surge in immigration cases for their possible doctrinal impact on administrative law. This article argues that recent Supreme Court cases applying *Chevron* in the immigration context—which have been little-analyzed by administrative law scholars, even though immigration cases now make up the majority of federal court administrative law cases<sup>44</sup>—reveal that the Court has recently significantly altered the boundaries between courts and agencies set forth in *Chevron*, shifting interpretive power to the immigration agency and limiting courts' role to that of oversight of the boundaries of agency interpretation. In other words, the Court's recent immigration jurisprudence demonstrates that the debate over whether and how the judicial interpretive role should be limited may have already largely been resolved—the Court has eroded the judicial role in statutory interpretation into a mere oversight function and thereby greatly expanded the agency's domain, at least in the immigration context, and potentially portending changes in administrative laws more generally.

This article further argues that this expansion of the agency's role has gone beyond what *Chevron* may have originally intended, that—at least in the immigration context—*Chevron*'s focus on deference has now been sharpened to the extreme. Thus, this article seeks to demonstrate some of the potential dangers of expanding an agency's interpretive domain at the expense of the courts by analyzing how this expansion is playing out in the immigration realm. Beginning in approximately 2001—just when the Court was increasing the scope of the immigration agency's authorities at the expense of the courts—the immigration agency began its own far-reaching transformation that ultimately led to the immigration agency falling into crisis.<sup>45</sup>

---

41. See, e.g., *Kucana v. Holder*, 558 U.S. 233 (2010); *Negusie v. Holder*, 555 U.S. 511 (2009); *Gonzales v. Thomas*, 547 U.S. 183 (2006); *INS v. Ventura*, 537 U.S. 12 (2002).

42. See Walker, *supra* note 9, at 2. See also Cianciarulo, *supra* note 26, at 142 (noting that the Real ID Act weakens an already “broken asylum system”).

43. See, e.g., Benson, *supra* note 34; Legomsky, *Immigration Adjudication*, *supra* note 36.

44. See Michael M. Hethmon, *Tsunami Watch on the Coast of Bohemia: The BIA Streamlining Reforms and Judicial Review of Expulsion Orders*, 55 CATH. U. L. REV. 999, 1002 (2006); Benson, *supra* note 34, at 47 n.34.

45. See *Press Release*, U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE UNVEILS ADMINISTRATIVE RULE CHANGE TO BOARD OF IMMIGRATION APPEALS IN ORDER TO ELIMINATE MASSIVE BACKLOG OF MORE THAN 56,000 CASES (Feb. 6, 2002), [http://www.usdoj.gov/opa/pr/2002/February/02\\_ag\\_063.htm](http://www.usdoj.gov/opa/pr/2002/February/02_ag_063.htm)

This article proceeds in three parts. First, Part I demonstrates why we need the courts by examining the failure of the immigration agency. Part II then focuses on judicial deference in administrative law generally. Part II describes the current debates over the role of the courts in supervising or deferring to agency action, and examines how the Court may be ratcheting up deference to agencies. In Part III, this article then proceeds to analyze deference jurisprudence through an immigration lens. Part III discusses how immigration cases are increasingly being decided by administrative law principles, even though deference jurisprudence originated with respect to well-functioning agencies such as the EPA. Part III then argues that the combination of the onslaught of immigration cases, the chaos at the agency, and the emergence and application of doctrines apparently aimed at reducing the role of the courts, shows how in the immigration realm, we *may be approaching Chevron without the courts, where the judicial role is being weakened* at the very time the immigration agency needs it most.

### I. WHY WE NEED THE COURTS

If the Supreme Court were to launch a new drive to promote deference to an administrative agency, several agencies might provide plausible vehicles. For example, the Federal Communications Commission (FCC) deals with highly technical matters relying on an expert staff with training and experience far beyond that of lay judges. Alternatively, the Court might enunciate new principles of deference in cases involving the Food and Drug Administration (FDA), which depends on a large, highly specialized staff to make extremely nuanced medical decisions. Most simply, the Court might return to the Environmental Protection Agency (EPA), whose work spawned the original *Chevron* decision and which must master a wide array of highly technical scientific disciplines. All three of these agencies—along with many others—are generally well-regarded for their technical sophistication and presumably bring that expertise to bear when attempting to discern what federal statutes are most likely to mean. And on a number of occasions, the Court has indeed used cases from these agencies as vehicles to restrict judicial review of administrative agencies generally.<sup>46</sup>

Few, however, would have expected the deeply troubled immigration agency, which deals with relatively non-technical issues and is too overwhelmed to produce thoughtful deliberative decisions with any regularity, to be the poster child for greater judicial deference to agency discretion.

---

(announcing reforms at the BIA); *see generally* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 7309 (proposed Feb. 19, 2002).

46. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 530 (2009) (weakening “arbitrary and capricious” review of agencies’ decisions); *Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985) (revitalizing the doctrine of precluding review of matters “committed to agency discretion”); *see also* *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 109-10 (1998) (narrowing private parties’ standing to seek judicial enforcement of statutes agencies have elected not to enforce).

This Part illustrates some of the troubling consequences of heading towards “*Chevron* without the courts” by looking closely at the crisis in the immigration arena, and its implications for the agency’s interpretive role. Ultimately, Part I argues that the current crisis in the immigration arena demonstrates “why we need the courts”—that is, why the judicial role was, and should remain, a critical part of *Chevron*’s scope.

By almost any measure, the immigration agency is in the midst of a crisis. A near consensus has emerged that the U.S. immigration agency is “broken down”<sup>47</sup> and that “much of the law governing the administration of our immigration system exists in a state of disrepair.”<sup>48</sup> A survey of these problems demonstrates why a strong judicial role is both necessary for immigration law jurisprudence and for *Chevron*’s future evolution.

First, under *Chevron* and its progeny, reflecting longstanding administrative law principles, agencies are supposed to be specialists in their fields, possessing special expertise that they can bring to bear on issues that generalist courts may not have.<sup>49</sup> Agencies are also supposed to be more politically accountable than judges who may be insulated from political concerns.<sup>50</sup> In addition, agencies such as the immigration agency, which operate through case-by-case adjudication, are supposed to eventually achieve uniformity in their interpretations of statutes over time.<sup>51</sup> For these reasons, in cases such as *Mead*,<sup>52</sup> the Court looked at the agencies’ decision-making processes and the context in which decisions were made to determine whether to defer to the agency.

Currently, the immigration agency cannot fulfill any of the responsibilities that deference doctrine assumes. The immigration agency is burdened with a nearly insurmountable backlog of cases, issuing inexplicable decisions with concealed decision making, beset by numerous scandals including biased judges and illegally politicized appointments,<sup>53</sup> and is unable to meet even

---

47. Michael H. Posner, *The Evolution of Human Rights Law*, 31 COLUM. J. TRANSNAT’L L. 449, 455 (1994) (noting that proposed legislation is a reaction to the fact that the asylum system has broken down); see also Cianciarulo, *supra* note 26, at 142 (“[T]his Article has examined the recently enacted Real ID Act and has proposed interpretations of its three major asylum provisions. The analysis reveals that the Real ID Act is a codification—albeit a vague and poorly drafted one—of existing case law, regulations, and agency guidance. Despite the assertions of the Real ID Act’s supporters that the legislation is designed to repair a broken asylum system, the Real ID Act makes very few substantive changes to asylum law. Moreover, the changes that it does make will serve only to weaken the asylum system.”); Michele R. Pistone, *Asylum Filing Deadlines: Unfair and Unnecessary*, 10 GEO. IMMIGR. L.J. 95, 102 (1996) (noting that critics charge that the asylum system is broken and needs a major overhaul).

48. See Weiss, *supra* note 35, at 889.

49. Kelly, *supra* note 16, at 164-65.

50. *Id.*

51. Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059, 1113 (2011).

52. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

53. Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 564 (2011) (“Immigration judge caseloads continue to climb to record levels. In fiscal year 2009, approximately 230 immigration judges completed

the basic requirements of legitimate decision making.<sup>54</sup> The fundamental problems facing the agency's decision making include the legitimacy of "the fairness of the proceedings, the accuracy and constituency of the outcomes, the efficiency of the process (with respect to both fiscal resources and elapsed time), and the acceptability of both the procedures and outcomes to parties and to the public."<sup>55</sup> These problems are underscored by the additional "problems [of] severe underfunding, reckless procedural shortcuts, the inappropriate politicization of the process, and a handful of adjudicators personally ill-suited to the task."<sup>56</sup> The problems at the immigration agency read like a laundry list of all of the reasons a court should not defer to an agency; yet this is precisely what the Court is doing.

Indeed, the immigration agency is failing at each of the deference rationales articulated above. Rather than bringing specialized expertise to bear on immigration law issues, the immigration agency is notorious for its inconsistent and sometimes inscrutable decision making and interpretations. These "very significant differences from one decision maker to the next in the adjudication of asylum cases should be a matter of serious concern to federal policymakers."<sup>57</sup> Moreover, the agency has come under fire for repeatedly, and inconsistently, misreading or misinterpreting its own scope of review.<sup>58</sup> And just recently, it has been alleged that the agency made unsupported representations about its policies to the Court on an important matter of policy.<sup>59</sup>

These failures have not gone unnoticed by the federal judiciary who, if current trends continue, will have to increasingly defer to the agency. "Today a growing number of federal judges review decisions by the immigration courts with apparent skepticism . . . . [T]he trend is significant enough to count as an important—though often overlooked—thread of modern immi-

---

290,233 proceedings. Proceedings are more intensive hearings and do not include bond hearings and other motions—thus this number does not represent total workload. Proceedings alone average over 1200 per year per judge. Despite this frenetic pace, a backlog of cases continues to build. In September 2010, 261,083 cases were pending before the immigration courts. This backlog is forty percent higher than the backlog two years before. The average wait time for a case before an immigration judge is 456 days. Despite these daunting and growing caseloads, immigration judge hiring has been slow, and immigration judges on the bench lack adequate training and other in-house resources, like law clerks." (footnotes omitted)). That the immigration agency is overburdened becomes more clear when compared to other agencies. For example, the Social Security Administration employs approximately six times more judges than the immigration courts, yet immigration judges receive more than twice as many cases as Social Security Judges do. *Compare Hearing Office Locator*, [http://ssa.gov/appeals/ho\\_locator.html](http://ssa.gov/appeals/ho_locator.html) and *Information About Social Security's Hearings & Appeals Process*, <http://ssa.gov/appeals> with Benson & White, *supra* note 27.

54. Legomsky, *Restructuring Immigration Adjudication*, *supra* note 36.

55. *Id.* at 1639.

56. *Id.*

57. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 303 (2007).

58. See Scott Rempell, *The Board of Immigration Appeals' Standard of Review: An Argument for Regulatory Reform*, 63 ADMIN. L. REV. 283, 290 (2011) ("The Board decisions that interpret its scope of review under the regulation are problematic for many reasons.").

59. See *supra* note 32.

gration jurisprudence.”<sup>60</sup>

Federal judges across the country have criticized the agency’s decision making and aired their concerns over deferring to the agency. For example, one judge stated that “[p]articularly in light of the present state of affairs at the BIA, we should not so easily and unnecessarily relinquish our critical role in ensuring that the agency properly exercises its awesome authority over deportation.”<sup>61</sup> Another stated, “[r]epeated egregious failures of the Immigration Court and Board to exercise care commensurate with the stakes in an asylum case can be understood, but not excused, as consequences of a crushing workload that the executive and legislative branches of the federal government have refused to alleviate.”<sup>62</sup> Still another wrote “[a]t the risk of sounding like a broken record, we reiterate our oft-expressed concern with the adjudication of asylum claims by the Immigration Court and the Board of Immigration Appeals . . . . The performance of these federal agencies is too often inadequate. This case presents another depressing example.”<sup>63</sup> This chorus has spread to every circuit and judges of all stripes.<sup>64</sup>

How did this happen? It is important to examine the failure of the immigration agency and the potential consequences of a restricted judicial role overseeing agency decision making, both for the potential consequences for the agency itself and for the potential consequences for administrative law generally.

---

60. Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1672 (2007) (footnote omitted).

61. *Gor v. Holder*, 607 F.3d 180, 199 (6th Cir. 2010).

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

63. *Pasha v. Gonzales*, 433 F.3d 530, 531 (7th Cir. 2005).

64. *See, e.g., Ayala v. U.S. Att’y Gen.*, 605 F.3d 941, 943, 948 (11th Cir. 2010) (“The decision of the Board is riddled with error” and the BIA and IJ “fail[ed] to render a reasoned decision”); *Haile v. Holder*, 591 F.3d 572, 574 (7th Cir. 2010) (“[T]he Board’s conclusion . . . doesn’t follow from its premise, and unlike a jury an administrative agency has to provide a reasoned justification for its rulings.”); *Parlak v. Holder*, 578 F.3d 457, 471 (6th Cir. 2009) (Martin, J., dissenting) (“This record is replete with error”); *Bah v. Mukasey*, 529 F.3d 99, 111 (2d Cir. 2008) (“[W]e are deeply disturbed by what we perceive to be fairly obvious errors in the agency’s application of its own regulatory framework . . . . The claims of the petitioners before us, as set forth below, did not receive the type of careful analysis they were due.”); *N’Diom v. Gonzales*, 442 F.3d 494, 500 (6th Cir. 2006) (Martin, J., concurring) (noting “the significantly increasing rate at which adjudication lacking in reason, logic, and effort” is overwhelming federal courts of appeal); *Fiadjoe v. Att’y Gen.*, 411 F.3d 135, 154-55 (3d Cir. 2005) (noting that the IJ’s “hostile” and “extraordinarily abusive” attitude toward petitioner “by itself would require a rejection of his credibility finding”); *Grupee v. Gonzales*, 400 F.3d 1026, 1028 (7th Cir. 2005) (holding that IJ’s strange holding is “hard to take seriously”); *Korytnyuk v. Ashcroft*, 396 F.3d 272, 292 (3d Cir. 2005) (“[I]t is the IJ’s conclusion, not [the petitioner’s] testimony, that ‘strains credulity.’”); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1054 (9th Cir. 2005) (“[T]he IJ’s assessment of Petitioner’s credibility was skewed by prejudgment, personal speculation, bias, and conjecture . . . .”); *Wang v. Att’y Gen.*, 423 F.3d 260, 269 (3d Cir. 2005) (“The tone, the tenor, the disparagement, and the sarcasm of the IJ seem more appropriate to a court television show than a federal court proceeding.”); *Sosnovskaia v. Gonzales*, 421 F.3d 589, 594 (7th Cir. 2005) (“The procedure that the IJ employed in this case is an affront to [the petitioner’s] right to be heard.”); *Ssali v. Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005) (“This very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner’s] case . . . .”); *Tewabe v. Gonzales*, 446 F.3d 533, 540 (4th Cir. 2005) (“The IJ erred in this case simply because he gave no cogent explanation based on common sense, the record, or any other relevant factor for disbelieving [the petitioner].”).

As I have detailed in previous work,<sup>65</sup> since about 2000, there has been a substantial and highly controversial transformation of the administrative system of immigration review at the DOJ, the agency which oversees immigration adjudication. In the wake of these administrative changes, several key developments transformed the immigration agency into one that is increasingly falling into disrepair and increasingly unable to fulfill its *Chevron*-mandated interpretive role.

First, to address its surging backlog of cases, the immigration agency in 1999 and 2001 implemented a series of streamlining regulations which allowed the appellate body at the agency, the Board of Immigration Appeals (BIA), to issue summary affirmances of an Immigration Judge's decision, without having to issue an explanation of the Board's decision or even whether or not the Board agreed with the Immigration Judge's decision.<sup>66</sup> When these decisions were appealed to the federal courts, the federal courts were left to review terse, one-line opinions with no reasoning.<sup>67</sup>

The most immediate result of these changes was that the immigration agency's backlog was shifted to the federal courts.<sup>68</sup> The federal courts soon faced a flood of immigration appeals. Beginning in 2002, for example, the number of immigration appeals filed in the federal courts rose by about 500%; by about 2006-2007, immigration appeals made up 20% of the federal appeals docket and about 90% of the administrative law cases in the federal appeals courts.<sup>69</sup>

As the appeals rose, federal courts and other commentators began to severely criticize the agency for the poor quality of its decisions, calling them error-filled, sometimes nearly incomprehensible, arbitrary, and infused with bias and inconsistency. In one of the most famous examples, the Seventh Circuit's Judge Posner declared, "adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice."<sup>70</sup> Yet, the backlog of cases, and the terse and largely inexplicable summary affirmances were just some of the great problems facing the agency.

In a nutshell, the following changes were occurring at the agency itself:

---

65. Shrutti Rana, *Streamlining the Rule of Law: How the Department of Justice is Undermining Judicial Review of Agency Action*, 2009 U. ILL. L. REV. 829.

66. See 8 C.F.R. § 1003.1(e) (2011); Rana, *supra* note 65, at 832.

67. *Id.* Equally troubling is the fact that many judges displayed bias or professional incompetence. See *Lopez-Umanzor*, 405 F.3d at 1054 (noting the Immigration Judge's assessment was "skewed by prejudgment, personal speculation, bias, and conjecture"); Marouf, *supra* note 36; Richard B. Schmitt, *Immigration Judges Get New Regulations*, L.A. TIMES, Aug. 10, 2006, at A15.

68. See John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 19 (2005); see also Board of Immigration Appeals: Affirmances Without Opinions, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34654, 34655 (June 18, 2008) (codified at 8 C.F.R. pt. 1003).

69. See COMMERCIAL & FED. LITIGATION SECTION, *supra* note 34, at 8; Family, *supra* note 53, at 583; Rana, *supra* note 65, at 854 n.137 (noting that cases skyrocketed from 1642 in 2001 to an astonishing 8750 in 2004).

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

straining under an increasingly severe backlog of cases, and placed under heightened pressure to reform its handling of immigration cases in the wake of September 11, in early 2002 the agency implemented a series of policy and procedural changes which had sweeping effects on the federal courts.<sup>71</sup> For the purposes of this analysis, there are three procedural changes which are most significant. Each of these procedural changes took place at the Board of Immigration Appeals. The Board is an appellate body at the agency, which hears appeals from Immigration Judges' decisions (Immigration Judges hear deportation orders/asylum cases). The Board issues written and precedential decisions, which are supposed to bind the agency, and provides guidance to the courts and public on the interpretation of immigration statutes and regulations.

The first significant change was the streamlining rules described above—the agency implemented a procedure whereby affirmances of deportation orders were allowed to be issued in the form of affirmances without opinion. This meant that: (a) there were no written decisions for most affirmances of deportation orders, and (b) the rules were written so that the affirmances explicitly only affirmed the result, not the reasoning of the Immigration Judge; so that when these Board affirmances went to the federal courts, no one knew what the agency's reasons for affirmance were. Moreover, Board members, under tremendous resource pressures, were given time limits which worked out to about fifteen minutes per case, a minuscule amount of time to review extremely fact- and paper-intensive cases. The new procedures rendered it far easier to “rubber-stamp” an Immigration Judge's deportation decision, rather than to spend the time and resources needed to issue a reasoned decision reversing a deportation decision<sup>72</sup>—ultimately meaning deference generally operated in one direction, that of deportation.<sup>73</sup> Around this time, several studies began documenting extreme inconsistencies in the agency's deportation and asylum decisions and disarray in its procedures.<sup>74</sup> As I have argued previously, many of these changes were wrought precisely in order to grant more discretion to the immigration agency—discretion it was directed to use to issue as many deportation orders as possible.<sup>75</sup>

---

71. See, e.g., Rana, *supra* note 65 (analyzing the dramatic impact of the DOJ's streamlining decisions on both agency decision making and on the increasingly difficult, and sometimes inexplicable, appeals sent to the federal courts). These changes were repeatedly criticized by federal courts struggling to deal with these appeals arriving on an almost exponential basis. See, e.g., Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 73 *BROOK. L. REV.* 467, 507 (2008).

72. *Dia v. Ashcroft*, 353 F.3d 228, 239 (3d Cir. 2003) (en banc) (quoting *Marincas v. Lewis*, 92 F.3d 195, 202 n.7 (3d Cir. 1996)); Walker, *supra* note 9, at 13.

73. See generally COMMERCIAL & FED. LITIGATION SECTION, *supra* note 34; Rana, *supra* note 65; Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà vu of Decisional Disparities in Agency Adjudication*, 60 *STAN. L. REV.* 475 (2007); Walker, *supra* note 9.

74. See generally Taylor, *supra* note 74.

75. See Rana, *supra* note 65 (noting how the changes at the immigration agency were designed to promote “swift and scanty” reviews of deportation decisions).



Second, as it increasingly issued affirmances without opinion, the Board also drastically reduced the number of precedential decisions it issued, the decisions that were supposed to provide guiding interpretations of immigration statutes.

Third, all of this came against the backdrop of political scandal. As the Board basically stopped issuing written opinions for many of its decisions, the agency was also forced to launch an investigation into the actions of allegedly biased and intemperate judges, eventually firing some of these judges.<sup>76</sup> Finally, an investigation into the DOJ's hiring practices revealed that the agency had illegally politicized hiring practices for immigration judges,<sup>77</sup> and, as the agency's backlog of cases mounted, had cut the number of Board members by firing the Board members viewed as most immigrant-friendly.<sup>78</sup> These two developments certainly call into question the idea that agencies are or should be more politically accountable than the judiciary—another reason why we need the courts in this context. Moreover, these scandals have continued rather than abated; for example, the immigration agency was recently forced to release an embarrassing set of documents which revealed that the agency had deliberately misled states and localities on their obligations to participate in certain programs.<sup>79</sup>

As noted earlier, these developments at the Board had the effect of swamping the federal courts with immigration appeals. After 2002, the number of immigration appeals filed in the federal courts rose by more than 600%, with the total caseload rising to record levels.<sup>80</sup> By 2006, immigration appeals made up nearly a fifth of the total federal appellate caseload and approximately 90% of the administrative appeals in the federal courts,<sup>81</sup> a crisis that continues.<sup>82</sup> These rising caseloads, however, were just one indication of a larger crisis at the immigration agency.

Following the agency's adoption of the policies of "streamlining" its adjudication procedures and ceasing to issue written opinions for many of its decisions,<sup>83</sup> policies adopted due to significant resource constraints and

---

76. See OFFICE OF PROF'L RESPONSIBILITY & OFFICE OF THE INSPECTOR GEN., *supra* note 36, at 110-11; Schmitt, *supra* note 67; Press Release, Dep't of Justice, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006), [http://www.justice.gov/opa/pr/2006/August/06\\_ag\\_520.html](http://www.justice.gov/opa/pr/2006/August/06_ag_520.html).

77. Legomsky, *Restructuring Immigration Adjudication*, *supra* note 36, at 1665-57.

78. See Rana, *supra* note 65.

79. See *supra* note 32.

80. *Immigration Litigation Reduction: Hearing before the S. Comm. on the Judiciary*, 109th Cong. 27 (2006) (statement of Jonathan Cohn, Deputy Assistant Att'y Gen., Civil Division, U.S. Dep't of Justice).

81. *Id.*

82. See Benson & Wheeler, *supra* note 27, at 101.

83. *Id.* In 2008, responding to criticism that streamlining made it difficult for the Board to publish adequate numbers of precedential decisions, the Board proclaimed that it "published more precedents (25) than in any other year since fiscal year 2000, and surpassed that number in fiscal year 2007, publishing 40 decisions." The agency further noted that the Board was doing so "[a]t a time when the Board has been issuing approximately 44,000 decisions annually and . . . immigration judges . . .

political pressures, studies showed that the agency's decisions subsequently grew more arbitrary and highly inconsistent, with the outcomes of cases increasingly resembling "a spin of the wheel of fate."<sup>84</sup> As federal caseloads rose, federal judges increasingly criticized the agency for the poor quality of its decisions, describing them as error-filled, sometimes incomprehensible, highly inconsistent, and infused with bias.<sup>85</sup> Indeed, a "number of federal appellate judges . . . suggested that the immigration courts are fundamentally incompetent, biased, or both"<sup>86</sup> while one federal judge famously stated that "adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice."<sup>87</sup>

These concerns have not abated over the last decade. For example, while BIA appeals reached their high point in 2006, as of 2011 the BIA is still struggling with massive rates of appeal. In 2011, for instance, the number of BIA appeals was 6,311, dropping only 10% from 2006 and still nearly quadruple the number of appeals in 2001.<sup>88</sup> So, even if the number of appeals may be starting to ebb, it is still vastly greater than the number of appeals in 2001, the year when appeals began their meteoric rise. In addition, cases before Immigration Judges continue to climb,<sup>89</sup> perhaps an indication that the slight ebb in BIA appeals may only be a momentary respite or aberration. Moreover, the Federal Courts of Appeal are still inundated with appeals from the immigration agency. In 2011, for instance, immigration appeals made up 25% of the docket of the Second Circuit.<sup>90</sup>

And in terms of fulfilling its agency guidance duties, the BIA comes up short in still another way. The BIA still decides over 90% of its appeals through single-member affirmances, and rarely hears oral argument—hearing only one oral argument in 2009.<sup>91</sup>

---

[have been] adjudicating 350,000 cases annually," creating "an important need not only to provide clear guidance but also to promote a degree of national uniformity and consistency in the disposition of these cases." 73 Fed. Reg. 34654, 34659 (June 18, 2008).

84. See Ramji-Nogales et al., *supra* note 57, at 305.

85. See *id.* at 353; see also ABA COMMISSION ON IMMIGRATION & LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUCATION, AMERICAN JUSTICE THROUGH IMMIGRANTS' EYES (2004), available at <http://www.abanet.org/publicserv/immigration/americanjusticethroughimmigeeyes.pdf>; APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS (2009), available at <http://appleseednetwork.org/wp-content/uploads/2012/05/Assembly-Line-Injustice-Blueprint-to-Reform-Americas-Immigration-Courts1.pdf>; Rana, *supra* note 65; *Immigration Courts: Still a Troubled Institution*, TRANSACTIONAL RECORD ACCESS CLEARINGHOUSE (TRAC), <http://trac.syr.edu/immigration/reports/210/> (last visited Feb. 8, 2013).

86. Cox, *supra* note 60, at 1682.

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

88. See Benson & Wheeler, *supra* note 27, at 101.

89. See EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2011 STATISTICAL YEARBOOK, *supra* note 28, at Y1-Y2 (showing that a total of 297,848 immigration court cases were pending as of 9/30/2011). This represents a rise of approximately 15,000 cases in immigration court cases pending from the year before. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2010 STATISTICAL YEARBOOK, *supra* note 29, at Y1-Y2 (showing that a total of 262,622 immigration court cases were pending as of 9/30/2010).

90. *Id.*

91. *Id.*

Thus, in a multitude of ways, the immigration agency is currently failing to fulfill the promise of its expanded interpretive role.<sup>92</sup> Arguably, the problems at the agency require greater, rather than diminished, judicial oversight over the agency and its decision making.<sup>93</sup>

In short, with a series of largely unreadable decisions, concealed reasoning, a large backlog of cases,<sup>94</sup> biased judges,<sup>95</sup> illegal hiring practices,<sup>96</sup> a lack of transparency at many levels,<sup>97</sup> a chorus of federal judges criticizing the agency for its unreasoned, error-filled, or just inexplicable decisions,<sup>98</sup> and unsupported representations by the agency,<sup>99</sup> there are a number of arguments to be made that the immigration agency either is incapable of, or currently unable to, bring greater expertise to statutory interpretation issues than the federal courts, sufficient to justify the courts deferring to the agency.<sup>100</sup> The *Chevron* and administrative law rationales for deference to an agency are largely missing, if not entirely absent. Under almost any measure, indicators of quality decision making are lacking at the immigration agency, and the agency appears unable to meet the minimum threshold requirements for deference.

Furthermore, the increased deference shown to the agency does not appear to be spurring the additional exercise of agency expertise that the Court may have been hoping for, but rather precisely the opposite, as the immigration

---

92. Significantly, these developments circumscribing judicial review have occurred just as the Board's role and review have become more critical. See John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of INS v. Ventura*, 18 GEO. IMMIGR. L.J. 605, 607 (2005) ("Given the diminished circuit court jurisdiction and the narrow scope of judicial review, the Board has become the final arbiter on direct appeal for most issues involving the exercise of discretion and, in cases involving aliens with serious criminal offenses, for all issues related to relief from removal.").

93. See, e.g., 73 Fed. Reg. 34654, 34659 (June 18, 2008) ("The number of Board decisions published as precedent also has important implications for judicial review. The courts of appeals have been issuing hundreds of precedent decisions each year in reviewing cases decided by the Board, and a substantial number of the court decisions are interpreting the immigration laws and regulations. As a result, the courts of appeals, in many cases, have found themselves faced with the need to resolve key interpretive or procedural issues without the benefit of any precedential guidance from the Board on those issues").

94. Legomsky, *Restructuring Immigration Adjudication*, *supra* note 36, at 1651-52.

95. See generally Marouf, *supra* note 36.

96. Legomsky, *Restructuring Immigration Adjudication*, *supra* note 36, at 1665-57.

97. Benson, *supra* note 38, at 13 (noting that greater transparency was needed during the period in question).

98. See, e.g., *Ayala v. U.S. Att'y Gen.*, 605 F.3d 941, 943, 951 (11th Cir. 2010) (remanding to the BIA because the decision of the Board was "riddled with error" and the BIA and IJ "fail[ed] to render a reasoned decision"); *Bah v. Mukasey*, 529 F.3d 99, 111 (2d Cir. 2008) ("[W]e are deeply disturbed by what we perceive to be fairly obvious errors in the agency's application of its own regulatory framework . . . The claims of the petitioners before us, as set forth below, did not receive the type of careful analysis they were due."); *Pasha v. Gonzales*, 433 F.3d 530, 531 (7th Cir. 2005) ("At the risk of sounding like a broken record, we reiterate our oft-expressed concern with the adjudication of asylum claims by the Immigration Court and the Board of Immigration Appeals . . . The performance of these federal agencies is too often inadequate. This case presents another depressing example."); *Ssali v. Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005) ("This very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner's] case . . .").

99. See *supra* note 32.

100. See Farbenblum, *supra* note 51, at 1059.

agency acts in increasingly erratic ways. As just one illustration, the immigration authorities recently had to release a set of embarrassing documents revealing the agency's obfuscation on its new Secure Communities program, further revealing the chaos and *ad hoc* nature of decision making in the immigration realm.<sup>101</sup> In another example of the agency's failure to act promptly, important cases that have been remanded by the Supreme Court to the agency have languished at the agency level with no action. For example, though the Supreme Court remanded the case of *Negusie v. Holder*, 555 U.S. 511 (2009), back to the agency in 2009, as of this writing the agency has yet to act upon this case. Such delays further frustrate the purpose of the right to judicial review.<sup>102</sup> The recent *Judulang v. Holder* case provides another interesting example. There, the Court described the mixed messages the agency was sending and found the agency's reasoning indefensible and "unmoored from the purposes and concern of the immigration laws."<sup>103</sup>

In this light, it seems fair to say that the recent limitations on the judicial role over immigration decisions have come at precisely the time when the judicial role has become more important, and the agency has increasingly been failing to fulfill its expanded interpretive role. In other words, we now have a crisis where the courts are being required to step in, but where the courts have less and less power to do so in a meaningful way as the judicial role mandated by *Chevron* is being increasingly weakened. In this sense, we may be ultimately heading towards "*Chevron* without the courts" at least in the immigration arena, and with the potential to spread into other areas of administrative law.

The crisis at the immigration agency shows why we need the courts—the judicial role is not only an important one, but becomes highly significant in light of agency degeneration. With respect to the immigration agency, mistakes or inconsistencies at the agency can have severe consequences—sending people to persecution or even death in other countries.<sup>104</sup> A strong judicial role is needed to help address or mitigate the problems at agencies in chaos such as the immigration agency, to increase consistency in decision making, and to generally promote the rule of law.

We need the judicial role in the statutory interpretation/*Chevron* realm for other highly significant reasons as well. Undermining *Chevron*'s two steps by essentially abdicating the judicial role "invites the courts to elide the constraints *Chevron* rightly imposes on the scope of independent judicial construction of regulatory statutes, and undermines the utility of judicial decisions

---

101. Esquivel, *supra* note 79.

102. See also Kevin R. Johnson and Serena Faye Salinas, Remand Symposium: Judicial Remands of Immigration Cases: Lessons in Administrative Discretion from *INS v. Cardoza-Fonseca*, 44 *Ariz. St. L. J.* 1041, 1059 (2012) (discussing immigration cases that have been left to languish at the agency despite a court's instructions for further proceedings on remand).

103. *Judulang v. Holder*, 132 S. Ct. 476, 490 (2011).

104. See *Lanza v. Ashcroft*, 389 F.3d 917, 927-28 (9th Cir. 2004) (describing the drastic remedy of deportation and the harsh consequences of deportation).

reviewing agency action as guides for further administrative choices.”<sup>105</sup>

This is a very real concern in an agency run amok as the immigration agency has become. When agencies “come to expect less scrutiny” from the courts, quality often suffers. That is, “[t]here is reason to believe that *Chevron’s* methodology has actually lowered the quality of administrative decision-making on technical and expert matters, since agencies have come to expect less scrutiny on those dimensions in the *Chevron* era. The doctrine relieves the pressure on agencies to develop a full, expert record, and to engage in a full-bodied review of technical or expert considerations, as those administrative tasks are no longer of central concern to the courts.”<sup>106</sup>

Furthermore, eroding the boundaries between the institutional roles of the courts and agencies undermines the comparative institutional advantage each can bring to bear on important issues, and also “blunts *Chevron’s* utility as a framework for circumscribing the appropriate scope of independent judicial decision making more generally, including in those cases in which a court must resolve a statute’s meaning before an agency has exercised its interpretive authority in a format entitled to *Chevron* deference.”<sup>107</sup>

The disarray at the immigration agency—perhaps the disaster agency of our time—shows how critical the judicial role in statutory interpretation can be. Furthermore, analysis of the court’s recent immigration jurisprudence reveals that for whatever reasons—political, historical, or something else<sup>108</sup>—the Supreme Court has chosen to ignore this disarray and is granting the immigration agency increasing, rather than decreasing, deference.

These developments raise the following questions for future analysis: Is this what *Chevron* really intended? Is *Chevron* legitimately being redrawn in the immigration realm despite the push for quality in *Mead* and other cases? Is the Court’s current interpretation of *Chevron* a plausible interpretation of Congressional intent? Finally, does the immigration crisis show that *Chevron* should have no place in the immigration context—that no deference should be given to an agency in collapse?

## II. DO WE HAVE THE COURTS? THE CONTRACTION OF THE JUDICIAL ROLE IN STATUTORY INTERPRETATION

At least in the immigration context, the Court is currently moving *Chevron* in directions that are little understood.<sup>109</sup> This Part traces the background of administrative law deference jurisprudence, focusing on developments related to *Chevron* and on the debates surrounding *Chevron*. Section A

---

105. See Bamberger & Strauss, *supra* note 1, at 612.

106. Foote, *supra* note 6, at 709.

107. *Id.*

108. See Rana, *supra* note 65 (charging that immigration law after September 11, 2001 had become increasingly politicized, with the emphasis shifting towards summary and wholesale deportations).

109. See Kelly, *supra* note 16, at 158 (stating that “*Chevron* started as a schizophrenic doctrine” and fostered multiple approaches to deference).

discusses the evolution of the roles of the judiciary and agencies as the modern administrative state emerged, and sets the stage for the current debates over the boundaries of these roles. Section B then lays out the debates surrounding *Chevron*, *Mead*, and *Brand X*, highlighting the uncertain state of current deference doctrine.

A. *The Evolution of the Judicial Interpretive Role: The Courts' Authority to Say What the "Law" Is*

The judicial and executive branches have long been locked in a complex struggle over the scope and meaning of their respective power. This section discusses the evolution of the judicial interpretive role from its constitutional foundations to the rise of the modern administrative state, focusing on the conceptual underpinnings of the current *Chevron* controversies.

The constitutional origins of the judicial interpretive role lie in Article III, vesting judicial power in the Supreme Court.<sup>110</sup> This provision is traditionally understood, in *Marbury's* words, to confer on the courts the authority "to say what the law is,"<sup>111</sup> including the ability to override the executive and construe statutes. Under this framework, the judicial interpretive role was a strong one; arguably, "[w]ithin the original understanding, the 'judicial power' was to announce what a statute means, *not* to acquiesce in an agency's interpretation of the law unless it is foreclosed by the statute."<sup>112</sup> In other words, it was not the agency's role "to say what the law is."<sup>113</sup>

Throughout the nineteenth century, as government administration remained relatively simple, the Court appears to have largely followed this *Marbury* model of separation of powers.<sup>114</sup> Courts generally refrained from interfering with the administrative tasks of the Executive Branch, but asserted the power to construe and interpret statutes when the need arose in cases before them.<sup>115</sup>

Courts increasingly confronted such questions as administration become more complex, particularly after the turn of the twentieth century as Congress created new regulatory agencies in a growing number of fields such as communications and a range of commercial activities.<sup>116</sup> However, the most significant challenge to this traditional framework arose with the New Deal

---

110. U.S. CONST. art. III, § 1.

111. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

112. Eskridge & Baer, *supra* note 7, at 1159-60.

113. *See supra* notes 15, 51.

114. *See Gifford, supra* note 8, at 786-89 (2007) (discussing the "Nineteenth Century Model" of judicial review and its historical and legal underpinnings).

115. Gifford, *supra* note 8, at 788; *see also* Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 206-09 (1991) (offering examples of judicial administration in the early Republic).

116. Gifford, *supra* note 8, at 789-90 (discussing the creation of the Interstate Commerce Commission, which oversaw the regulation of railroad rates in 1887, the creation of the Federal Trade Commission in 1914, and Federal Radio Commission in 1927).

and the rise of the modern administrative state.

In the 1930s, Congress created a number of independent agencies as “regulation proliferated.”<sup>117</sup> During this period, agencies were generally subject to judicial review, and the judicial interpretive role remained strong; indeed, “[t]he New Deal Congress rejected extreme proposals that would have marginalized judges and denied them their *Marbury* role of independent judgment in statutory interpretation.”<sup>118</sup> However, the increasing regulatory complexity demanded greater clarity over the judicial and agency roles.<sup>119</sup>

To address this need, in 1946, Congress enacted the Administrative Procedure Act (APA).<sup>120</sup> The APA set forth the basic framework delineating the power between courts and agencies in the modern administrative state, reserving for the courts the powers “to decide all relevant questions of law” and “interpret constitutional and statutory provisions” in Section 706.<sup>121</sup> The APA further directed courts to invalidate agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>122</sup>

The precise contours of these provisions have been the subject of much debate, though it has been argued that the APA did not significantly change the judicial role.<sup>123</sup> Following the enactment of the APA, courts exercised their power to interpret statutes and to mark the boundaries of agency authority, while at the same time allowing space for agencies to exercise their expertise and to design policies.<sup>124</sup> In essence, “[w]hile maintaining primary and ultimate authority on questions of law, courts pre-*Chevron* recognized that agencies constituted a body of experience and informed judgment to which courts and litigants may resort for guidance.”<sup>125</sup>

Two key analytical features of the court/agency divide emerged and were

---

117. Gifford, *supra* note 8, at 790-91.

118. Eskridge & Baer, *supra* note 7, at 1160; *see also* Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 575-76 (1992) (acknowledging the quick promulgation of judicial deference for the sake of combating the Great Depression, but noting the widespread concerns regarding insufficient control of administrative action). Congress’s concerns regarding the protection of judicial deference were also reflected in the 1939 Walter-Logan Bill, which would have introduced stronger provisions for judicial review if President Roosevelt had not vetoed the bill. Sidney A. Shapiro, *A Delegation Theory of the APA*, 10 ADMIN. L.J. AM. U. 89, 98 (1996).

119. Gifford, *supra* note 8 at 792; Werhan, *supra* note 117, at 575 (arguing that “the New Deal did not produce a coherent approach to administrative law”).

120. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551-559 (2006)).

121. *Id.*; *see also* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 54-55 (John F. Duffy & Michael Herz eds., 2005) [hereinafter DUFFY & HERZ].

122. 5 U.S.C. § 706(2)(A) (2006).

123. *See* KENNETH C. DAVIS, ADMINISTRATIVE LAW: CASES, TEXT, PROBLEMS 75 (1977) (addressing the APA scope of review provisions as “a good summary of the law of judicial review”); KENNETH WARREN, ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM 430 (Westview Press 2004) (1982) (characterizing APA § 706, the “Scope of Review” section, as “largely a codification of court opinions on scope of review”); Eskridge & Baer, *supra* note 7, at 1120-62 (arguing that the operative provisions of the APA regarding the judicial role “follow the traditional *Marbury* model”).

124. Gifford, *supra* note 8, at 793-94.

125. *See* Kelly, *supra* note 16, at 153 n.5.

strengthened over the next three decades.<sup>126</sup> First, the Supreme Court explicitly recognized agencies' authority to resolve ambiguities in statutory terms.<sup>127</sup> Second, the Court also solidified the division of authority between courts and agencies "through the language of 'law' and 'fact,'" as "[c]ourts decided questions of law while agencies decided questions of fact."<sup>128</sup> As synthesized, this meant that courts were to defer to agency determinations of ultimate fact, and to agencies' determinations regarding how to apply statutory terms where there was sufficient support in the record and law for the agency's position, while also exercising judicial authority to determine the scope of ambiguity in statutory terms.<sup>129</sup>

Still, analytical tensions remained. Courts were essentially told to defer to agencies' regulatory decision making, while also operating as a check on such authority.<sup>130</sup> Key questions facing the courts regarding the relationship between the judicial and agency interpretive roles included the extent to which a court should "make up its own mind, independently, about the meaning of the words of the statute" and the court's attitude towards agency action, or "its readiness to set aside [an agency's regulatory policy] as unreasonable, arbitrary or inadequately considered."<sup>131</sup>

In the decades following the passage of the APA, and as regulation continued to grow in complexity, the Supreme Court appeared to equivocate on the scope of judicial interpretive authority, sometimes emphasizing judicial authority to interpret statutes and other times emphasizing deference to agency determinations.<sup>132</sup> The Court declared both that if an agency's "construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute" and at other times explicitly stated that "the judiciary is responsible for the final determination of the meaning of statutes."<sup>133</sup> As the Court teetered in both directions in the face of these competing concerns, "[a]n enormous body of case law and scholarly writing" arose attempting "to reconcile these arguably

---

126. See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 365-67 (1986) (discussing significant post-APA Supreme Court cases discussing the judicial and agency authority); Gifford, *supra* note 8, at 793-94.

127. Gifford, *supra* note 8, at 793-94.

128. *Id.* at 794.

129. *Id.* at 794.

130. See Breyer, *supra* note 126, at 364-65 (discussing the "two basically conflicting pressures" facing courts, "the need for regulation and for checks on regulators" as courts are urged to both "defer to administrative interpretations of regulatory statutes" and "review agency decisions of regulatory policy strictly").

131. *Id.* at 364.

132. See *id.* at 365-67 (discussing the "two opposite judicial attitudes" during this time period reflected in cases deferring to agencies as well as cases where the Supreme Court explicitly stated that "the judiciary is responsible for the final determination of the meaning of statutes").

133. See *id.* at 367 (citing *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979) and *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965) as examples of the conflicting pronouncements on scope of the courts' and agencies' roles).



conflicting obligations.”<sup>134</sup>

With its 1984 decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council* (“*Chevron*”),<sup>135</sup> the Court attempted to clarify the appropriate framework for courts’ and agencies’ interpretive roles. The *Chevron* framework and its implications rapidly became the focus of the interpretive debate.<sup>136</sup>

#### B. *Chevron and its Impact on the Judicial Role in Statutory Interpretation*

*Chevron* marked a critical milestone in the debates over the nature of the judicial interpretive role. In *Chevron*, the Court attempted to set forth a framework reconciling the requirements of Article III and *Marbury*’s edict that the courts must “say what the law is” with the necessities of the modern administrative state. The *Chevron* case dealt directly with the primary issue “that courts [found] most perplexing” in the allocation of authority between courts and agencies: “[t]he extent to which courts should defer to agency interpretations of statutory terms and the extent to which courts should construe these terms independently.”<sup>137</sup>

*Chevron* involved an agency interpretation by the Environmental Protection Agency (“EPA”), which had issued a regulation defining a term, “stationary source,” appearing in its governing statute.<sup>138</sup> In reviewing the agency’s interpretation, the Court of Appeals found that the Clean Air Act had not explicitly defined the term “stationary source,” but set aside the EPA’s definition of the term as “inappropriate.”<sup>139</sup> The Supreme Court reversed, finding that the Court of Appeals had erred in construing the term “stationary source” after determining that Congress had failed to define this term. The Supreme Court then set forth its vision of courts’ proper role in an oft-quoted passage:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the

---

134. See DUFFY & HERZ, *supra* note 121, at 55; see also Breyer, *supra* note 125, at 365.

135. 467 U.S. 837 (1984).

136. See DUFFY & HERZ, *supra* note 121, at 54 (noting that since the mid-1980s, the effort to reconcile the competing obligations of judicial interpretation and deference have “centered on the Supreme Court’s seminal decision in [*Chevron*], which has become the most-cited and most-discussed decision in administrative law” (citation omitted)).

137. See Gifford, *supra* note 8, at 784.

138. See 467 U.S. at 839-41.

139. *Id.* at 841 (quoting the lower court’s opinion in *Natural Res. Def. Council, Inc. v. Gorsuch*, 685 F.2d 718, 723, 726 (D.C. Cir. 1982)).

court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>140</sup>

*Chevron* thus critically reshaped, and restricted, the judicial role in interpreting regulatory statutes. Though *Chevron* stated that "the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent,"<sup>141</sup> the framework the case established "served as a kind of 'counter-Marbury' for the regulatory state," mandating deference to reasonable agency interpretations where there was statutory silence or ambiguity.<sup>142</sup>

*Chevron* thus carried significant institutional implications and rapidly became "the most-cited and most-discussed decision in administrative law."<sup>143</sup> Moreover, though superficially simple, the *Chevron* framework spawned significant confusion and criticism,<sup>144</sup> proved to be "complicated as a matter of theory and chaotic as a matter of practice"<sup>145</sup> and, it soon became clear, left many questions unanswered.<sup>146</sup>

One of the most critical questions *Chevron* left unanswered is the precise contours of its Step One. Stated another way, what are the scope and limits of the courts' interpretive role? How "independently" can a court construe the meaning of statutory terms?<sup>147</sup> This question drives to the heart of the confusion and doctrinal instability in the *Chevron* framework.<sup>148</sup> *Chevron*

---

140. *Id.* at 842-43 (footnotes omitted).

141. *Id.* at 843 n.9.

142. DUFFY & HERZ, *supra* note 121, at 56.

143. *Id.* at 54.

144. See Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 532 (2003) ("[D]espite the almost two decade existence of the *Chevron* decision, there continues to be confusion about the scope of judicial deference to agency decisions. Circuit splits have arisen over the applicability of *Chevron* deference and there has been inconsistency even within circuits over its proper scope."); see also Eskridge & Baer, *supra* note 7, at 1156-57 ("[T]he Supreme Court's deference doctrine is complicated as a matter of theory and chaotic as a matter of practice . . . . In short, the Supreme Court's deference jurisprudence is a mess.").

145. Eskridge & Baer, *supra* note 7, at 1156-57.

146. See *id.* at 1097 (discussing recent Supreme Court decisions which "suggest that there are many issues *Chevron* left unresolved," including a number of doctrinal questions such as whether there is some kind of super-deference involved when agencies are interpreting their own prior regulations or acting on foreign affairs or national security matters).

147. See Breyer, *supra* note 125, at 364.

148. See Gifford, *supra* note 8, at 798-99 (arguing that "while the *Chevron* formula is easily stated, it was inherently unstable in its original form because it did not address many critical issues," including that ambiguity is a matter of degree and tends to vary with the interpretive approach applied, thus leading to inconsistencies; that *Chevron* provides an unsatisfactory rationale for deference, the difficulty of distinguishing when deference is required or not, and how the deference mandated by *Chevron* would play out against the rule of stare decisis and judicial interpretation); Slocum, *supra* note 143, at 532 ("One major area of confusion is whether *Chevron* applies to agency interpretations of purely legal questions, especially ones that do not implicate agency expertise."); see also Stephenson & Vermeule, *supra* note 11, at 597 n.3 (pointing out that a number of scholars have recognized the doctrinal instabilities in *Chevron* regarding the difficulty of distinguishing

seems to envision a strong role for the courts at Step One, declaring that “[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”<sup>149</sup> *Chevron* gives courts significant authority by empowering them to rely on any “traditional tools of statutory construction,” rather than just the law’s language to find an authoritative meaning.<sup>150</sup> The nature of the judicial interpretive role has also given rise to a “doctrinal tug-of-war” between the justices, in particular between *Chevron*’s author, Justice Stevens, and Justice Scalia.<sup>151</sup>

In the decades after *Chevron*, this “doctrinal tug of war”<sup>152</sup> continued to escalate. Each time the Court addresses the judicial interpretive role under *Chevron*, scholars, courts and commentators debate over the scope and implications of these decisions.<sup>153</sup>

However, the focus of these debates has recently been sharpening; as one commentator put it, “[m]ore than at any time in recent years, a threshold

between *Chevron*’s two steps as well as between *Chevron* and other strands of judicial review doctrine).

149. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984).

150. DUFFY & HERZ, *supra* note 121, at 57.

151. *See, e.g.*, Eskridge & Baer, *supra* note 7, at 1088-89 (“Since *Cardoza-Fonseca*, there has been a doctrinal tug of war within the Supreme Court between Justice Stevens (*Chevron*’s author) and Scalia (the cheerleader for a broad reading.); *see also* Bamberger & Strauss, *supra* note 1, at 619-21 (discussing the Justices’ divergent views on *Chevron*). *See* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 192-93 (2006), for a very good description of each justice’s views and their internal debates regarding *Chevron*’s reach. *See also id.* at 193 n.28 (discussing the debates reflected in the Justices’ statements in *Cardoza-Fonseca* and *Brand X*).

152. *See* Eskridge & Baer, *supra* note 7, at 1088-89.

153. *See, e.g.*, Claire R. Kelly & Patrick C. Reed, *Once More unto the Breach: Reconciling Chevron Analysis and De Novo Judicial Review After United States v. Haggard Apparel Company*, 49 AM. U. L. REV. 1167, 1230 (2000) (“With the narrow holding of *Haggard* limited to legislative regulations and its implications unclear, it is not surprising that the task of reconciling *Chevron* analysis and de novo judicial review in the [United States Court of International Trade] required the Supreme Court to agree to examine the subject again in *Mead*. Customs litigants are being commanded, as were King Henry’s troops, to charge “once more unto [the] breach” before the applicability of *Chevron* analysis in customs litigation is determined.”); Russell L. Weaver, *The Emperor Has No Clothes: Christensen, Mead and Dual Deference Standards*, 54 ADMIN. L. REV. 173, 201 (2002) (“In recent years, the *Chevron* doctrine has been derailed, especially by the Court’s recent decisions in *Mead* and *Christensen*. Those decisions establish dual deference standards, and indicate the focus of *Chevron* deference is whether Congress intended to allow the agency to interpret with the ‘force of law’ in the format that was used. These glosses are a most unwelcome and undesirable addition to the law. They ask courts to search for congressional intent in situations where such intent is non-existent or not ascertainable.”); *see also* Lisa Schultz Bressman, *How Mead has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1446 (2005) (commenting on *Barnhart v. Walton*, 535 U.S. 212 (2002), that “[t]he Supreme Court has not clarified the relationship between *Mead* and *Barnhart*, which were decided only one Term apart. As a result, it has left lower courts simply to choose between them. But rather than a split in the circuits between those consistently applying *Mead* and those consistently applying *Barnhart*, we see individual panels favoring one or another and panels in later cases involving the same interpretive procedure—in whatever circuit—following the previous panel’s decision. Thus, *Chevron* deference appears to depend more than anything else on whether the first panel to evaluate a particular interpretive procedure favors *Mead*-style factors or *Barnhart*-style factors.”); William S. Jordan, III, *Judicial Review of Informal Statutory Interpretations: The Answer is Chevron Step Two, Not Christensen or Mead*, 54 ADMIN. L. REV. 719, 732 (2002) (arguing that “*Mead*’s vague test is an invitation to extensive litigation and inconclusive results on a threshold issue that may have little effect on the ultimate outcome”).

question—the scope of judicial review—has become one of the most vexing in regulatory cases.”<sup>154</sup>

As noted above, in one strand of recent *Chevron* jurisprudence, the Court has generally refused to defer to agency interpretations deemed to have not been produced through processes showing sufficient quality in the agency’s decision making.<sup>155</sup> These cases indicate that the Court is seeking quality from the agencies, and in doing so is shifting interpretive power away from the agencies and towards the courts, seeking to strengthen the independent interpretive judgment courts should exercise.

Another line of cases suggests that the Court has continued its “tilt toward deference.”<sup>156</sup> The Court has appeared in this line of cases to be generally providing agencies more leeway in their decision making, “extend[ing] the agency flexibility over policy that had been a hallmark of the *Chevron* doctrine” and allowing agencies “greater freedom to agencies to formulate their own statutory interpretations and to revise them than did the earlier law.”<sup>157</sup>

In *Brand X*, the Court took up the question of the scope of stare decisis over agency decision making. The *Brand X* case involved a construction of a statutory term by the Federal Communications Commission (FCC), which was challenged in the Ninth Circuit.<sup>158</sup> The appellate court rejected the FCC’s interpretation of the term, “telecommunications” service, because it conflicted with prior Ninth Circuit precedent construing the same term.<sup>159</sup> The Supreme Court reversed, holding that judicial statutory interpretations would bind an agency only where the court determined that the statute was

---

154. Sunstein, *supra* note 151, at 190; *see also* Bamberger & Strauss, *supra* note 1, at 619-21 (discussing the Justices’ divergent views on *Chevron*); Eskridge & Baer, *supra* note 7, at 1088-89 (“Since *Cardoza-Fonseca*, there has been a doctrinal tug of war within the Supreme Court between Justice Stevens (*Chevron*’s author) and Scalia (the cheerleader for a broad reading).”).

155. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 226-27 (2001) (holding that *Chevron* deference applies only when it is clear that Congress delegated authority to an agency for it “to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority”); *see also* Barnhart v. Walton, 535 U.S. 212, 222 (2002) (ruling that *Chevron* deference depends on “the interpretive method used and the nature of the question at issue”); Christensen v. Harris County, 529 U.S. 576, 587 (2000) (ruling that interpretations of agency opinion letters, “like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference”); *see, e.g.*, Bressman, *supra* note 153, at 1475 (“*Mead* has muddled judicial review of agency action”); Thomas W. Merrill & Kristin E. Hickman, *Chevron*’s Domain, 89 GEO. L.J. 833, 840-48 (2001).

156. *See* Eskridge & Baer, *supra* note 7, at 1087 (discussing the “*Chevron* revolution” and the Court’s ongoing tilt towards deference to agency decisionmaking).

157. *See* Merrill & Hickman, *supra* note 155, at 833; Elliott, *supra* note 4, at 5 (“*Chevron* marked a significant way-station in the evolution of the so-called ‘Administrative State.’ *Chevron* remains a significant milestone in our evolving constitutional structure because it has given more policy discretion and law-making authority to administrative agencies, most of which are a part of the Executive Branch. This trend is a gradual, but fundamental, change in the nature of American government without the benefit of a constitutional amendment.”).

158. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967 (2005), *rev’g* Brand X Internet Servs. v. FCC, 345 F.3d 1120 (9th Cir. 2003).

159. *Id.*

unambiguous or *Chevron* was inapplicable.<sup>160</sup> The Court reasoned that, just as a federal court's interpretation of a state's law does not foreclose a state court from adopting a contrary interpretation of state law, a judicial interpretation of an ambiguous statute an agency is charged with administering does not foreclose the agency from adopting a conflicting (yet reasoned) interpretation. Moreover, even agency interpretations inconsistent with prior agency precedent would be owed deference so long as the agency's change in position was sufficiently justified. Justice Scalia's dissent in *Brand X* warned that *Brand X* would render "judicial decisions subject to reversal by executive officers," that it was probably unconstitutional because it would allow agencies to adopt positions which Article III courts had already deemed unlawful, and that *Brand X* would merely add to the confusion spawned by *Mead*.<sup>161</sup>

*Brand X* can thus be viewed as emphasizing the *Chevron* trend towards "freeing agencies from stare decisis"—so long as an ambiguity exists in its statute, an agency need not follow the court's construction.<sup>162</sup> *Brand X* thus clarified that once a court finds an ambiguity in the statute, and consequently a gap for the agency to fill, the court's role is limited to assessing the reasonableness of the agency's decision in filling that gap. The Court claimed that *Brand X* was simply reiterating or following *Chevron*, and thus did not really break new ground.<sup>163</sup> However, some commentators argued that *Brand X* had measurably tilted deference further towards agencies. As they put it, "*Brand X* added another point of dispute to an already convoluted doctrine, and significantly expanded the number of cases in which the doctrine would come into play," and this "somewhat troubling decision held out to agencies the rejuvenating promise that administrative deference would be a renewable resource." Under *Brand X*, some argued that "there would be no precedential sclerosis in the administrative state."<sup>164</sup>

*Brand X*<sup>165</sup> has been described as "the capstone of a series of decisions in

---

160. See *id.* at 983.

161. *Id.* at 1015-17 (Scalia, J., dissenting).

162. Recent Case, *Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008), 122 HARV. L. REV. 1969, 1974 (2009) ("After *Brand X*, all courts owe deference to the BIA's reasonable interpretations of statutory ambiguities no matter when those interpretations are issued.").

163. See Andrew Pruitt, *Judicial Deference to Retroactive Interpretative Treasury Regulations*, 79 GEO. WASH. L. REV. 1558, 1573 (2011) ("The Supreme Court's 2005 decision in *Brand X* significantly "amplified" *Chevron*'s already-powerful standard of judicial deference.").

164. See Recent Case, *supra* note 162, at 1974.

165. 545 U.S. 967 (2005) (discussing the impact of *Brand X* on the issue of *Chevron*'s scope). *Brand X* arose in the context of an administrative law landscape already marked by confusion and controversy over the scope of deference due to agency action following the Supreme Court's decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001) (modifying the categories of agency action due deference under *Chevron*). See Adrian Vermeule, *Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 361 (2003) (concluding that "the Court has inadvertently sent the lower courts stumbling into a no-man's land").

which the Supreme Court revisited its doctrine of judicial deference to agency interpretations of law.”<sup>166</sup> *Brand X* has spawned a great deal of controversy over where the courts’ role as “decider” should now begin and end,<sup>167</sup> and on the nature of *Brand X*’s impact on *Chevron* doctrine.<sup>168</sup> That is, “*Brand X* offered agencies another tool with which to claim deference from courts.”<sup>169</sup>

These arguably competing themes in the Court’s recent *Chevron* jurisprudence have generated much scholarly controversy. On one hand, some argue that doctrinally, *Chevron*’s analytical inquiry should be collapsed into a single judicial task—that of assessing the reasonableness of the agency’s statutory interpretation.<sup>170</sup> Others argue that there is still a critical, and analytically distinct, judicial interpretive role focusing on “judicial ascertainment of the range of meaning available to the agency” under the statute at issue,<sup>171</sup> and that collapsing this inquiry “muddies *Chevron*’s task-allocation function, thus distracting courts from an essential judicial function: that of bounding agency authority.”<sup>172</sup> Furthermore, collapsing such a task “invites courts to elide the constraints *Chevron* rightly imposes on the scope of independent judicial construction of regulatory statutes, and undermines the utility of judicial decisions reviewing agency action as guides for future administrative choices.”<sup>173</sup>

The next Part analyzes how deference jurisprudence has played out in recent immigration cases. In the immigration context at least, this Part argues that there can be little doubt that the Supreme Court has significantly tilted toward restricting the interpretative authority of the courts and requiring that the courts show greater deference to the immigration agency.

---

166. See Recent Case, *supra* note 162, at 1971; see also Gifford, *supra* note 8, at 830 (discussing the agency role under *Brand X* and stating that the “agency’s role as authoritative interpreter—both before and after interpretive issues come before a court—thus brings the current paradigm of agency/court interaction closer to completion.”).

167. See Bamberger & Strauss, *supra* note 1, at 617.

168. *Id.* at 614 (noting that the authors are among the group of courts and commentators who interpret *Chevron* as having two distinct steps, “*i.e.*, Step One as judicial ascertainment of the range of meaning available to the agency; Step Two as review of any agency determination falling within that range.”). See also *id.* (noting some felt that *Brand X* did nothing to clarify the preexisting doctrinal confusion about when such deference would be granted”).

169. See Recent Case, *supra* note 162, at 1969.

170. See Stephenson & Vermeule, *supra* note 11, at 597-98; see generally Bamberger & Strauss, *supra* note 1 (discussing Stephenson and Vermeule’s proposal for a unitary doctrinal inquiry under *Chevron*).

171. See Bamberger & Strauss, *supra* note 1, at 614 (noting that the authors are among the group of courts and commentators who interpret *Chevron* as having two distinct steps, “*i.e.*, Step One as judicial ascertainment of the range of meaning available to the agency; Step Two as review of any agency determination falling within that range.”).

172. *Id.* at 612.

173. *Id.*

### III. LOOKING THROUGH AN IMMIGRATION LENS: A NEW PERSPECTIVE ON RECENT *CHEVRON* JURISPRUDENCE

The immigration arena is in many ways an ideal case study for assessing the implications of how deference doctrines are being reshaped. In many ways, the “history of immigration jurisprudence is a history of obsession with judicial deference”<sup>174</sup>—one that continues, and appears to be deepening, today. This Part constructs an immigration lens to evaluate the ways in which the judicial role is being refashioned through recent *Chevron* jurisprudence. To this end, this Part assesses the implications of little-analyzed recent Supreme Court immigration decisions wherein the Court directly tackles questions over the nature of the judicial role. This Part argues that these decisions reveal that—at least in the immigration context—the judicial interpretive role has been further restricted than it appears from the non-immigration administrative law decisions on which most scholarly attention has focused to date.

#### A. *What Can an Immigration Lens Contribute?*

Much of the debate over whether there has been (or should be) a shift in the judicial interpretive role under *Chevron* since approximately 2000 has focused on a few high-profile Supreme Court decisions such as *Christensen v. Harris County*,<sup>175</sup> *United States v. Mead Corp.*,<sup>176</sup> and *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, (“*Brand X*”).<sup>177</sup> Of the vast amount of scholarship in this area addressing these recent developments,<sup>178</sup> very little focuses primarily on immigration cases, or discusses

174. Cox, *supra* note 60, at 1671.

175. 529 U.S. 576 (2000).

176. 533 U.S. 218 (2001).

177. 545 U.S. 967 (2005) (discussing the impact of *Brand X* on the issue of *Chevron*’s scope). *Brand X* arose in the context of an administrative law landscape already marked by confusion and controversy over the scope of deference due to agency action following the Supreme Court’s decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001) (which modified the categories of agency action due deference under *Chevron*). See Vermeule, *supra* note 165, at 361 (concluding that “the Court has inadvertently sent the lower courts stumbling into a no-man’s land”); Recent Case, *supra* note 162, at 1969 (“Over the last decade, cases such as *United States v. Mead Corp.* and *Barnhart v. Walton* have transformed the Court’s doctrine around deference to agencies from a two-part test to a convoluted multi-factor analysis”).

178. See Merrill & Hickman, *supra* note 155, at 840-48; Merrill, *supra* note 6, at 807 (arguing that “*United States v. Mead Corp.* is the U.S. Supreme Court’s most important pronouncement to date about the scope of the *Chevron* doctrine”); see, e.g., Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429, 431 (2006) (claiming that *Brand X* is a significant decision in administrative law because it clarifies that the *Chevron* doctrine trumps *stare decisis*); Sunstein, *supra* note 151, at 211-19 (citing *Christensen*, *Mead*, and *Barnhart v. Walton* as a “trilogy” of cases “attempt[ing] to sort out the applicability of the *Chevron* framework”); Linda Jellum, *Chevron’s Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 762-71 (2007) (citing *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007); *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81 (2007); *Rapanos v. United States*, 547 U.S. 715 (2006); *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004); *Barnhart v. Thomas*, 540 U.S. 20 (2003); *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36 (2002); *INS v. Aguirre-Aguirre*, 526 U.S.

how examining recent immigration jurisprudence can offer broader insights into the ways in which the Court may be revising *Chevron*.

This scholarly omission is particularly noteworthy given the significance of immigration cases to the Court's *Chevron* jurisprudence in previous decades.<sup>179</sup> For example, one of the key post-*Chevron* cases illustrating the Court's struggle over the boundaries of the judicial interpretive role under *Chevron* is *INS v. Cardoza-Fonseca*,<sup>180</sup> a 1987 immigration case wherein the Court dealt directly with judicial and agency interpretations of the term "well-founded fear" in the governing immigration statute, and declined to defer to the agency construction as "contrary to clear Congressional intent."<sup>181</sup> *Cardoza-Fonseca* has remained one of the most influential cases applying the *Chevron* doctrine.<sup>182</sup>

Nonetheless, most commentators have focused on a series of non-immigration administrative law cases in their attempts to understand how the judicial role under *Chevron* has changed over time.<sup>183</sup> Indeed, many view *Brand X* as the culmination of the Court's most recent attempts to revise judicial and agency roles under *Chevron*.<sup>184</sup> This stems from the fact that most scholars analyzing how the judicial role under *Chevron* has changed

---

415 (1999) as significant recent case law interpreting the *Chevron* doctrine); Lisa Schultz Bressman, *Chevron's Mistake*, 58 DUKE L.J. 549 (2009) (using *Zuni Public School District No. 89 v. Department of Education and Gonzales v. Oregon* to illustrate the effectiveness of a delegation-respecting approach to the *Chevron* doctrine).

179. The Court held that the *Chevron* deference framework applies to the immigration agency's interpretations of the Immigration and Nationality Act in *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

180. 480 U.S. 421 (1987).

181. *Id.* at 447 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

182. See, e.g., DUFFY & HERZ, *supra* note 121, at 56; Eskridge & Baer, *supra* note 7, at 1087 (discussing some of the implications of *Cardoza-Fonseca* for the "*Chevron* revolution").

183. See Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000) (applying the *Chevron* doctrine to foreign affairs deference); see also Elliott, *supra* note 4 (applying the *Chevron* doctrine to environmental law); Evan Criddle, *Chevron Deference and Treaty Interpretation*, 112 YALE L.J. 1927, 1928 (2003) (treating *Chevron* as an inferior "paradigm for conceptualizing judicial deference to executive treaty interpretation" found in administrative treaty case law); Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676 (2007) (advocating institutionalizing judicial deference to administrative agencies); Peter J. Smith, *Pennhurst, Chevron, and the Spending Powers*, 110 YALE L.J. 1187, 1191 (2001) (using *Pennhurst State School & Hospital v. Halderman* to argue that "*Chevron* deference should not apply to agency interpretations issued after the state accepts [federal] funds"); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006) (evaluating post-*Chevron* Supreme Court and circuit court decisions and their relationship to judges' political ideology); William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1460-86 (2008) (arguing that *Chevron* should be applied conservatively to preemption cases).

184. See, e.g., Gifford, *supra* note 8, at 830 (discussing the agency role under *Brand X* and stating that the "agency's role as authoritative interpreter—both before and after interpretive issues come before a court—thus brings the current paradigm of agency/court interaction closer to completion."); see also Foote, *supra* note 6, at 690-91 (identifying *Brand X* as a case that "illustrates the remarkable transformation of the paradigm of agency work from the pre-*Chevron* years—when the Court would have treated analogous acts of public administration as informal administrative policy implementation subject to review under the APA's standard of arbitrariness—to the distorted reality of *Chevron* where the Court deems interstitial administrative applications to be questions of law subject to the Court's own norms of judicial review"); see also May, *supra* note 178, at 431.



have approached this issue from an administrative law perspective, not an immigration one.<sup>185</sup>

Yet, the Court's shift towards agency deference is perhaps most clearly made manifest in its immigration jurisprudence. This jurisprudence stands out for another reason as well: the high stakes involved in immigration cases—often life or death—present a harsh backdrop to scholarly and judicial debates over deference. Thus, perhaps more than in other areas of administrative law, the political, human rights, and national security issues at stake in immigration cases often underscore the potentially high stakes involved in the debates over the nature of the judicial role.<sup>186</sup> It is not surprising, then, that deference issues have long been of heightened significance in the immigration context.<sup>187</sup>

Furthermore, as will be discussed in greater depth in Sections B and C below, recent developments in the immigration arena have brought immigration issues to the forefront of federal court jurisprudence generally. Following September 11, 2001, when the federal courts faced an unprecedented flood of immigration cases, political pressure for deportations began to rise.<sup>188</sup> In the Second Circuit, for example, the number of immigration appeals filed rose fourteen-fold between 2002 and 2006, while the Ninth Circuit saw a nearly six-fold increase in immigration appeals.<sup>189</sup> By 2006, immigration appeals made up nearly a fifth of the federal appellate caseload and approximately 90% of the administrative appeals in the federal courts.<sup>190</sup> This caseload expansion appears to have percolated up to the Supreme Court as well; in recent years the Supreme Court has been taking up an increasing number of immigration cases.<sup>191</sup> Moreover, as Sections B and C argue in

---

185. See generally notes 16-20, *supra*.

186. See *Slocum*, *supra* note 144, at 518 (“[I]mmigration law, in a variety of ways, is more important than ever before. The current level of immigration to the United States is as high as or higher than at any time in American history. In addition, concerns about terrorism have spurred an increased interest in immigration policy and legislation, with the government using immigration provisions to help fight terrorism and some arguing for a reexamination of our open immigration policies.”); see also *Guendelsberger*, *supra* note 92, at 624-26 (discussing *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999) as an example of an immigration case which highlights the interplay between politics, foreign relations and administrative law).

187. *Negusie v. Holder*, 555 U.S. 511, 517 (2009) (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988); *INS v. Aguirre-Aguirre*, 524 U.S. 415, 425 (1999)); see also Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1, 23 (2002) (“the modern Court has frequently stated that ‘[o]ver no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.”); *Cox*, *supra* note 60, at 1671 (“The history of immigration jurisprudence is a history of obsession with judicial deference.”).

188. See *Rana*, *supra* note 65.

189. *Immigration Litigation Reduction: Hearing before the S. Comm. on the Judiciary*, 109th Cong. 193 (2006) (testimony of Jonathan Cohn, Deputy Assistant Att’y Gen., Civil Division, U.S. Dep’t of Justice).

190. See *Benson*, *supra* note 34.

191. See, e.g., Kevin Johnson, *The Supreme Court’s Immigration Cases from Last Term*, CONCURRING OPINIONS (July 6, 2009), <http://www.concurringopinions.com/archives/2009/07/the-supreme-courts-immigration-cases-from-last-term.html> (“Last Term, the U.S. Supreme Court decided four immigration-related cases. The Court rarely takes so many immigration cases, which suggests that it—like the general public—views immigration as an important issue. In the four

more detail, the immigration agency's role has expanded, and the judicial role accordingly shrank, just when a strong judicial role has seemed most needed, as the courts now need to exercise greater oversight over the immigration agency and review an increasing number of its decisions.<sup>192</sup>

In sum, these critical developments in the immigration arena, coming just as the Supreme Court has been reshaping the judicial interpretive role, make the immigration context a particularly ripe and interesting case study illuminating the stakes involved in the debate over the balance of power between courts and agencies, and in particular, the implications of a significant erosion of judicial interpretive authority in favor of increased deference to an agency in crisis. Analysis of the results of these developments has much to offer to the study of administrative law generally. Contrary to the path set out by *Mead* and *Christensen*, where the Court appeared to be searching for, and deferring to, quality agency decision making, the Court has been doing just the opposite in the immigration realm—deferring to an agency in crisis that is by nearly any measure failing to fulfill the promise of its interpretive role. Indeed, the deference regime now emerging in the immigration context threatens to lead to judicial abdication to an agency unable to fulfill its most basic functions. These developments merit close examination for the insights they may offer as to deference doctrine and for how *Chevron* may play out in other areas of administrative law.

#### B. *What Immigration Cases Reveal About the Marginalization of the Judicial Interpretive Role*

In its recent administrative law jurisprudence, the Supreme Court has both restricted and refined the judicial interpretive role under *Chevron*. The Court's most radical revisions have played out in the immigration area, signaling a "trend toward increasing deference to the BIA [Board of Immigration Appeals]."<sup>193</sup> Again, this is occurring despite the growing indications that the agency is not responsibly fulfilling its functions. This section analyzes a set of key immigration cases to show how the court has been

---

decisions, the Court also addressed some conflicts on immigration law among the circuits."); *Immigration in the Supreme Court—Oct. 2008 through June 2009*, NATIONAL IMMIGRATION FORUM POLICY CENTER (on file with the author) ("Last term, the Supreme Court decided five cases, and refused to hear another, that will have a substantial impact on the U.S. immigration system. The Court rarely takes on such a relatively high number of immigration-related cases."). In the 2009 Term, the Court appeared to continue this trend of taking up immigration cases. The Court decided *Kucana v. Holder*, 558 U.S. 233 (2010) (whether the Illegal Immigration Reform and Immigrant Responsibility Act precludes judicial review of Board of Immigration Appeals orders) and *Padilla v. Kentucky* 559 U.S. 356 (2010) (whether defense lawyers have a duty to advise their clients of the adverse immigration consequences of a guilty plea to certain drug offenses).

192. See Walker, *supra* note 9, at 3 (stating "[t]hat the American asylum system has fallen into disrepute is no longer a significantly contested point of debate."); see also John S. Kane, *Refining Chevron—Restoring Judicial Review to Protect Religious Refugees*, 60 ADMIN. L. REV. 513, 591 (2008) (arguing that the Supreme Court should reassess how *Chevron* is applied in immigration cases, because "the dangerous mood of near complete judicial acquiescence to the BIA must change").

193. See Farbenblum, *supra* note 51, at 1096.

subtly and sometimes dramatically reshaping *Chevron* in its immigration jurisprudence.

First, it is important to start out by noting that one of the key cases signaling a shift in the Court's immigration-oriented *Chevron* jurisprudence is not an immigration case at all—*National Cable & Telecommunications Ass'n v. Brand X Internet Services*, (“*Brand X*”).<sup>194</sup> Yet this case has become one of the sharpest tools the immigration agency has used to argue for increased deference to its opinions, regardless of their quality.

Moreover, the true reach of *Brand X* becomes clear when it is analyzed alongside more contemporaneous immigration cases. This section argues that an examination of key immigration cases—wherein the Court has tackled head-on the question of the judicial interpretive role—reveals that the new limits on the courts' role are more evident than if one were to look at *Brand X* or its traditionally discussed predecessors without also considering the Court's immigration jurisprudence.

To begin with, it is worth elaborating how *Brand X* opened up a key opportunity for the immigration agency to step in and demand deference, and that is precisely what the immigration agency did, despite the chaos the agency was undergoing. Almost immediately, the immigration agency seized upon *Brand X*, seeking deference to its interpretations under *Brand X*. For example, the Office of Immigration Litigation (OIL)<sup>195</sup> has encouraged government attorneys to utilize *Brand X* in this manner when litigating its cases,<sup>196</sup> expressly viewing it as a way to bypass judicial constructions contrary to the agency's views. Commentators have also noted that the

---

194. 545 U.S. 967 (2005) (discussing the impact of *Brand X* on the issue of *Chevron*'s scope). *Brand X* arose in the context of an administrative law landscape already marked by confusion and controversy over the scope of deference due to agency action following the Supreme Court's decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001) (modifying the categories of agency action due deference under *Chevron*); see Vermeule, *supra* note 165, at 361 (concluding that “[t]he Court has inadvertently sent the lower courts stumbling into a no-man's land”).

195. According to the Department of Justice, OIL “oversees all civil immigration litigation, both affirmative and defensive, and it is responsible for coordinating national immigration matters before the federal district courts and circuit courts of appeals.” *Office of Immigration Litigation*, U.S. DEP'T OF JUSTICE, [http://www.justice.gov/civil/oil/oil\\_home.html](http://www.justice.gov/civil/oil/oil_home.html) (last visited Feb. 8, 2013). Essentially, OIL works in tandem with the government on immigration cases, and it is “generally viewed as a good resource for legal analysis of immigration issues because its substantive expertise and its staffing yield a prompt and serviceable response.” Margaret H. Taylor, *Behind the Scenes of St. Cyr and Zavydas: Making Policy in the Midst of Litigation*, 16 GEO. IMMIGR. L.J. 271, 29 (2002) [hereinafter *Behind the Scenes*].

196. See Papu Sandhu, *Brand X Application to Immigration Cases*, IMMIGR. LITIG. BULL., Apr. 2008, at 1, 17-18, [http://www.justice.gov/civil/docs\\_forms/ImmigrationBulletin/April\\_2008.pdf](http://www.justice.gov/civil/docs_forms/ImmigrationBulletin/April_2008.pdf); see also *Recent Court Decisions*, IMMIGR. L. ADVISOR 6-7 (U.S. Dep't of Justice, Executive Office for Immigration Review, Dec. 2007), available at <http://trac.syr.edu/immigration/reports/212/include/12-2007.pdf> (reviewing the application of *Brand X* to a recent BIA decision). For a visual representation of the relationship between DHS, DOJ, BIA, ICE, and OIL, see EOIR ORGANIZATIONAL CHART, *supra* note 21 (providing an organizational chart demonstrating the relationship between the relevant agencies). See, e.g., *Brand X in Immigration Cases*, AMERICAN IMMIGRATION COUNCIL, <http://www.americanimmigrationcouncil.org/clearinghouse/litigation-issue-pages/brand-x-immigration-cases> (last visited Feb. 8, 2013). See also *Fernandez v. Keisler*, 502 F.3d 337 (4th Cir. 2007), cert. denied *sub nom.* *Fernandez v. Mukasey*, 555 U.S. 837 (2008) (mem.).

immigration agency has “appropriated” *Brand X* to “avoid statutory interpretations” the agency believes is unfavorable.<sup>197</sup> In case after case, following *Brand X*, courts have deferred to immigration agency interpretations despite prior conflicting judicial precedents, even when previous courts had not explicitly found ambiguities in the governing statute,<sup>198</sup> (thereby fulfilling one of the warnings set forth by scholars discussing the potential impact of *Brand X*, who worried that *Brand X* could lead agencies and courts to question, and seek alternative interpretations of, prior judicial precedents where courts had appeared not to have found statutory ambiguities).<sup>199</sup> The court’s role in these immigration cases often appears to have been limited to simply assessing the outer boundaries of the agency’s interpretation.<sup>200</sup>

While many agree that *Brand X* tilts judicial review towards deference generally, in the immigration context the post-*Brand-X* “trend toward increasing deference to the BIA” is abundantly clear.<sup>201</sup> Looking closely at the Court’s immigration jurisprudence also provides clearer answers to the questions still considered to be left open after *Brand X* in non-immigration administrative-law arenas: that is, questions about precisely when deference is triggered, how far the tilt towards deference has gone, and how much of an active role the courts can still play in terms of interpretation of the statutory terms in *Chevron* Step One given the emphasis towards deference.<sup>202</sup>

A group of key immigration cases issued around the time of *Brand X* show that the Court has altered and cut back the judicial role more than is widely recognized.<sup>203</sup> These immigration cases show that if the courts identify an

---

197. Weiss, *supra* note 35, at 891-92.

198. *See id.* at 892-93; *see also* *Fernandez*, 502 F.3d at 347-48 (deferring to BIA interpretation under *Brand X* despite prior contrary Fourth Circuit precedent interpreting the Immigration and Nationality Act); *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1242 (10th Cir. 2008) (applying *Brand X* and deferring to a new agency interpretation even though the conflicting judicial opinion came from the Supreme Court); *Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008) (deferring to agency interpretation under *Brand X* although contrary to prior Seventh Circuit interpretations).

199. Richard Murphy, *The Brand X Constitution*, 2007 BYU L. REV. 1247, 1251 (“*Brand X* suggests a broad principle: Where a politically accountable body uses transparent, deliberative means to adopt a reasonable interpretation of a law it administers, the courts should defer to this interpretation, regardless of whether it contradicts judicial precedent.”); Todd S. Aagaard, *Factual Premises of Statutory Interpretation in Agency Review Cases*, 77 GEO. WASH. L. REV. 366, 405 (2009) (“Applying the *Brand X* principle to premise facts yields the conclusions that agencies have the authority to reconsider prior judicial statutory interpretations that rest on factual premises, and that courts must treat agency determinations of premise facts deferentially, even when prior judicial precedent relied on contrary findings or assumptions.”); *contra* Doug Geyser, *Courts Still Say What the Law Is: Explaining the Functions of the Judiciary and Agencies After Brand X*, 106 COLUM. L. REV. 2129, 2167 (2006) (“[C]ourt-agency relationship and the functions of each body illustrate how courts retain their traditional role of “saying what the law is” even after *Brand X*.”)

200. *See, e.g.*, *Mirzoyan v. Gonzales*, 457 F.3d 217, 221 (2d Cir. 2006).

201. *Farbenblum, supra* note 51, 1096.

202. *See generally* Stephenson & Vermeule, *supra* note 11 (discussing contemporary *Chevron* debates).

203. Since 2001, the Court has considered a number of immigration cases. However, in this analysis I have chosen to focus on the cases that are most relevant to the Court’s *Chevron* analysis and the mainstreaming of immigration law. The other immigration cases that I did not include in this analysis include: *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010) (reversing BIA interpretation of “aggravated felony”—no deference); *Nijhawan v. Holder*, 557 U.S. 29 (2009) (affirming BIA—no

ambiguity or legal error in Step One of the *Chevron* analysis, the courts must then withdraw from any further exercise of their interpretive role—that is, the courts must step back from construing the statutory terms any further, allowing the agency the first crack at interpreting the statute, with the courts then limited to determining whether the agency’s interpretation is reasonable.

### 1. *A Far From Ordinary “Remand Rule”*

The first key immigration case that bears analyzing is *INS v. Ventura*.<sup>204</sup> *Ventura* is a brief, rather simple decision with broad implications. In *Ventura*, the Supreme Court summarily reversed the Ninth Circuit decision in an asylum case. When the case was before the Ninth Circuit, the circuit court construed the significance of a factual issue in an asylum case—whether country conditions had changed to the point that a true fear of persecution no longer existed. Rather than remand to the BIA to consider this claim, the circuit court noted that the Immigration Judge originally hearing the case had held that the country conditions had not changed, and the circuit court, relying on the Immigration Judge’s analysis, thus found that country conditions had not sufficiently changed, ruling in *Ventura*’s favor.<sup>205</sup> This rather unlikely vehicle for deference analysis then proceeded to the Supreme Court.

When the case reached the Supreme Court, the Court invoked what it called “the ordinary remand rule,” saying that a court could not substitute a judicial decision for a matter that Congress had placed in agency hands. The

---

review—no deference or *Chevron* analysis); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) (supporting BIA—no review—no deference or *Chevron* analysis); *Lopez v. Gonzales*, 549 U.S. 47 (2006) (reversing and remanding whether offense was “aggravated felony”—no deference); *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006) (affirming *INS*—retroactivity case—no deference); *Jama v. ICE*, 543 U.S. 335 (2005) (court deferred to executive on a matter of foreign policy on the issue of deportation of an alien to an objecting nation with no mention of *Chevron* deference); *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (reversing and remanding whether offense was “aggravated felony”—no deference); *Demore v. Kim*, 538 U.S. 510 (2003) (affirming *INS*—no review—no mention of *Chevron* deference); *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001) (deference to Congress on constitutional challenge to immigration law—no mention of *Chevron* deference); *Calcano-Martinez v. INS*, 533 U.S. 348 (2001) (affirming Court of Appeals—no review—statutory interpretation only—no mention of *Chevron* deference). Cases not directly relevant to immigration law for the purposes of this analysis include *Hui v. Castaneda*, 130 S. Ct. 1845 (2010) (no review—medical negligence claim by survivors of immigration detainee—no mention of *Chevron* deference); *Padilla v. Kentucky*, 559 U.S. 356 (2010) (no review—sufficiency of counsel case—no mention of *Chevron* deference); *Flores-Figueroa v. United States*, 556 U.S. 646 (2009) (no review—criminal case—no mention of *Chevron* deference); *Mohawk Industries Inc. v. Carpenter*, 558 U.S. 100 (2009) (no review—employment dispute—no mention of *Chevron* deference); *Kimbrough v. United States*, 552 U.S. 85 (2007) (no review—criminal drug possession case—no mention of *Chevron* deference); *Muehler v. Mena*, 544 U.S. 93 (2005) (no review—challenging a search warrant—no mention of *Chevron* deference); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (no review—jurisdiction case, held in favor of AG—no mention of *Chevron* deference); *Lopez v. Gonzales*, 549 U.S. 47 (2006) (reversed & remanded: whether offense was “aggravated felony”—no deference). This list is not intended to be exhaustive, but rather to explain how I chose the subset of immigration cases most relevant to my analysis.

204. 537 U.S. 12 (2002) (clarifying and invoking the “ordinary remand rule” directing courts to refrain from making judicial judgments and remand to the agency on matters “that statutes place primarily in agency hands”).

205. *Id.* at 17-18.

Court then held that this factual issue was just such a decision, and that the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The Court thus remanded the issue so that the agency could address the significance of the facts in the first instance in light of its own expertise.<sup>206</sup> In other words, the agency would get the first crack at resolving the issue with the courts' role limited to reviewing the boundaries of the agency's determination, if appealed. The Court explicitly stated that an appellate court cannot "intrude upon the domain which Congress has exclusively entrusted to an administrative agency" and that "[a] court of appeals 'is not generally empowered to conduct a de novo enquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.'"<sup>207</sup>

After *Ventura*, some commentators assumed that the Court was merely saying that courts should send back to the agency unresolved factual issues. Under this reading, *Ventura* appeared to do nothing to disturb the common assumption that courts could still resolve interpretation issues, that is, construe the meaning of statutory terms, in the first instance, without necessarily having to remand.<sup>208</sup> Notably, despite the escalating chaos at the immigration agency (which was reflected in *Ventura* itself, in that the BIA had failed to consider the finding at issue made by the Immigration Judge) the Court made no mention of the agency's ability to fulfill its interpretive role or properly bring its expertise to bear on the issue at hand.<sup>209</sup>

However, two other key immigration cases issued shortly thereafter demonstrate that the Court actually went further in *Ventura*, significantly tilting deference toward the agency. First, in early 2006, the Supreme Court issued its decision in *Gonzales v. Thomas*,<sup>210</sup> just eight months after *Brand X*. The *Thomas* case concerned another Ninth Circuit asylum decision which had come out just weeks before *Brand X*.<sup>211</sup> *Thomas* is instructive because here again the Court took an innocuous-looking case and issued a brief, seemingly simple decision, yet in doing so subtly and significantly expanded the agency's domain.

*Thomas* revolved around how to apply the standard whereby individuals need to show that they have been persecuted due to their membership in a particular social group to qualify for asylum under the asylum statute.<sup>212</sup> The

---

206. *Id.* at 16.

207. *Id.* at 16 (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

208. The Court's "ordinary rule is to remand to give 'the BIA the opportunity to address the matter in the first instance in light of its own experience.'" *Negusie v. Holder*, 555 U.S. 511, 517 (2009) (citing *INS v. Ventura*, 537 U.S. 12, 16-17 (2002); *id.* at 523 ("[T]he proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.")) (quoting *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006)).

209. *See Ventura*, 537 U.S. at 17.

210. 547 U.S. 183 (2006) (applying the *Ventura* remand rule and determining that the agency, not courts, should decide whether the facts as found fell within a statutory term).

211. *Id.* at 184.

212. *Id.* at 186.

Ninth Circuit interpreted the language of the asylum statute to determine whether a family could qualify as a particular social group for the purposes of qualifying for asylum—that is, the Ninth Circuit was defining the term “family” as a general matter, not whether the facts showed that the particular family in question in the case before them qualified for asylum. Such an analysis would appear to be a classic statutory interpretation question for the federal courts to review under *Chevron*. Indeed, the Ninth Circuit sought to reconcile conflicting inter- and intra-circuit precedents on whether the term “social group” in the governing statute included or could include families. In doing so, the Ninth Circuit believed it was simply construing a statutory term as many of its sister courts had done before. In fact, taking care to not overstep its boundaries after *Ventura*, after determining in *Thomas* that a family could constitute a “social group,” the Ninth Circuit actually remanded the case back to the BIA for the agency to determine whether the family at issue fell within a social group consisting of a family.<sup>213</sup>

However, yet again, when the case reached the Supreme Court, the Court summarily reversed the Ninth Circuit. This time, the Court somewhat sidestepped the interpretive issue by reframing the question as a “matter that require[d] determining the facts and deciding whether the facts as found fall within a statutory term.”<sup>214</sup> On that basis, the Court invoked the *Ventura* “ordinary remand” rule and remanded the case back to the agency.

The *Thomas* case, together with *Ventura*, thus further elided the boundaries between the courts’ and the agency’s interpretative roles as the Court treated a statutory interpretive issue as more like a factual one that had to go first to the agency under *Ventura* and *Chevron*. In doing so, the Court subtly and significantly expanded the tilt towards agency deference.

*Ventura* and *Thomas* alone might be dismissed as immigration cases where interpretive lines became slightly fuzzy or perhaps as cases where movements away from strict *Chevron* divides can be laid at the feet of the “rogue” Ninth Circuit. However, when these cases are viewed in combination with the next key Supreme Court immigration case—*Negusie v. Holder*<sup>215</sup>—the shift away from a strong judicial role becomes crystal clear.

## 2. *Collapsing the Judicial Role*

In *Negusie v. Holder*,<sup>216</sup> a 2009 asylum case, the Court’s *Chevron* tilt toward the agency sharpened even further. The issue presented in *Negusie* was how to interpret the “persecutor bar” in the asylum statute, which bars a

---

213. *Thomas v. Ashcroft*, 359 F.3d 1169, 1172 (9th Cir. 2004).

214. *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006).

215. 555 U.S. 511 (2009).

216. *Id.* (finding that since the agency had committed a legal error in its statutory interpretation, it had therefore not yet exercised its *Chevron* discretion, and remanding to the agency to allow it to exercise this interpretive authority in the first instance).

person from receiving a grant of asylum if the person had participated in the persecution of others.<sup>217</sup>

On the surface, this question seemed ripe for judicial interpretation. When the Supreme Court issued its decision in *Negusie*, Justice Stevens, the author of *Cardoza-Fonseca*, wrote in dissent that “[t]he narrow question of statutory construction presented by this case is whether the so-called ‘persecutor bar’ disqualifies from asylum or withholding of removal an alien whose conduct was coerced or otherwise the product of duress. If the answer to that question is ‘no,’ courts should defer to the Attorney General’s evaluation of particular circumstances that may or may not establish duress or coercion in individual cases.”<sup>218</sup> He reiterated, “[b]ut the threshold question the Court addresses today is a ‘pure question of statutory construction for the courts to decide.’”<sup>219</sup>

Instead, the majority of the Court decided that the immigration agency and the Fifth Circuit had legally erred by misapplying agency and Supreme Court precedent on a similar issue to resolve the statutory interpretation issues at hand. The Court invoked *Brand X* to say that the interpretation of the statute was here a gap-filling issue for the agency, stating that the agency should thus take the first crack at interpretation. Significantly, the Court once again invoked the ordinary remand rule from *Ventura*, and invoked *Thomas* to further support the view that it was the agency’s role to construe the meaning of the persecutor bar in the statute in the first instance. The Court thus tilted deference precepts further towards the agency in a series of steps: first, the Court noted that it was “well settled that ‘principles of *Chevron* deference are applicable to this statutory scheme.’”<sup>220</sup> Then, the Court cited *Brand X* for the proposition that ambiguities in statutes are within the agency’s jurisdiction to administer.<sup>221</sup>

Crucially, the Court refused to interpret the statutory language itself or even to outline the boundaries of any ambiguity in the terms of the statute, but instead limited itself to simply identifying a legal error and then sending the case back for agency interpretation—in doing so, severely restricting the judicial interpretive role. The Court collated language from *Chevron*, *Ventura*, and *Thomas* to state that “when statutes place an issue ‘primarily in agency hands’ courts should remand back to the agency under the *Ventura* ‘ordinary remand’ rule,” and that under *Thomas*, courts should do so in order to give the agency “the opportunity to address the matter in the first instance in light of its own experience.”<sup>222</sup>

*Negusie* arguably went further than the prior combination of *Brand X*,

---

217. *Id.* at 516.

218. *Id.* (Stevens, J., concurring in part and dissenting in part) (citation omitted).

219. *Id.* (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987)).

220. *Id.* at 516 (citation omitted).

221. *Id.* at 523.

222. Farbenblum, *supra* note 51, at 1092.



*Ventura*, and *Thomas*, and carved out a new, even more restricted judicial role. Rather than interpreting a term of pure statutory construction, as Justice Stevens urged,<sup>223</sup> and in doing so letting the agency determine how to apply it, the Court did something more radical. The majority not only refused to interpret the statutory language itself, or to even outline the ambiguities in the statute, if any, but the Court also further restrained itself to simply identifying a legal error and then sending the case back to the agency to interpret and apply the statute.<sup>224</sup>

Together, *Brand X*, *Ventura*, *Thomas*, and *Negusie* demonstrate that the battleground has shifted from the question of how courts should interpret the language of a statute to the question of precisely when deference should be granted. The interpretive focus has decisively moved from the courts and towards the agency. The courts' role appears to have become largely an error-checking one, wherein the courts' primary and overarching responsibilities have collapsed to merely assessing the reasonableness of agency action, as opposed to the courts' taking an active role in statutory interpretation. As some legal scholars had predicted, these decisions indicate that, at least in the immigration arena, *Chevron's* two steps have largely collapsed into a single step, wherein the court's primary and overarching role is largely limited to error-checking or assessing the reasonableness of agency action, rather than construing statutory terms.<sup>225</sup>

### 3. *Furthering Chevron's Collapse into a Single Step*

The most recent round of Supreme Court immigration and non-immigration administrative law decisions provides further evidence indicating that the Court has shifted the role of the courts in judicial review of agency action, at least in the immigration context. The Court's recent immigration jurisprudence is in flux as this Article goes to press. Therefore, in the following section, I can provide only preliminary analyses of recently issued cases. Most notably, consider *Judulang v. Holder*,<sup>226</sup> in which the Court decided that the immigration agency's actions were "arbitrary and capricious" and thus struck down the agency's policy for applying § 212(c) in deportation cases. The Court in *Judulang* acknowledged that "[a]gencies, the BIA among them, have expertise and experience in administering their statutes that no court can properly ignore."<sup>227</sup> But the Court then went on to find that "[t]he BIA has flunked that test here. By hinging a deportable alien's eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien's fitness to reside in this

---

223. *Negusie v. Holder*, 555 U.S. 511, 528 (2009) (Stevens, J., concurring).

224. *Id.*

225. *See generally* Stephenson & Vermeule, *supra* note 11.

226. 132 S. Ct. 476 (2011).

227. *Id.* at 483.

country—the BIA has failed to exercise its discretion in a reasoned manner.”<sup>228</sup>

Importantly, in the *Judulang* case, despite the Solicitor General asking the Court to review the case under *Chevron*’s Step Two,<sup>229</sup> the Court instead rested its analysis on the APA, but noted that its analysis would be the same under *Chevron*.<sup>230</sup> The Court justified this approach by stating that “[w]ere we to [review the case based on *Chevron* instead of the APA], our analysis would be the same, because under *Chevron* step two, we ask whether an agency interpretation is ‘arbitrary and capricious in substance.’” The Court thus reviewed the agency’s actions through a single step of arbitrary and capricious review. In other words, the Court appeared to skip *Chevron*’s first step, declining to explicitly rule on whether the statute was ambiguous or on the scope of any ambiguity. Other scholars agree with this interpretation of *Judulang*—noting, for instance, that “[i]nitially the Supreme Court declined the government’s suggestion to review the BIA’s decision under the *Chevron* two-step analysis and instead applied the APA’s ‘arbitrary [or] capricious standard.’”<sup>231</sup> In doing so, the Court carved out a narrow role for itself, stating that its scope of review under the APA “is ‘narrow’; as we have often recognized, ‘a court is not to substitute its judgment for that of the agency.’ . . . But courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking.”<sup>232</sup>

In *Judulang* then, the Court seemed to use the single-inquiry arbitrary and capricious standard while also recognizing the failures of the immigration agency, stating “[w]e hold that the BIA’s approach is arbitrary and capricious. The legal background of this case is complex, but the principle deciding our decision is anything but. When an administrative agency sets policy, it must provide a reasoned explanation for its action. That is not a high bar, but it is an unwavering one. Here the BIA has failed to meet it.”<sup>233</sup> Indeed, the Court criticized the Board methodology as one that “turns deportation decisions into a ‘sport of chance’—exactly what the arbitrary and capricious standard was designed to prevent.”<sup>234</sup> Again, in *Judulang* the Court appears to be continuing to move in the direction of gradual acceptance of the idea that “‘arbitrary and capricious’ review is the same as *Chevron* review.”<sup>235</sup> Hence, although the Court overturned the immigration agency’s actual decision in *Judulang*, the *Judulang* precedent serves to potentially expand the immigra-

---

228. *Id.* at 484.

229. *Id.* at 483 n.7.

230. *Id.*

231. U.S. Department of Justice, *Supreme Court Soundly Rejects BIA’s Comparability Grounds Approach to Adjudicating s212(c) Waivers*, Vol. 15, No. 12 IMMIGR. LITIG. BULL. (Dec. 2011).

232. 132 S. Ct. at 483-84 (citations omitted).

233. *Id.* at 456.

234. *Id.* at 484.

235. Bill Araiza, *More News from the World of Chevron*, PRAWFSBLOG (May 22, 2012, 4:16 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2012/05/index.html>.

tion agency's scope of authority in future cases by limiting the role of courts to reviewing agency decisions using the arbitrary and capricious standard, and thereby restricting the courts' authority to limit agency decision making based on statutory interpretation under *Chevron's* Step One.

Significantly, the Court in *Judulang* did not focus on the disarray at the agency, other than to note that the Attorney General had provided mixed signals to the agency.<sup>236</sup> The Court overturned the BIA's decision in *Judulang* because of the agency's failure to render a defensible decision, stating that it could not find a reason for the agency's decision and that the rule the BIA had proffered was "unmoored from the purposes and concerns of the immigration laws."<sup>237</sup> Thus, it seems that the Court is still focusing on the agency's decisions, or the individual decisions it sees, without discussing the agency's increasing state of disarray or without taking note of the context in which such indefensible decisions are arising.

*Judulang* does, however, offer a glimmer of hope that the Court might soon begin looking more closely at the agency's procedures and level of functioning. The fact that the Court acknowledged mixed signals at the agency and that the agency had failed to provide a reasoned decision may indicate that the Court may be more willing to step in to address the endemic problems at the agency if it is presented with other, similarly poorly reasoned decisions. If the Court were to take on such an increased or active role, perhaps some of the poor decision making, mixed messages, and overall chaos at the agency may be lessened if the agency heeds a future Court's pushes for reform.

On balance, however, the *Judulang* case provides additional evidence that the Court is collapsing *Chevron's* two steps, at least in the immigration realm.<sup>238</sup> Again, the *Judulang* Court specifically adopted a single-step arbitrary and capricious standard, despite requests that it review the case under the *Chevron* standard.<sup>239</sup> It is worth watching the next wave of immigration cases that reach the Court, both to see if the Court begins to delve deeper into the disarray at the agency, and whether it chooses to adopt a single-step or two-step inquiry.

Moreover, scholars have suggested that other recent non-immigration decisions similarly indicate that the Court may be collapsing *Chevron's* two steps into a single "arbitrary and capricious" inquiry.<sup>240</sup> Thus, the new

---

236. 132 S. Ct. 476, 489.

237. *Id.* at 490.

238. For another recent immigration case in which the Court arguably appears to have skipped the first *Chevron* step of inquiring as to whether there is ambiguity in the statute, see *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011 (2012) (consolidated cases). The Court deferred to the BIA in *Martinez Gutierrez* and explicitly applied *Chevron*. In doing so, the Court stated that the Board's position "prevails if it is a reasonable construction of the statute . . ." *Id.* at 2017.

239. 132 S. Ct. at 490.

240. See Araiza, *supra* note 235 (discussing *Astrue v. Capato ex rel B.N.C.*, 132 S. Ct. 2021 (2012), and *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704 (2011)).

deference framework applied to the immigration arena through *Brand X*, *Ventura*, *Thomas*, and *Negusie* appears alive and well in the Court's jurisprudence.

Furthermore, the Court's recent cases suggest that the Court may be moving toward reviewing immigration cases under a general administrative law framework, moving away from its traditional treatment of immigration law as an "exceptional" area of law wherein the usual administrative law rules were often overridden by constitutional concerns.

### C. *Implications for Non-Immigration Administrative Law*

Throughout this article, I have suggested that the developments currently playing out with respect to deference jurisprudence in the immigration arena *may* have implications for non-immigration administrative law cases. I do not mean to argue that this is necessarily the case. Rather, I mean to raise this as a question deserving greater scholarly attention. At the very least, it seems clear that administrative law scholars should further study the developments currently taking place in the immigration realm. As I have noted above, immigration appeals now make up the vast majority of the administrative law cases in the federal appeals courts.<sup>241</sup> Considering the importance of immigration cases to the recent administrative law dockets of the federal courts, it would be surprising if the Supreme Court's recent decisions regarding deference within the immigration context had no impact on non-immigration administrative law cases. And, indeed, there is some evidence that courts are citing the precedents developed in immigration cases in non-immigration decisions.<sup>242</sup>

Moreover, the Supreme Court's recent immigration cases have been noteworthy in another respect. Recent immigration cases not involving *Chevron* appear to have been decided under straightforward administrative law principles, suggesting that the Court may be moving away from its past "immigration exceptionalism" and instead mainstreaming immigration cases into a general administrative law framework. In this light, cases such as *Arizona v. United States*,<sup>243</sup> *Vartelas v. Holder*,<sup>244</sup> and *Kawashima v.*

---

241. See COMMERCIAL & FED. LITIGATION SECTION, *supra* note 34, at 8; Family, *supra* note 53, at 583; Rana, *supra* note 65, at 854 n.137 (noting that cases skyrocketed from 1642 in 2001 to an astonishing 8750 in 2004).

242. See, e.g., *W. Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186, 1201 (9th Cir. 2008) (quoting *Gonzales v. Dep't of Homeland Security*, 508 F.3d 1227, 1234 (9th Cir. 2007)) (energy case citing immigration case); *Sash v. Zenk*, 428 F.3d 132, 135 (2d Cir. 2005) (quoting *Michel v. INS*, 206 F.3d 253, 262 (2d Cir. 2000)), in discussion of the application of deference to the Bureau of Prisons on the issue of time off for good behavior); *Fort Independence Indian Cmty. v. California*, 679 F. Supp. 2d 1159, 1170 (E.D. Cal. 2009) (citing *Marmolejo-Campos v. Holder*, 558 F.3d 903, 909 (9th Cir. 2009)) (Native American/Gaming case citing immigration case regarding *Chevron* and *Skidmore* deference).

243. 132 S. Ct. 2492 (2012).

244. 132 S. Ct. 1479 (2012) (applying the standard test for retroactive application of new laws and finding for *Vartelas*).

*Holder*,<sup>245</sup> have attracted attention because the Court did not invoke constitutional principles as it might have done in earlier eras.<sup>246</sup>

Consequently, these cases could portend the softening of “immigration exceptionalism.”<sup>247</sup> To the extent this is occurring, the recent mainstreaming of immigration law would not be unprecedented. Scholars have argued that a similar dynamic has been occurring in the area of taxation.<sup>248</sup> Prior to the recent case of *Mayo Foundation for Medical Education & Research v. United States*,<sup>249</sup> many tax scholars had argued that deference operated differently in the tax context than in other areas of administrative law, suggesting the prior existence of a form of “tax exceptionalism” similar to “immigration exceptionalism.”<sup>250</sup> However, the Supreme Court in the *Mayo* case decisively

---

245. 132 S. Ct. 1166 (2012), which has been described as “a run-of-the-mill statutory interpretation case.” Johnson, *supra* note 191.

246. Johnson, *supra* note 191.

247. One aspect of the prior practice of immigration exceptionalism is the notion that immigration differs from many other administrative law areas because of its implications for foreign affairs. The Supreme Court has often reiterated that “[j]udicial deference in the immigration context is of special importance, for executive officials ‘exercise especially sensitive political functions that implicate questions of foreign relations.’ . . . [and] ‘The judiciary is not well-positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.’” *Negusie v. Holder*, 555 U.S. 511, 517 (2009) (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *INS v. Abudu*, 485 U.S. 94, 100 (1988)); see also *Chin*, *supra* note 187, at 23 (“[T]he modern Court has frequently stated that ‘[o]ver no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.”) (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)); *Cox*, *supra* note 60, at 1671 (2006) (“The history of immigration jurisprudence is a history of obsession with judicial deference.”). In my view, this is yet one more reason our balance-of-powers framework suggests that the judicial role in immigration cases should be stronger, rather than weaker. See, e.g., Bressman, *supra* note 153, at 1450 (“Congress should not have unfettered discretion to tinker with the procedures for lawmaking, as the Court has from time to time recognized. Specifically, Congress should not have unlimited authority to invent procedures for administrative lawmaking that promote less accountability and tolerate more arbitrariness than we have come to accept”). While the Executive Branch might face international repercussions for its decisions, the Executive Branch can disclaim responsibility for judicial decisions in the domestic realm, especially as immigration cases generally turn on U.S. law, not foreign law, another argument for the continued application of the *Chevron* framework in immigration cases, and for a stronger judicial role. See generally Bradley, *supra* note 183, at 673-74 (“[T]he *Chevron* doctrine appears to be well-entrenched in the Supreme Court . . . . Second, regardless of whether the criticisms of *Chevron* have force as a general matter, they have less force in the context of foreign affairs law—an area characterized long before *Chevron* by exceedingly broad executive branch power and sweeping deference by the courts. Given this history, application of the *Chevron* perspective to foreign affairs law poses substantially less danger of centralizing power in the executive branch than does applying it to other areas of law [and] . . . [t]here are a number of ways in which the *Chevron* perspective might offer greater benefits in foreign affairs than in other areas of law. Part of its value in foreign affairs is law comes simply in providing a framework for understanding and controlling deference in what is otherwise a very amorphous area.”). In any case, in practice, courts generally defer to the immigration agency’s interpretation, at best finding international norms persuasive rather than binding. See *Farbenblum*, *supra* note 51.

248. See, e.g., Jeremiah Coder, *News Analysis: Mayo’s Unanswered Questions*, 130 TAX NOTES 1118 (2011) (“The Court in *Mayo* eliminated any sense of tax exceptionalism by refusing to distinguish between different types of regulations, whether legislative or interpretive, in deciding what level of deference to apply. . . .”).

249. 131 S. Ct. 704 (2011).

250. See, e.g., Kristin Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1559-63, 1600 (2006) (describing the debate between tax scholars who argued that deference operated differently in the tax context as compared to other areas of administrative law and the tax scholars who argued against this ‘tax exceptionalism’ position).

rejected the arguments for “tax exceptionalism”—thereby mainstreaming tax law into the broader administrative law rubric.<sup>251</sup> If the Supreme Court is similarly in the process of decisively ending immigration exceptionalism, then the Court’s recent immigration decisions regarding deference may lead to an accompanying reformulation of deference doctrine in non-immigration administrative law cases.

Thus, arguably, the deference battleground has now shifted from the question of how courts should interpret the language of a statute to the question of precisely when deference should be granted. At least in the immigration context, interpretive power has shifted from the courts to the agency. This shift is especially troubling because many of these decisions granted deference, sometimes even approvingly,<sup>252</sup> to an immigration agency that was rapidly falling into crisis. An important question for administrative law scholars is whether immigration administration may be the canary in the coal mine showing that the Court’s recent *Chevron* jurisprudence could be leading to dangerous ground for administrative law generally.

In this article, I take no position on the larger problem of how deference doctrines should apply with respect to well-functioning agencies. Instead, I have focused on the harms that can result from limiting the role of the courts with respect to failing agencies, following my argument in Part I that the immigration agency should be considered such a failing agency. It is one thing to maintain that the courts should defer to agencies either when: (a) the agencies render well-thought-out decisions with significant persuasive value on the merits, or (b) the agencies exercise their decision making authority through the use of procedures designed to ensure quality. It is quite another thing for the courts to be forced to defer to an agency—like the immigration agency—that is failing to either reach persuasive decisions or to make decisions through the use of procedures designed to ensure quality decision making. To the extent the courts are forced to defer to failing agencies,<sup>253</sup> we risk an outcome of *Chevron* without the courts, wherein deference doctrine results in unchecked agency discretion without opportunity for meaningful judicial oversight.

---

251. See Clifford M. Sloan et al., *Supreme Court Mayo Foundation Grants Chevron Deference to Treasury Regulations*, TAX EXECUTIVE INSTITUTE (June 7, 2011), [http://www.tei.org/news/articles/Pages/TTE\\_SPRING11\\_supreme\\_courts\\_mayo\\_foundation\\_opinion.aspx](http://www.tei.org/news/articles/Pages/TTE_SPRING11_supreme_courts_mayo_foundation_opinion.aspx) (“For decades, many taxpayers and the government have disagreed over the level of deference that courts should grant to Treasury. In *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704 (2011), the Supreme Court of the United States, in an opinion authored by Chief Justice John Roberts, unanimously and emphatically resolved that disagreement in favor of the government . . . The Supreme Court, absent strong justification, will not treat tax law differently from other areas of administrative law.”).

252. *Negusie*, 555 U.S. at 516-17 (noting with approval the Immigration Judge’s careful opinion).

253. Agencies have failed before, most notably the Social Security Administration, see Taylor, *supra* note 73, and if the past provides any indication of the future, it is not inconceivable that courts will once again be forced to deal with failing agencies.

## IV. CONCLUSION

This article has attempted to contribute to the dialogue over whether and in what contexts *Chevron* is being redrawn, as well as to offer some suggestions for how and in what ways the judicial role might be strengthened to fulfill *Chevron*'s original promise. This article thus seeks to open a larger debate into possibilities for resolving the current disarray in both *Chevron* jurisprudence and immigration administration. One way forward could be to strengthen the judicial role in statutory interpretation, shifting *Chevron* jurisprudence once again, yet this time with concrete examples as to what can happen when deference is given to a failing agency. More simply, the Court could reassert its insistence that agency decisions receiving deference be reached in a deliberative way that provides a realistic basis for believing that the agency explored all viable alternatives. The Court might also return to its traditional separation between questions of statutory interpretation and questions of fact, applying the APA's standard of review to the latter while retaining the judicial role in saying what the law is in the former. Alternatively, looking deeply at the failures of the immigration agency may spur the Court to further rethink *Chevron*, and related assumptions on deferring to agencies.

As I argued in Part I, the failure of the immigration agency demonstrates why we need to maintain an interpretative role for the courts at least in circumstances wherein an agency fails any meaningful test of quality decision making. Courts simply lack the resources that would be required to check failing agencies by reviewing every agency decision under an arbitrary and capricious standard. For courts to be able to successfully function as a check on failing agencies, the courts must not be forced to defer to the legal interpretations of these agencies unless the agencies reach their decisions using quality procedures. The *Chevron* deference framework is predicated on notions of agency expertise and accountability. The purposes of the *Chevron* framework are thus not furthered by mandating that the courts defer to agencies even when the agencies clearly fail to either employ expertise or to act in an accountable fashion.

Imagine if the Supreme Court had called out the failures of the immigration agency and reached a *Mead*-like decision concluding that courts need not defer to the interpretive decisions of the immigration agency until such decisions were reached through quality procedures. Indeed, there is some evidence that the threat of judicial review forces agencies to develop better procedures and clean up their acts.<sup>254</sup> Had the Court issued a ruling of this sort (similar to *Mead*, directed to the immigration agency or other failing

---

254. See, e.g., O'Connell, *supra* note 24, at 932-33 (stating that data and analysis regarding agency rulemaking set forth in the article "provides some support for the conclusion that agencies' use of notice-and-comment rulemaking increased after the Supreme Court's 2001 decision in *United States v. Mead Corporation*"); see also Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and*

agencies), the past decade of immigration disasters might have been at least partially averted. In contrast to what actually happened, wherein the immigration agency designed practices so as to restrict meaningful judicial review and agency review, a world in which the Court issued this hypothetical decision might well have seen the immigration agency revitalize its procedures to ensure quality, as doing so would be a prerequisite for the immigration agency to receive deference.

Perhaps this hypothetical is something of a pipe dream. But it is likely not a complete coincidence that the immigration agency fell into chaos just as the Supreme Court issued a series of decisions guaranteeing that the immigration agency would still receive deference despite its lack of quality procedures, and that this occurred during a time—post-September 11 America—when the agency was focused on deporting as many people as possible.<sup>255</sup>

Understanding the past decade of the immigration agency's disasters is important in its own right, for the many lives affected by its chaos and increasingly poorly rendered decisions on matters of great importance. Both administrative law and immigration law scholars should pay greater attention to this troubling history—asking why the courts were unable to effectively check the immigration agency as it fell into chaos. Moreover, beyond the importance of this history for immigration law and policy, administrative law scholars should study the interactions between the courts and the immigration agency as a case study of how the Supreme Court's recent deference jurisprudence might play out with respect to other failing agencies.

Governance is complex, and regulatory capture or excess politicization always lurks as a threat to effective regulation. In the American system, the courts have historically stood as an important check against failures in the executive branch. The question must now be asked—in light of the Supreme Court's recent *Chevron* jurisprudence, and looking to the case study of the immigration agency—can the courts still provide a meaningful check on the possibility of agencies running amok? Or are we headed toward *Chevron* without the courts, not just in the immigration context, but in administrative law generally?

---

*Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 490-91 (2002) (suggesting that in the context of legislative rules, judicial review does improve the overall quality of rules).

255. See Rana, *supra* note 65 (explaining how the agency, after September 11, 2001, adopted procedures that deliberately and successfully skewed decision making towards deportation).