Enforcing/ Protection:
The Danger of *Chevron* in Refugee Act Cases

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[draft][1]

I. Introduction

Basic human rights protections for refugees are colliding in countries all over the world with strong claims to the executive prerogative to exclude foreigners and secure borders.[2]

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[1] This article is still in draft form. If you have any comments or suggestions, please contact me at msweeney@law.umaryland.edu.

[2] The United Nations High Commissioner for Refugees estimates that there are 65.6 million people worldwide who have been involuntarily displaced across international borders because of persecution, war or other violence. U.N. High Commissioner for Refugees, *Figures at a Glance* (June 19, 2017) http://www.unhcr.org/en-us/figures-at-a-glance.html. At the same time, proposed policies supporting restrictive immigration were and are a mainstay

Nationalist legal regimes and political movements (embodied in strong executive leaders employing a rhetoric of security and national defense) are confronting internationalist human rights frameworks and instruments - and the domestic law that incorporates those frameworks. Issues of deference to executive power have been central to recent debates about a variety of immigration issues in the United States, including the Trump administration's travel bans[3] and the Obama administration's litigation over restrictive state immigration laws and its Deferred Action for Parents of Americans (DAPA) program.[4]

Less flashy, but of life-or-death importance to hundreds of thousands of people with asylum applications pending,[5] are the quiet decisions that federal courts around the country make every day about whether or not they should apply a presumption of *Chevron* deference to the asylum case decisions of the Attorney General and the Justice Department's Board of Immigration Appeals (BIA or Board), the highest decision making body of the immigration court system. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 US 837 (1984), the Supreme Court held that, where Congress has left a policy question ambiguous, courts should generally defer to the decisions of an executive agency charged with administering a statutory scheme.[6] The doctrine has been famously difficult to manage in

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of Donald Trump's "America First" campaign, as well as the Brexit campaign for Britain to leave the European Union and unexpectedly strong recent showings of nationalist parties in France, Germany, the Netherlands, Austria and Italy. *See,* e.g., Leigh Thomas, *France's Le Pen Says National Front to be Overhauled after Election Defeat*, Reuters (May 7, 2017) https://www.reuters.com/article/us-france-election-lepen/frances-le-pen-says-national-front-to-be-overhauled-after-election-defeat-idUSKBN1830VK. Melissa Eddy, *Alternative for Germany: Who are They, and What do They Want?, N.Y. Times* (Sept. 25, 2017) https://www.nytimes.com/2017/09/25/world/europe/germany-election-afd.html. *Italy Shakes Europe's Establishment as Political Upstarts Form Pact to Govern*, https://www.wsj.com/articles/italys-5-star-league-reach-deal-on-government-program-1526237962.

[3] [update this citation and quote] *Hawaii v. Trump*, 859 F.3d 741, 768 (9th Cir. 2017) ("[T]he Government renews the argument…that we may not review EO2 because the consular nonreviewability doctrine counsels that the decision…is not subject to judicial review").

[4] *Texas v. United States*, 809 F.3d 134, 165–166 (5th Cir. 2015) ("The Secretary has broad discretion to 'decide whether it makes sense to pursue removal at all' and urges that deferred action…is a presumptively unreviewable exercise of prosecutorial discretion").

[5] As of December 2016, the United States Citizenship and Immigration Service (USCIS) had 223,433 pending affirmative asylum applications. USCIS Asylum Division, Affirmative Asylum Statistics, December 2016. https://www.uscis.gov/outreach/asylum-division-quarterly-stakeholder-meeting-6. The Executive Office for Immigration Review, which administers the Immigration Courts, reported that it received 65,218 asylum applications in FY 16. Executive Office for Immigration Review, Office of Planning, Analysis, and Statistics, FY 2016 Statistics Yearbook, March 2017. https://www.justice.gov/eoir/page/file/fysb16/download. [overall # of asylum/whdg appls pending in courts?

[6] In *Chevron*, the EPA promulgated a rule that allowed states to categorically regulate all "pollution-emitting devices." Private companies sued, arguing that there were fundamental

application, though. Since the Supreme Court's 1984 decision, courts at all levels have struggled with when to apply the deference the Court envisioned and how strongly.[7] In the intervening decades and up to the present day, a complicated set of considerations has cabined and limited the seemingly straightforward and broad sweep of the Court's initial decision. In the context of refugee protection,[8] the *Chevron* question dictates the rigor with which courts review BIA decisions interpreting the provisions defining eligibility for protection, and this question of deference can mean the difference between lifesaving protection and deportation back to danger.

Consider a potential asylum applicant. This young man became homeless at the age of eleven when he left his abusive and neglectful father's house, having lost his mother several years earlier. He was taken in by members of a powerful criminal gang in his neighborhood who protected him and provided him food, shelter and a sense of belonging, but who also gradually began demanding that he participate in their activities. He left the gang at age fourteen because his conscience did not allow him to join in the escalating violence the gang leadership demanded of him. Shortly after making this decision of conscience, he was forced to flee the country when he was "green-lighted" with a death sentence for having defied gang leaders. At the age of 16, he now applies for protection in the United States.

While there is no dispute that this young man's life is in danger,[9] an applicant for asylum or withholding has the burden to show that the danger he faces is on account of a particular reason – one of the limited number of reasons that give rise to protection under the international refugee protection accords that form the basis for U.S. asylum law.[10] Relevant to our potential asylum applicant, the Board of Immigration Appeals has held that an individual targeted for harm for having defected from a criminal gang will not qualify for asylum or withholding because he cannot be considered a member of a "particular social group" as Congress intended that legal definition to be understood.[11] The Board made this

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differences between types of pollution that deserve different treatment. The Supreme Court held that the EPA's interpretation of "stationary source" was a reasonable interpretation and therefore not judicially reviewable.

7 *See, e.g., Gutierrez-Brizuela v Lynch,* 834 F3d 1142, 1156 (CA 10, 2016)(J. Gorsuch conc.) (noting "practical problems of administration").

cite to articles about the development and many questions around the doctrine. 30 years later symposia, etc.

8 explaining the sometimes interchangeable use of the terms refugee, asylum and withholding of removal.

9 [article about danger faced by gang defectors]

10 8 USC 1158(a) and 8 USC 1101(a)(43). As discussed, *infra*, Congress incorporated the terms of the 1952 Geneva Convention on the Status of Refugees into the INA through the Refugee Act of 1980 with the express purpose of bringing the United States into compliance with its obligations under the Convention and the 1967 Protocol. Refugee Act of 1980, 8 U.S.C §§ 1101–1525 (1980). Ref Convention. *See also Cardoza-Fonseca*, 480 U.S. 421, 424 (1987) (finding that Congress intended the Refugee Act to bring U.S. into compliance with the Refugee Convention).

11 8 USC 1158. Matter of WGR.

decision in *Matter of W-G-R-,* a case that relied on a change in the standard the Board used for recognizing particular social groups for asylum and withholding cases. In the wake of *W-G-R-,* federal circuit courts of appeals are faced with the question of whether or not to defer to the new social group standard generally or to the Board's specific conclusion about former gang members as a possible protected group.

And it turns out that the answer to the deference question has serious consequences for our young man. His chances of winning asylum[12] will differ significantly depending on which circuit court has jurisdiction over his location and that court's decision about whether or not it should give *Chevron* deference to the Board's standard. The four circuit courts that have considered whether former gang members can constitute a "particular social group" have reached two opposite results on the basis of four different lines of reasoning regarding agency deference. In a decision upholding the Board, the First Circuit explicitly deferred to the Board under *Chevron*. Three other circuits overturned the Board's holdings in individual cases, each dealing with the *Chevron* question in its own way, but each finding that *Chevron* did not constrain its review and that the proposed social group was cognizable under the statute.[13] And all of these circuit court decisions were issued prior to *W-G-R-* and could be susceptible to an argument under *Brand X* that the subsequent agency decision should override the earlier court holdings.[14] Thus, though there is some uncertainty on the question, our potential applicant *would* likely have a viable claim to protection in the Fourth, Sixth or Seventh Circuit, but not in the First – outcomes that flow to a significant degree from the courts' decisions about whether or not to apply *Chevron* deference to the executive agency's interpretation of "particular social group." So *Chevron* matters deeply for our

[12] Asylum, refugee status and withholding of removal are all forms of humanitarian protection under the Immigration and Nationality Act that are rooted in the 1951 Geneva Convention on the Status of Refugees. Many of their elements are drawn from the Convention and are therefore identical, including the definition of "refugee," which also applies to asylees and is related to the eligibility criteria for withholding of removal. For simplicity, I refer to "asylum" or "refugee protection" in this article; in many instances, those statements will also apply to the other forms of humanitarian protection.

[13] The Fourth Circuit acknowledged that Board decisions interpreting the INA are "generally" due deference but declined to defer in this case on grounds that the single-Board-member decision from below was not meant to carry precedential weight and was thus not deserving of discretion. *Martinez v. Holder*, 740 F.3d 902, 909–910 (4th Cir. 2014) (citing *United States v. Mead Corp.*, 533 U.S. 218). The Seventh Circuit, having refused to defer to the Board's standard in an earlier case on grounds that "[w]hen an administrative agency's decisions are inconsistent, a court cannot pick one of the inconsistent lines and defer to that one," declined to defer again, holding the Board's decision inconsistent with its original, unevolved standard for particular social groups. The Sixth Circuit, while maintaining (without mentioning *Chevron*) that "substantial deference is given to the Board's interpretation of the INA and accompanying regulations," nonetheless managed to overturn the Board's decision by finding that the Board "erred as a matter of law" in applying circuit precedent.

[14] Explanation of Brand X argument. And post-WGR cases arguing this?

asylum seeker, as it can significantly limit the rigor with which the federal courts will review BIA decisions, with life-and-death consequences.

Very early in the life of the *Chevron* doctrine, just three years after the decision was issued, the Supreme Court stated in *dicta* in *INS v. Cardoza-Fonseca*[15] that *Chevron* deference would apply in the interpretation of the INA's asylum and withholding provisions, and courts have since then repeated that assertion without much analysis.[16] However, in the three decades since that statement, *Chevron* doctrine has evolved considerably, and the Supreme Court has limited the reach of automatic deference. The case law has developed nuance as to whether, when, how and why deference should or should not be applied to the decisions of a particular executive agency in a particular instance. From the same *Cardoza-Fonseca* decision in 1987 – which highlighted the limits imposed by the statutory language and intentions of Congress – to *King v. Burwell* in 2015 and other recent cases,[17] the Supreme Court has considered various aspects of both the nature of the executive agency and the nature of the question at issue to decide whether it was likely that Congress intended to delegate the question to that agency and whether courts should apply *Chevron*'s presumption of deference to the agency interpretation. The doctrine has evolved from a seemingly straightforward directive of automatic deference to add a preliminary "Step One" analysis of statutory construction and congressional intent and, later, several varieties of what have been called "Step Zero" consideration of whether to apply the doctrine at all.[18]

However, the Court has never returned to the Refugee Act context to apply any of this jurisprudential nuance to questions of humanitarian protection law. To the contrary, *Cardoza-Fonseca* set the case law trajectory early, before these more nuanced questions were being asked about *Chevron*. In the years since, courts have applied *Chevron* deference to asylum and withholding law as part of immigration law, without any particularized analysis of its institutional context or unique origin as a product of international law.

This article will do what the courts have not done since 1987 – it will apply contemporary *Chevron* doctrine to the question of deference to the Board of Immigration Appeals and the Attorney General in asylum and withholding of removal cases arising under the Refugee Convention. We will consider the appropriateness of deference in light of both the nature of the agency involved and the nature of the interpretive questions raised in humanitarian protection cases. We will look at statutory construction principles arising from the international law basis for the INA's asylum and withholding provisions, as well as the character and expertise of the Department of Justice with regard to asylum issues, including the institutional dilemmas posed by conflicting simultaneous mandates of enforcement and humanitarian protection. Finally, we will consider whether the interpretation of international

15 480 U.S. 421 (1987).

16 *Id.* at 446. *See, infra*, Section *.

17 *See,* e.g., *King v Burwell*, slip op at 8 (holding that an agency's level of involvement and expertise in a complex subject matter and the political and economic significance of the question are relevant to the deference due agency decisions); [? *City of Arlington v. FCC*, concurrence ?]. See infra Section *.

18 See infra Section *.

human rights instruments can be considered a "policy" decision for which political accountability is either appropriate or desirable. In the end, we will conclude that application of deference principles under contemporary *Chevron* doctrine leads to the conclusion that deference to the Board is not appropriate in cases arising under the Refugee Act because of the institutional and legal particularities of decision-making in this area of law.[19]

[paragraph to reflect scope of the article and to explain the structure.]

II. *Chevron*: A Doctrine in Motion

In the 1984 *Chevron* decision, the Supreme Court both acknowledged and further enabled the broad exercise of power by administrative agencies in the modern regulatory state.[20] The case required the Court to consider the appropriateness of the Environmental Protection Agency (EPA)'s implementation of a provision of the Clean Air Act allowing all pollution emitting devices to be grouped into a single category.[21] Faced with this technical policy question and with a lack of indication in the statute of how Congress intended to resolve it, the Court institutionalized, for cases where Congress left ambiguous certain policy details for the implementation of a statute, a flat preference for the decisions of politically accountable executive agencies over reviewing courts.[22] The Court was concerned with incursions by the judiciary into policy questions about which it had no particular expertise and for which it did not have any political accountability. The decision was framed in terms of separation of powers principles and established a hierarchy of government authority for policy questions

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[19] It is worth noting that these arguments are not just a variation of immigration exceptionalism, rooted in the idea that immigration should be treated differently than other regulated fields. [cites to imm exceptionalism examples]. To the contrary, they reflect an application of generally applicable developments in *Chevron* jurisprudence to the context of humanitarian protection law under the INA and as implemented by federal immigration agencies.

[20] *See, e.g.,* Thomas W. Merrill, Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law, 111 Colum. L. Rev. 939 (2011), as cited in Strauss, 1149 (discussing the history of deference to agencies since the controversies of the New Deal in response to "Congress's increasing tendency to allocate primary responsibility for implementing new statutory schemes away from the courts and into administrative agencies."); and Scalia, _____, at 517 (?) ("Broad delegation to the Executive is the hallmark of the modern administrative state."). *See also,* 44 Loy. U. Chi. L.J. 141, Loyola University Chicago Law Journal, Fall 2012, THE IMPACT OF THE RISE AND FALL OF CHEVRON ON THE EXECUTIVE'S POWER TO MAKE AND INTERPRET LAW, Linda D. Jellum[a1] ("Put simply, Chevron and its ensuing reformulation dramatically altered the executive's power to create and interpret law.").

For a good general history and discussion of *Chevron, see* ******.

[21] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 840 (1984).

[22] Chevron cite.

arising in the implementation of statutory programs: legislative intent trumps executive implementation which in turn is given deference over judicial interpretation. In the words of Michael Herz, "Properly understood and sensibly applied, [*Chevron*] is a salutary recognition that Congress delegates broad authority to agencies and courts must respect those delegations."[23] *Chevron* was an enormously important decision in the development of the administrative law principles that govern our increasingly administrative state,[24] and a brief review of its history and theoretical bases is helpful to understanding its texture and the nuances with which it has been implemtned..

A. The History of *Chevron* Implementation

While the holding of *Chevron* can be state relatively simply, its implementation has been anything but straightforward. As administrative agencies have grown in size and power, the Supreme Court and lower courts have struggled for 30 years to discern the proper limits to deference and balance of power between the branches of government in agency decision making.[25] Courts at all levels have wrangled with how and where and to what extent to apply this seemingly straightforward preference for executive policymaking, and scholars have struggled to explain the doctrine's theoretical underpinnings. Indeed *Chevron* seems to be "both an untouchable doctrine and yet always under attack."[26] What appeared at first blush to be a sweeping and categorical preference for executive over judicial authority has gradually been narrowed and qualified over the years, as courts have continued to identify limits to the reach of the doctrine and have become concerned about disproportionate power in executive agencies.

Within three years of his majority decision in *Chevron*, Justice Stevens clarified in *INS v. Cardoza-Fonseca* that if a reviewing court could discern the intent of Congress on a question, there was no need to even consider, much less defer to, the position of the agency: "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[27] This became known as *Chevron*'s Step One. In 2001, in *United States v. Mead Corp*, the Court held that an agency must have been authorized to and must have in fact spoken

23 Herz, 1879.

24 *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 454 (1987)(J. Blackmun concurrence)(recognizing *Chevron* as "an extremely important and frequently cited opinion, not only in this Court but in the Court of Appeals" (citations omitted)); [cited by 15,362 cases as reported by Westlaw/ increasing importance of administrative agencies].

25 [citations]

26 Barnett/Walker, Chevron in the Circuit Courts, at 2 (noting that a Westlaw search turned up 80,000 citations for *Chevron*). *See also*, Pappas, at 978, n 5, observing that the volumes of commentary on Chevron testify to its importance as a doctrine, but also to its complexity.

27 480 US at 448. quoting Chevron at 843, n. 9.

"with the force of law" in order to trigger *Chevron* deference.[28] This has been dubbed a preliminary Step Zero.[29]

In a series of cases in more recent years and with concern for "the growing power of the administrative state,"[30] individual justices and Court majorities have raised other questions about the reach of the doctrine and have increasingly been willing to recognize reasons to decline to defer to executive agencies. The Court has been more and more willing to make a robust initial inquiry (à la Step Zero) into whether Congress likely intended to delegate authority to a particular agency on a specific question at issue. The Court continues to be concerned about and to use *Chevron*'s language of balance of powers between the branches of government, but as administrative agencies have grown in influence and power, the concern has shifted from worry about a judiciary overstepping its bounds to fear of runaway executive agencies in danger of trampling the other two Branches of government. As Chief Justice Roberts expressed it, in dissent in *City of Arlington v. FCC* in 2013: "[The Court's] duty to police the boundary between the Legislature and the Executive is as critical as our duty to respect that between the Judiciary and the Executive."[31] By 2014, in *Utility Air Regulatory Group v EPA*, a fractured Court rejected on substantive grounds an EPA decision that expanded the agency's own jurisdictional reach, in part because the Court found it unreasonable (under Step Two) to believe that Congress would have intended to delegate "decisions of vast 'economic and political significance'" to the agency without doing so explicitly.[32] And in 2015, in *King v. Burwell*, the Court sidestepped the *Chevron* framework entirely on grounds that it was unlikely that Congress intended to implicitly delegate a question of such "deep economic and political significance" under the Affordable Care Act to the Internal Revenue Service, given the agency's lack of expertise in health insurance policy.[33] In the same year, then-Judge Neil Gorsuch described the danger of the runaway executive: "When unchecked by independent courts exercising the job of declaring the law's meaning, executives throughout history had sought to exploit ambiguous laws as license for

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28 *U.S. v. Mead Corp.* U.S.June 18, 2001, 533 U.S. 218, 237 (holding that an agency letter binding only as the specific recipient of the letter was not sufficiently authoritative agency action to warrant *Chevron* treatment).

29 *See* Thomas W. Merrill & Kristin E. Hickman, Chevron's Domain, 89 Geo. L.J. 833, 836 (2001). [check this****] *See also,* Cass Sunstein, *supra*, n. **Error! Bookmark not defined.**, 191.

30 City of Arlington, 133 S.Ct. at 1879 (Roberts dissent). Though Justice Roberts was in the dissent in this case, his concerns shifted to the majority by 2015 when the Court dismissed *Chevron* concerns in *King v. Burwell* because of its doubt that Congress intended to delegate important decisions under the Affordable Care Act to the Internal Revenue Service. 135 S.Ct. at 2498-90.

31 City of Arlington, 133 S.Ct. at 1886 (Roberts dissent).

32 UARG, 134 S.Ct. 2427, 2444 (2014), citing Brown & Wmsn.

33 135 S.Ct. at 2489-90 ("This is not a case for the IRS. It is instead our task to determine the correct reading of Section 36B.").

their own prerogative."[34] More recently, he expressed concern that *Chevron* represents a "violation of the separation of powers."[35]

These decisions demonstrate the Court's growing skepticism of the central notion behind *Chevron* deference - that where Congress does not say otherwise, it necessarily intends to delegate the power to interpret an ambiguous statute to the executive agency rather than the courts. Indeed, even beyond the situational willingness to question that premise demonstrated in this line of cases, the Court may soon be on the verge of overturning *Chevron* altogether. In a parting suggestion to his colleagues in the 2018 case of *Pereira v. Sessions* (an immigration case in which the majority sidestepped *Chevron* by finding the statute to be unambiguous), retiring Justice Anthony Kennedy opined that "it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision."[36] He noted with apparent sympathy the calls in other cases from three of his conservative colleagues to reconsider *Chevron* and pointed out the "troubling" tendency the doctrine encourages for reviewing courts to apply "reflexive deference" and engage in nothing but the most cursory statutory review.[37] He warned that the lackadaisical review of the lower courts in *Pereira* "suggests an abdication of the Judiciary's proper role in interpreting federal statutes."[38]

Unless and until the Court takes that momentous step, however, the courts will continue to have to wrestle with when and to what degree to apply *Chevron* deference. And they do so with literally life-and-death consequences in the context of asylum and withholding applications on review from the BIA and the Attorney General. In order to assess the appropriateness of deference in this context, it will be helpful for us to review the theoretical justifications for the doctrine.

B. The Theoretical Underpinnings of the Doctrine

As the case law has shifted over the years, scholars have struggled to nail down the theoretical bases for the doctrine. In the words of Peter Strauss, administrative law scholars

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[34] *United States v. Nichols*, 784 F.3d 666, 671-72 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc).

[35] *Gutierrez-Brizuela v Lynch*, 834 F3d 1142, 1154 (CA 10, 2016) (Gorsuch, J., concurring and citing *Michigan v. EPA*, —— U.S. ——, 135 S.Ct. 2699, 2713–14 (2015) (Thomas, J., concurring); *cf. City of Arlington v. FCC*, —— U.S. ——, 133 S.Ct. 1863, 1877–79 (2013) (Roberts, C.J., dissenting).

[36] Pereira v. Sessions, --- S.Ct. ---- (2018), 2018 WL 3058276, *14. *See* Rachel E. Rosenbloom, A win for Immigrants and Cloud over Chevron at High Court, June 22, 2018, https://www.law360.com/articles/1056048/a-win-for-immigrants-and-cloud-over-chevron-at-high-court.

[37] *Id.*, citing *Arlington v. FCC*, 569 U.S. at 312–328 (ROBERTS, C.J., dissenting), 133 S.Ct. 1863; *Michigan v. EPA,* 576 U.S. ——, ——, 135 S.Ct. 2699, 2712–2714, 192 L.Ed.2d 674 (2015) (THOMAS, J., concurring); and *Gutierrez–Brizuela v. Lynch,* 834 F.3d 1142, 1149–1158 (C.A.10 2016) (Gorsuch, J., concurring).

[38] *Id.*

have "leveled a forest" since 1984 exploring and attempting to explain the theoretical underpinnings, the justifications and the limits of the *Chevron* doctrine,[39] and more than thirty years later, the debate continues in the courts and in the academy.[40] While it is well beyond the scope of this article to comprehensively address this forest of scholarship, it is worth taking a moment to identify the main rationales given for the doctrine, because they surface in contemporary questions about its reach.

1. Legislative delegation

Prior to *Chevron*, courts recognized and generally deferred to agency interpretations and rules where Congress had explicitly delegated rulemaking authority to an agency.[41] The essential move of the *Chevron* decision was to equate statutory "gaps" or ambiguities with those explicit legislative delegations of authority and to extend to agency interpretations filling those gaps the deference that had traditionally been given to exercises of explicitly delegated authority.[42] This concept of *implied* legislative delegation to the agency was articulated prominently by the Court in the *Chevron* decision itself and was the principal traditional theoretical justification for *Chevron*'s preference for agency decision-making: If Congress is the primary legislative body, deference should be given to any body to which Congress has delegated that legislative authority, whether explicitly or implicitly.[43] Professor Strauss describes "Chevron space" as a "consequence of delegation"[44] and as:

> the area within which an administrative agency has been statutorily empowered to act in a manner that creates legal obligations or constraints--that is, its delegated or allocated authority. The whole idea of "agency" is that the agent has a certain authority, a zone of responsibility legislatively conferred upon it. [45]

Much of the early force of the *Chevron* doctrine rested in the separation of powers argument that deference to the delegated authority of the agency was indirectly deference to the principal law-making function of Congress.

However, this stated basis for the Court's decision has been roundly criticized and debunked as a legal fiction with no basis in legislative reality.[46] Justice Scalia opined early on that gaps

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39 Strauss, 1144.

40 #s of citations in cases and articles.

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42 Merrill/Hickman 89 Geo L J 833, 834.

43 Cite to Chevron. *See also, King v. Burwell* 135 S. Ct. 2480, 2488–89 (2015)(explaining that Chevron deference "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps" but ultimately holding that Congress did not intend such a delegation in that case).

44 Strauss, 112 Colum. L. Rev. 1143, 1146.

45 Strauss, 1145.

46 Herz, 1876 ("…. [I]t is hard to find anyone who does not consider congressional delegation a fiction," citing e.g., David J. Barron & Elena Kagan, Chevron's Nondelegation Doctrine, 2001 Sup. Ct. Rev. 201, 212-25 (concluding Chevron does not rest on actual

in statutory frameworks in the vast majority of cases likely did not indicate any congressional intent whatsoever but rather that Congress "didn't think about the matter at all,"[47] and then-Judge Neil Gorsuch dismissed implied legislative delegation in a 2016 concurring opinion as "no more than a fiction — and one that requires a pretty hefty suspension of disbelief at that."[48] Indeed, Abbe Gluck argues persuasively that the modern trend toward "unorthodox" lawmaking and large, extremely complex and "messy" statutes[49] makes it increasingly likely both that such inadvertent gaps will result and that they will reflect no intention at all on the part of Congress to delegate anything.[50] Even the *Chevron* decision itself recognizes that Congress's failure to speak on a particular detail might have been "inadvertent."[51]

As criticism of the fiction of delegation mounted, reliance on it as the justification for *Chevron* deference correspondingly dwindled. But it has not disappeared by any means. Many of the recent cases eschewing deference have done so with the explanation that, for one reason or another, it was unlikely that Congress intended to make such a delegation to a particular agency in the specific context at issue.[52]

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congressional intent); Lisa Schultz Bressman, Reclaiming the Legal Fiction of Congressional Delegation, 97 Va. L. Rev. 2009, 2009 (2011) ("The framework for judicial review of agency statutory interpretation rests on a legal fiction: Congress intends to delegate interpretive authority to federal agencies whenever it fails to resolve clearly the meaning of statutory language."); Abbe R. Gluck, What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation, 83 Fordham L. Rev. 607, 613 (2014) ("[I]n contrast to most of the other interpretive rules, there is widespread agreement about Chevron's source: the Court created the doctrine."); Ronald J. Krotoszynski, Jr., Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore, 54 Admin. L. Rev. 735, 749 (2002) ("Chevron deference revolves around the fiction of a congressional delegation ...."); Scalia, supra note 31, at 517 (noting "any rule [regarding congressional allocation of interpretive authority] represents merely a fictional, presumed intent"); Sunstein, Beyond Marbury, supra note 29, at 2589-91 (describing proposition Congress has delegated authority to executive as "fiction").)

47 Scalia at 517 (describing implied congressional delegation as "a fictional, presumed intent"). *See also,* Merrill 759 ("Even Chevron's most enthusiastic champions admit that the idea of an 'implied delegation' is a fiction.").

48 *Gutierrez-Brizuela v Lynch*, 834 F3d 1142, 1153 (10th Cir. 2016)(J. Gorsuch conc.).

49 Gluck, Imperfect Statutes, 76, 110.

50 Gluck, 96 ("One way to understand all of this is to view the Court's sidestepping of Chevron [in *King v. Burwell*] as actually a new doctrinal move: namely, that not every ambiguity in an imperfect and complicated statute creates interpretive space for the agency.").

51 467 U.S. at 865 (referring to "the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency").

52 *See*, e.g., *King v. Burwell*, 135 S. Ct. at 2488 (explaining that the *Chevron* framework "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps"); [Add UARG.]

2. Agency Expertise

Another justification offered for agency deference is that the agency, because of its focus, has expertise in the subject matter at hand. The *Chevron* court, faced with a technical question of the relative merits of different approaches to controlling industrial air pollution, acknowledged that a full understanding of the policy implications of the question "depended upon more than ordinary knowledge"[53] and that the justices were "not experts in the field."[54] In light of its lack of expertise, the Court found it preferable to leave the policy question for the agency to answer. The Court subsequently described "practical agency expertise" as "one of the principal justifications behind Chevron deference."[55] The Court has waffled nonetheless in how it has described the sort of expertise that should justify deference. Does expertise refer to a technical or scientific expertise in the field of regulation as it did in *Chevron*?[56] To "the way the real world works" in the implementation of the statute?[57] Or to the complicated workings of a statutory scheme?[58] The Court has not resolved this question, and, perhaps correspondingly, it and lower courts have varied in the weight they have given to agency expertise in deference decisions.

It also appears that courts have varied in the levels of deference they have been willing to give different agencies according to their perceptions of the general levels of expertise, capacity and oversight in those agencies.[59] One study revealed that courts granted the most substantial deference in cases arising in the technically complicated areas of environmental science, energy regulation, intellectual property, pension regulation, and bankruptcy.[60] On the other hand, courts have proven less willing to cede to claims of agency expertise where they perceive problems of bias or dysfunction in an agency.[61] For example, a comparative study of the effects of *Chevron* on administrative law decisions found that while the doctrine

53 467 U.S. at 844.

54 467 U.S. at 865.

55 Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 651-52 (1990), cited in Chaffin, fn 102, p 525. Justice Scalia, in turn, stated his position that while agency expertise may be a practical benefit of *Chevron* deference, it was not theoretically sufficient to justify it. Scalia, 514.

56 Example of later case involving scientific/tech knowledge.

57 Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. at 651.

58 Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191, 2203 (2014).

59 *See* Pildes, Institutional Formalism, 28-30, discussing "unique patterns of judicial review" for certain agencies according to the trust of the court in the agency, the complexity of the subject matter, the potential political bias of the agency, and other factors ("Empirical studies confirm what common sense suggests: courts engage in institutional realism at least some of the time. Not all agencies are treated the same.") /// /// *See also,* Peter H. Schuck & E. Donald Elliott, To the Chevron Station: An Empirical Study of Federal Administrative Law, 1990 Duke L.J. 984, 1043 (1990) (noting marked statistical differences in the effect of the *Chevron* decision on decisions from different agencies).

60 Pildes, 29, citing Eskridge and Baer, 96 Georgetown L J at 1083, 1173-74.

61 Pildes, 29, citing Jeffrey M. Hirsch, Defending the NLRB: Improving the Agency's Success in the Federal Courts of Appeals, 5 F1U L Rev 437, 451 (2010).

generally increased deference to agencies, it seemed to make courts no more willing to defer to decisions by the legacy Immigration and Nationality Service,[62] a difference one commentator attributed to "judicial knowledge of the dysfunctionality of that particular agency."[63]

One way to understand the Supreme Court's rejection of the *Chevron* framework in *King v. Burwell* is as a rejection of the IRS as an expert in the field of health insurance regulation that was the main subject of the ACA. The Court responded to but did not dwell on the reality that complex statutory schemes now often implicate different federal agencies to different degrees and may involve them in peripheral ways in fields in which they are not truly expert.[64]

And finally, some commentators have questioned whether being immersed in the day-to-day implementation of a statutory scheme necessarily makes an agency a better decision-maker than a court, regardless of specialized knowledge. Some have argued that agencies can develop "tunnel vision," causing them to act without sufficient regard for larger normative frameworks such as the Constitution.[65] Others argue that agencies that work regularly with certain interested parties or industries can become "captured" by those special interests and lose their regulatory independence.[66]

Such concerns for agency independence, capacity and expertise have led some Supreme Court justices and some scholars to argue for a completely new regime that would condition levels of judicial deference on "the type of agency, the agency's track record, the agency's expertise, the level of presidential and congressional control over the agency, and the timing of the agency's action."[67]

3. Policy question for which political accountability is desirable

"Chevron imagines the agency as a policymaker, appropriately responsive to the political views of the President in office at any given time."[68] The *Chevron* Court described the subject of the contested decision-making at issue in that case as "policy-making" and as "assessing the wisdom of [ ] policy choices and resolving the struggle between competing views of the

62 Shuck and Elliott, Chevron Station, 1043.

63 Pildes, 29, n. 84.

64 King reaction blogs.

65 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, 1174–75 (2008)

66 [refine this fn] Pildes 21 et seq. fn 53-4.

67 *See* Anne Joseph O'Connell, Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State, 94 Va. L. Rev. 889, 980 (2008). *See also* Articles by Justices Kagan and Breyer advocating different levels of deference depending on which executive voice speaks and/or whether agency is exec or independent. Cited in Pildes.

68 Strauss, 1146-7.

public interest."[69] The Court held that this function of formulating "policy" was most properly left to the political branches, which could ultimately be held accountable by their constituents for these normative choices: "[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."[70]

If an agency has authority and capacity to engage in policy-making, the next question is what constitutes a question of "policy" on which its action should receive deference. *Chevron*'s first step narrows this inquiry by excluding questions found to require only statutory interpretation, because any policy decisions already made by Congress should simply be implemented. From there, the doctrine originally seemed to presume that any remaining ambiguity would be resolved by having the agency weigh the relative merits of substantive policy alternatives and choose among them based on their normative value in light of the public interest. However, over time, it became clear that the line between legal interpretation and substantive policy decisions could be fuzzy. Some of the implementation work of agencies turned out to be more akin to interpreting statutory language than filling in substantive policy gaps. Many courts and commentators began to describe this generally as the "interpretive authority" given to agencies over the statutes they administer[71] and to debate whether such "law-like" interpretive activities were deserving of as much deference as more substantive policy choices.[72] Michael Herz has attempted to clarify the difference, distinguishing between two possible meanings of the word "construction" as applied to a statute: (1) construing (interpreting) statutory language and (2) "constructing" policy, that is, "making a normative, policy-based, prescriptive decision"[73] "in the space Congress left for the agency to work within."[74] Courts have not always been consistent in distinguishing these

69 865-66.

70 866.

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72 Kanstroom, Herz/

73 Herz, Chevron is Dead, 1883, citing support from Elizabeth V. Foote, Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters, 59 Admin. L. Rev. 673, 684-708 (2007) (making extended argument that treating agency implementation of statutes as being "statutory interpretation" is both incorrect and harmful); Herz, Deference Running Riot, supra note 58, at 196-200 (arguing Chevron deference applies to agency policymaking but not agency "interpretation" in sense of determining what it is Congress has done); Richard J. Pierce, Jr., How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss, 59 Admin. L. Rev. 197, 200 (2007) ("Step two ... does not ... authorize agencies to 'interpret' statutes .... [I]t recognizes that institutions may choose among competing constructions of a statutory provision that is within the range of meanings that the statutory language can support .... An institution can make that choice only by engaging in a policymaking process." (footnotes omitted)).

74 Herz 1891. Francis Lieber per Herz: "distinction between interpretation and construction. Interpretation was the narrower task, consisting of "the discovery and representation of the true meaning of any signs used to convey ideas."135 Every text requires interpretation," 1894.

types of activity or in deciding whether they are equally worthy of deference, often deferring under *Chevron* to agency interpretation of statutory language that does not appear to implicate traditional notions of policy-making.

C. An Active Doctrine or Too Often "Ignored, Disparaged, and Distinguished"?

And so, with the high court itself jostling over the theoretical underpinnings and limits of *Chevron* doctrine, the Supreme Court and lower courts have applied the doctrine's two (or three) steps through the years, leaving a trail of jurisprudence in which scholars have struggled to find coherence. In fact, empirical studies have found a distinct lack of coherence, revealing that courts have been "inconstant" and unpredictable in their practice with regard to *Chevron*.[75] Scholars have found that courts apply the doctrine inconsistently and much less often than might seem to be warranted by its terms.[76] They also observe that it has been applied less frequently as time goes on.[77]

There appears to be a difference, too, between the sway of the doctrine in the Supreme Court and its influence in the lower courts. As noted, the Supreme Court in recent terms has seemed to find any number of ways to evade exercising *Chevron* deference, so much so that it

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""Construction is the drawing of conclusions respecting subjects, that lie beyond the direct expression of the text, from elements known from and given in the text--conclusions which are in the spirit, though not within the letter of the text."" 1894.

[75] Strauss, 1144, citing, e.g., 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, 1090 (2008) (arguing in most cases courts "rel(y) on ad hoc judicial reasoning"); Orin S. Kerr, Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals, 15 Yale J. on Reg. 1, 59-60 (1998) (concluding existing models of Chevron doctrine do not predict actual outcomes); Cass R. Sunstein, Law and Administration After Chevron, 90 Colum. L. Rev. 2071, 2075 (1990) (noting Chevron "raises at least as many questions as it answers").

[76] Id. *See also,* Thomas J. Miles & Cass R. Sunstein, Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron, 73 U. Chi. L. Rev. 823, 825-26 (2006) (detailing the results of an empirical study showing that the Justices of the Supreme Court and the judges of the courts of appeals apply Chevron based on their own politics); and Linda Jellum, Rise and Fall, at 145, citing Linda Jellum, Chevron's Demise: A Survey of Chevron from Infancy to Senescence, 59 Admin. L. Rev. 725, 772-73 (2007) [hereinafter Jellum, Chevron's Demise] (noting decrease in Chevron citations in Supreme Court terms from 2003-2006, compared to the early 1990s); Ann Graham, Searching for Chevron in Muddy Watters: The Roberts Court and Judicial Review of Agency Regulations, 60 Admin. L. Rev. 229 (2008) at 231 (reviewing eleven Roberts Court decisions reviewing agency action, only one of which applies the *Chevron* docrine); See Connor N. Raso & William N. Eskridge, Jr., Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases, 110 Colum. L. Rev. 1727, 1740-64 (2010) (examining 1014 post-Chevron Supreme Court cases and finding that the Court only used Chevron in a third of the cases where it should have applied).

[77]

has been described as a "doctrine to ignore, disparage or distinguish" in that Court.[78] The 2015 Court term included so many important cases that appeared to weaken *Chevron* that it has been described as "potentially a watershed moment"[79] and even "*annus horribilus*" for the doctrine.[80] Justice Alito recently described *Chevron* as "an important, frequently invoked, once celebrated, and now increasingly maligned precedent."[81] And as noted, Justice Kennedy made it one of his last actions on the Court to call for its reconsideration.[82] Furthermore, well before the 2015 term, empirical studies showed that the Court applied *Chevron* deference in only a very limited percentage of the cases in which it would have seemed to apply.[83]

Nevertheless, the doctrine continues to exert enormous power in the lower federal courts. In a recent study of 1561 cases in the federal circuit courts, Kent Barnett and Christopher Walker found that the *Chevron* framework was applied to agency decisions 75% of the time in the courts of appeals.[84] Of those decisions subjected to *Chevron* analysis, the vast majority – 70% – made it to Step Two, in which the court was required to defer to any reasonable agency interpretation, and, not surprisingly, in an even greater percentage of those cases, the agency prevailed.[85] Fully 94% of agency interpretations were upheld at Step Two.[86] In fact, Barnett and Walker found that there was a difference of nearly twenty-five percentage points in the overall rate at which government agencies won cases depending on whether the circuit court applied the *Chevron* framework or not – the agencies won 77% of cases in which they applied *Chevron* and 53% of cases in which the court considered the question but declined to grant deference.[87] Acknowledging that the doctrine's record is considerably different in the Supreme Court, Barnett and Walker nonetheless conclude simply and with considerable understatement that the choice to apply *Chevron* deference "seems to matter in the circuit courts."[88] The *Chevron* doctrine continues to be vitally important in the practice of administrative law in the lower courts, where the vast majority of cases are resolved. As

78 Barnett & Walker, citing Herz.

79 Herz 1868-9, citing others.

80 Jody Freeman, The Chevron Sidestep: Professor Freeman on King v. Burwell, http://environment.law.harvard.edu/2015/06/the-chevron-sidestep/.

81 Pereira v. Sessions, --- S.Ct. ---- (2018), 2018 WL 3058276, *15.

82 Pereira v. Sessions, --- S.Ct. ---- (2018), 2018 WL 3058276, *14.

83 Eskridge & Baer, Continuum of Deference, at 1124-25 (Court applied *Chevron* deference in only about one quarter of cases); cited in Barnett & Walker, Chevron in the Cir Cts, at 17 (also citing Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 YALE L.J. 969, 992 (1991)).

84 Barnett & Walker, at 31.

85 *See,* Merrill – Judicial Deference, 101 Yale LJ 969, 970, 1992 (observing that Chevron's two-step formulation transforms deference doctrine into "a regime with an on/off switch"), cited at Pappas, 982.

86 Barnett & Walker, at 31.

87 Barnett & Walker, at 29.

88 Barnett & Walker, at 5 (leading the authors to postulate the existence of a "*Chevron* Supreme and a *Chevron* Regular").

Thomas Merrill put it, "for every case in which the [Supreme] Court confronts a Chevron question, thousands are decided by the lower courts."[89]

III. *Chevron* Deference to the Justice Department in Asylum and Withholding Cases

We turn now to the application of the *Chevron* framework in the context of asylum and withholding of removal law. We will begin this section with a brief discussion of why I believe the question of *Chevron* deference in humanitarian protection has not been definitively settled (despite a number of Supreme Court cases stating that the doctrine applies) and the inconsistent history of *Chevron* deference in immigration cases. Then I will turn to the main subject at hand and apply the principles of contemporary *Chevron* jurisprudence to the question of whether deference should be applied to the decisions of the Board of Immigration Appeals and the Attorney General under the Refugee Act.

A. Existing Case Law on *Chevron* in Immigration Cases and Refugee Act Claims

The Supreme Court and lower courts have stated repeatedly and without much analysis that the *Chevron* framework applies to asylum and withholding of removal law, but they have never engaged in a robust analysis that takes into account the unique features of these Refugee Act provisions, and they have not examined the question in recent years in light of the nuances of contemporary *Chevron* doctrine.

The Court first observed that *Chevron* deference would apply to some aspects of asylum adjudications in the 1987 decision of *Cardoza-Fonseca.*[90] The observation came in *dicta* because the Court decided the case on the "pure question of statutory construction" of the INA provisions for asylum and withholding.[91] The Court distinguished the narrow legal question before it (of whether the asylum and withholding standards were identical) from a hypothetical question about the concrete meaning of the phrase "well-founded fear." The Court offered the observation that the latter phrase was ambiguous and that courts would need to respect the agency's adjudicatory interpretations giving it concrete meaning case by case, citing to *Chevron* – a good indication that the Court was assuming that *Chevron* deference would apply to the agency's decisions interpreting a well-founded fear (though it did not say so directly).[92] However, the Court's observation was not essential to its decision and involved no further discussion or analysis of *Chevron*'s applicability in the context of provisions enacted in the Refugee Act – which the Court did acknowledge was enacted with the express congressional intent of bringing U.S. refugee law into compliance with the

[89] Merrill, Step Zero after City of Arlington, 83 Fordham L.Rev. 753, 783 (2014). [original does not have italics on Chevron]. *See also, Cardoza-Fonseca*, 480 U.S. at 454 (Blackmun, conc.) (recognizing in 1987 that *Chevron* had already been "an extremely important and frequently cited opinion, not only in th[e Supreme] Court but in the Courts of Appeals").

[90] Cardoza-Fonseca. 480 US 421.

[91] Cardoza-Fonseca, 480 US at 446.

[92] Cardoza-Fonseca, at 448.

country's international obligations under the Geneva Convention on the Status of Refugees and the 1967 Refugee Protocol.[93]

Since that time, the Court has gone on to hold directly that *Chevron* deference is due in asylum and withholding cases, but an examination of these cases reveals a simple reliance on the *dicta* in *Cardoza-Fonseca* and a continuing lack of robust and specific *Chevron* analysis, especially in light of subsequent developments in the jurisprudence. In 1999, the Court held in *INS v. Aguirre-Aguirre* that it was "clear" that principles of *Chevron* deference applied to the statutory scheme of withholding and overturned a circuit court of appeals decision for failing to give deference to a BIA interpretation.[94] The Court relied on the fact that Congress charged the Attorney General in a general way with broad powers to implement and interpret the INA and to determine eligibility for relief in individual cases.[95] The Court also recognized that deference in the immigration context generally was "especially appropriate" because of the political nature and potentially sensitive foreign relations implications of immigration decisions.[96] But the Court relied on *Cardoza-Fonseca* and these general principles without otherwise engaging contemporary *Chevron* case law or discussing the international roots of the Refugee Act provisions or even engaging in a particularly robust Step One analysis. Most notably, though the Court cited to *Cardoza-Fonseca* for the proposition that Congress had passed the Refugee Act with the intention of complying with the 1967 Refugee Protocol, it declined to follow that case's lead in looking to international understandings of the Protocol to construe the statutory language in a Step One analysis.[97]

In 2009, the Court again addressed *Chevron* deference in the asylum and withholding context in the case of *Negusie v. Holder*, citing *Aguirre-Aguirre* for the proposition that "it is well settled that 'principles of *Chevron* deference are applicable to this statutory scheme.'"[98] But again, the Court did not take a fresh look at the question in light of the development of *Chevron* principles, and it did not look specifically at the propriety of deference to provisions of the

[93] Cardoza-Fonseca, at 436 [check this***] – congressional intent to bring US into compliance with the Protocol/Convention. The United States was not a party to the original 1951 Convention, which specifically addressed and was limited to refugees created in Europe by World War II and its aftermath, but its signing of the 1967 Protocol bound it to the Convention's terms. Full citation to Protocol if it hasn't happened yet.

[94] INS v. Aguirre-Aguirre, 526 US 415, 424 (1999).

[95] 526 at 424, citing 8 USC §1253(h)(1), §1253(h)(2) and §1103(a)(1).

[96] 526 at 425, citing INS v. Abudu, 485 U.S. 94, 110, 108 S.Ct. 904, 99 L.Ed.2d 90 (1988)(case involving a motion to reopen deportation proceedings).

[97] 526 US at 428-29 (dismissing proffered UNHCR guidance on the language as merely a "useful interpretative aid" that the BIA was free to ignore if it so chose and holding that the reviewing court was bound to accept this interpretation as "fair and permissible").

[98] 555 US 511 (2009), citing Aguirre-Aguirre, 526 US at 424 ("Because the Court of Appeals confronted questions implicating 'an agency's construction of the statute which it administers,' the court should have applied the principles of deference described in Chevron.").

Refugee Act. Rather, it relied on rationales for deference in immigration matters generally, which it lifted almost verbatim from *Aguirre-Aguirre*.[99]

And despite this line of case law and other cases counseling deference in immigration generally, the Supreme Court and lower courts have found many ways and reasons over the years to to avoid deferring to the BIA and the Attorney General in immigration cases. For example, as noted above, the Supreme Court avoided deference to the BIA in *Cardoza-Fonseca* by recognizing judicial primacy in pure statutory construction, looking to legislative history to divine congressional intent and inaugurating *Chevron*'s Step One.[100] In 2001, the Court again declined to proceed to *Chevron*'s Step Two in two important cases – *Zadvydas v. Davis* (challenging indefinite immigration detention) and *INS v. St. Cyr* (challenging the retroactivity of recently imposed bars to relief from deportation).[101] In both cases, the Court disposed of the questions using Step One statutory construction principles. In the 2011 case of *Judulang v. Holder* challenging the agency's implementation of a waiver of deportation, the Court again rejected the government's argument for *Chevron* deference, this time on the grounds that the question did not involve the interpretation of any direct statutory language, and the Court instead reviewed the agency's policy under the Administrative Procedures Act's "arbitrary and capricious" standard.[102] In 2017, in *Esquivel-Quintana v. Sessions,* a case about the immigration consequences of a conviction, the Court again sidestepped *Chevron* deference by going to some lengths to hold that the INA was "unambiguous" in its (undefined) use of the phrase "sexual abuse of a minor."[103] And most recently, in *Pereira v. Sessions*, the Court again found a lack of ambiguity that allowed it to avoid *Chevron*, relying on the "plain text, the statutory context, and common sense" to hold that a "Notice to Appear" must include all the statutory elements in order to trigger the "stop-time" rule that limits eligibility for the relief of cancellation of removal.[104]

It is also worth noting that there are broad areas of adjudication under the INA – even very active areas in which the agency could be argued to have developed its expertise on questions within its regulatory authority – on which the BIA is given no deference whatsoever. For example, courts do not defer to the Board on constitutional questions.[105] Nor do they defer on applications of the categorical analysis used to determine whether a

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99 555 U.S. at 516-17

100 Cardoza-Fonseca, 480 U.S. at 446.

101 Zadvydas, 533 U.S. at 699 (applying the doctrine of constitutional avoidance in Step One and thus failing to find any ambiguity in the statute); and I.N.S. v. St. Cyr, 533 U.S. 289, 320 n. 45 (2001) (applying statutory interpretation principles of retroactivity in Step One and finding no ambiguity in the statute: "Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, there is, for Chevron purposes, no ambiguity in such a statute for an agency to resolve." [internal citations omitted]).

102 Judulang v. Holder, 132 S. Ct. 476, 484 n. 7 (2011) (case challenging agency's interpretation of the scope of the old §212(c) waiver).

103 Esquivel-Quintana v. Sessions, No. 16-54, 2017 WL 2322840 (May 30, 2017)

104 Pereira v. Sessions, --- S.Ct. ---- (2018), 2018 WL 3058276, *3.

105 case stating that BIA is due no deference on constitutional questions.

conviction will trigger immigration consequences, a complex area of law that is relevant to the application of such concepts as removability, inadmissibility and "good moral character" as defined in the INA. Though this analysis is an active area of BIA adjudication and integral to the enforcement of the INA's grounds of removal and inadmissibility, the Supreme Court has held and the Board itself acknowledges that it is due no deference in its application of the categorical approach.[106] This is because the approach requires the analysis of the elements of criminal statutes underlying the prior convictions, an area in which the Board has no particular expertise in comparison to reviewing federal courts that regularly apply and interpret criminal statutes.[107]

And finally, many courts have historically resisted deferring to the Board and the Attorney General on immigration decisions, for reasons that appear to range from a lack of confidence in the competence of the Board to concerns about its objectivity as an adjudicator. Studies going back to 1990 have found that courts have been less deferential to BIA decisions than to the decisions of most other agencies.[108] Even earlier, Justice Blackmun, concurring in the decision in *Cardoza-Fonseca* in 1987, was blunt in finding fault with the then-INS for failing to adequately develop the asylum standard that had been "entrusted to its care," finding that the agency had allowed itself to be mired in "years of seemingly purposeful blindness" and had developed a standard that was "strikingly contrary to plain language and legislative history."[109] More recently, Judge Richard Posner has been one of the most vocal judicial critics of the BIA. He has regularly drawn attention to the deficiencies of the Board's process and of the quality of its decisions, as, for example, in a 2005 decision in which he detailed numerous BIA decisions that had been overturned for "gaping holes" in their reasoning, mistakes, unsupported factual conclusions, procedures that constituted "an affront to [petitioner's] right to be heard," hostility and abuse inflicted by immigration judges, and ignoring elementary principles of administrative law and of

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106 Cite to a SCT case that recognizes the lack of expertise in the BIA. Moncrieffe? *See* also, *Matter of Silva-Trevino* ["Silva-Trevino III"], 26 I&N 826, 833 (BIA 2016), citing *Matter of Chairez*, 26 I&N Dec. 819, 820 (BIA 2016) (reaffirming that the application of the categorical approach is not a matter upon which the Board receives deference). See also, *** format these: "Although we generally defer to the BIA's interpretations of the INA, where, as here, the BIA construes statutes and state law over which it has no particular expertise, its interpretations are not entitled to deference." Omargharib v. Holder, 775 F.3d 192, 196 (4th Cir. 2014) (alterations and internal quotation marks omitted). "We thus review the pure legal issue in this case de novo." See Espinal–Andrades, 777 F.3d at 166; see also Vizcarra–Ayala v. Mukasey, 514 F.3d 870, 873 (9th Cir. 2008) (reviewing de novo the issue of whether California forgery is an aggravated felony). Alvarez v. Lynch, 828 F.3d 288, 292 (C.A.4, 2016)

107 Cite to language acknowledging lack of expertise in crim-imm. Silva-Trevino III?

108 Pildes, at 29 n. 84, citing Peter H. Schuck and E. Donald Elliott, To the Chevron Station: An Empirical Study of Federal Administrative Law, 1990 Duke L J 984, 1043 (finding that, in contrast to most agencies whose success rate in judicial review increased significantly in the wake of *Chevron*, the BIA's actually decreased).

109 *Cardoza-Fonseca*, 480 U.S. at 450-452.

common sense.[110] In short, Judge Posner noted that the agency had been overturned in a "staggering" percentage of the cases seen in the Seventh Circuit that term and concluded that "the adjudication of these cases at the administrative level ha[d] fallen below the minimum standards of legal justice."[111] Five different federal circuit courts refused to defer when Attorney General Michael Mukasey attempted to rewrite the method for analyzing whether a conviction should trigger deportation as a "crime involving moral turpitude."[112] A recent survey of *Chevron* deference in the circuit courts found that immigration decisions continued to be somewhat less likely to receive deference than other types of agency decisions.[113]

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110 Benslimane v. Gonzales, 430 F.3d 828, 829-30 (7th Cir 2005)

111 Benslimane v. Gonzales, 430 F.3d 828, 829-30 (7th Cir 2005), citing *Niam v. Ashcroft,* 354 F.3d 652, 654 (7th Cir 2003). Numerous commentators have also chronicled the dysfunction of the immigration adjudicatory system, which has only worsened since 2005. *See,* e.g., Shruti Rana, Chevron Without the Courts? The Supreme Court's Recent Chevron Jurisprudence Through an Immigration Lens, 26 GEORGETOWN IMMIGRATION LAW JOURNAL 313, 319 (2012) (describing the system as "beset with so many severe problems—from overburdened courts and an enormous backlog of cases, to charges of bias, to endemic mistakes, to widely inconsistent decision making"); and Andrew Tae-Hyun Kim, RETHINKING REVIEW STANDARDS IN ASYLUM, 55 Wm & Mary L Rev 581, 585, 608-23 (2013) (describing the lack of resources for immigration judges, significant inconsistencies in rates of favorable decisions, political bias among immigration judges and BIA members, and the lack of meaningful review at the agency).

112 Attorney General Holder, in vacating Mukasey's decision in 2015, cited "the decisions of five courts of appeals rejecting the framework set out in Attorney General Mukasey's opinion--which have created disagreement among the circuits and disuniformity in the Board's application of immigration law--as well as intervening Supreme Court decisions that cast doubt on the continued validity of the opinion…." MATTER OF CRISTOVAL SILVA-TREVINO, RESPONDENT, 26 I. & N. Dec. 550, 553, 2015 WL 1754705, at *4.

[Courts of appeals cases on Silva-Trevino demonstrating the mutiny by the circuits. We should keep only those that refused deference to Silva-Trevino. Check these citations and descriptions from the BIA VLL:] Jean-Louis v. Att'y Gen., —F.3d—; 2009 WL 3172753 (3d Cir. 2009) - does not accord deference to AG's "realistic prbability" requirement. Mata-Guerrero v. Holder, —F.3d—, 2010 WL 4746189 (7th Cir. 2010) - accords deference; Fajardo v. U.S. Att'y Gen., 2011 WL 4808171 (11th Cir. 2011) – does not accord deference; Prudencio v. Holder, 669 F.3d 472 (4th Cir. 2012) – does not accord Chevron deference; rejects reasoning. Guardado-Garcia v. Holder, 615 F.3d 900 (8th Cir. 2010) – declined to apply; Da Silva-Neto v. Holder, 680 F.3d 25 (1st Cir. 2012) – declined to rule on 3rd prong of test, but noted its controversy among the circuits. Nino v. Holder, 690 F.3d 691 (5th Cir. 2012) – declined to rule on; Marin-Rodriguez v. Holder, 2013 WL 819383 (7th Cir. 2013) – cites favorably; Olivas-Motta v. Holder, 2013 WL 2128318 (9th Cir. 2013) – disagrees with; does not accord Chevron deference

113 Kent Barnett & Christopher J. Walker, CHEVRON IN THE CIRCUIT COURTS 115 MICHIGAN LAW REVIEW (forthcoming 2017), working draft Jan 2017, at 49.

In short, the history of judicial deference to case-by-case adjudicatory immigration decisions by the Board of Immigration Appeals and the Attorney General is not entirely consistent, but leans toward a generous standard that allows the Executive substantial latitude. By the same token, courts have sometimes been willing to subject the agency's decisions to rigorous review, with a variety of justifications. The history of deference in Refugee Act cases, more specifically, has been similar, in that courts have been inconsistent in their application of *Chevron,* applying the doctrine in many cases but not in others.

B. Application of Contemporary *Chevron* Doctrine to Refugee Act Provisions

And so we come to our question: Should the federal courts defer under *Chevron* to Justice Department decisions on provisions of asylum and withholding of removal law that originated in the Refugee Convention? First it is important to note that the law and procedure of asylum and withholding of removal are different from most other aspects of immigration law – and from other regulatory contexts – in at least a few ways that affect the salience of justifications for the application and scope of *Chevron* deference. Both the type of question at issue in humanitarian protection cases and the nature of the relationship between the agency and the regulated party distinguish this context and affect the dynamics between the branches of government implicated in setting presumptions about deference.

The most obvious way in which the law of asylum and withholding differs from much of the rest of the INA is that it derives directly from international treaty obligations of the United States under the Geneva Convention and the 1967 Protocol on the Status of Refugees. The Refugee Act imported the structure of refugee protection and even much of the language of its statutory provisions directly from the Convention.[114] Among these features was the central concept of *non-refoulement* – the prohibition against returning someone to a country where they face a likelihood of prohibited persecution – and the statutory definition of refugee,[115] as well as the language of and policy judgments behind many of the bars to protection.[116] As such, many of the Refugee Act's requirements are not based simply in statutory language or even in policy judgments made by Congress but rather in the congressional intent to comply with the international obligations to which the United States had already acceded as a signatory to the Protocol. Consequently, the implementation of these provisions likewise implicates those international obligations rather than just the normal *Chevron* considerations of deference to congressional lawmaking, balance of powers, agency expertise, and judicial restraint.

Another significant difference between this and many other areas of administrative law is that asylum and withholding law operates in a context in which an individual – by definition a vulnerable one claiming a risk of persecution in their country of origin – is facing the full enforcement power of the federal immigration agencies. While this legal context is

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114 INS v Cardoza-Fonseca, 480 US at 437.

115 Compare Art.s * with INA 101(a)(42) and nonrefoulement language.

116 Compare Art.s * with INA 101(a)(42) and 208 and 241b3 provisions. Also regs. Criminal and persecutor bars.

considered "civil" because it is at least nominally not intended to punish,[117] it undeniably subjects individuals to harsh sanctions, including indefinite imprisonment during the pendency of removal proceedings,[118] separation from family, and deportation, a sanction that has been rightly recognized as potentially causing one to lose "all that makes life worthwhile."[119] The harshness is particularly clear in the context of asylum and withholding applications, where the applicant claims a fear of likely harm or in many cases even death if deported. The applicant's only administrative safeguards in the face of this enforcement power are in the hands of DHS and the Justice Department, the very agencies committed to the enforcement of laws restricting migration. In a political climate in which irregular migration is a perennial focus of strong political rhetoric, the context juxtaposes a particularly strong national enforcement machinery with particularly vulnerable individuals - who, as noncitizens, by definition have no access to influence the political process. This institutional structure invites abuse, while the civil and human rights context demands robust protection of a vulnerable individual. This juxtaposition contrasts with the majority of administrative contexts in which *Chevron* questions arise, many of which involve the regulation of powerful industries by agencies such as the EPA, for example. These distinctive features of the area of law will inform our application of *Chevron* to asylum and withholding of removal cases.

1. Step One: Statutory Interpretation, Congressional Intent and *Charming Betsy*

As always in *Chevron* analysis, Step One of our inquiry requires analysis of the statutory language, applying ordinary tools of statutory construction to determine how to interpret the intent of Congress in this area of law. As noted, in *INS v. Cardoza-Fonseca*, the Supreme Court held that "one of Congress' primary purposes [in passing the Refugee Act of 1980] was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, to which the United States acceded in 1968."[120] The Court majority came to this conclusion on the basis of the textual structure of the statute, which included a number of nearly verbatim provisions from the Refugee Convention, and of numerous statements of intent from the legislative history.[121]

Following immediately upon its finding of a manifest congressional intent to comply with international law, the Court concluded that it was "thus appropriate to consider what the

117 *But see* Sweeney and Scholten, Penalty and Proportionality [other articles on the punitive nature of immigration detention, deportation, etc].

118 Jennings v. Rodriguez, Demore v. Kim.

119 Ng Fung Ho v. White, 259 U.S. 276, 284 (1922); *see also* Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (holding that deportation is a drastic measure and at times the equivalent of banishment of exile).

120 INS v Cardoza-Fonseca, 480 US 421, 436–37 (1987), citing H.R.Conf.Rep. No. 96–781, p. 19 (1980), U.S.Code Cong. & Admin.News 1980, p. 160; H.R.Rep., at 9; S.Rep., at 4.

121 fn with the Stevens/Scalia disagreement about sources and reference to intl law.

phrase 'well-founded fear' means *with relation to the Protocol*."[122] This simple sentence has profound consequences for how we think about what Congress was doing in passing the Refugee Act. To the extent that it was incorporating the obligations of the Protocol into domestic law, Congress was *not* freely exercising its constitutional legislative authority to make policy choices, but was rather importing the substantive provisions already chosen by the drafters of the Refugee Convention and already agreed to by the President who signed the Convention and the Senate which ratified it. This is why it made sense to look to the Protocol for the meaning of the phrase "well-founded fear", because the Protocol and the Convention - rather than Congress's policy choices - were the substantive source of the statutory provisions.

This insight, that Congress was implementing already existing, external obligations in the Refugee Act rather than its own policy choices, in turn, has important consequences for how we should think about the provisions for *Chevron* purposes. For Step One purposes, as the majority in *Cardoza-Fonseca* recognized, it supports a statutory interpretation process that looks to international understandings of Convention obligations to identify what it was that Congress intended to comply with. Reference to international law sources and to the interpretations of sister signatory nations and judicial bodies thus assist a court in applying the "ordinary canon of statutory interpretation" that provisions should be interpreted to carry out the intent of Congress. To the extent that courts can use those international sources to construe the meaning of terms in the statute,[123] they are engaging in simple statutory interpretation under *Chevron* Step One, identifying the expressed intent of Congress, and the question of deference to an agency interpretation does not arise.[124]

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[122] INS v Cardoza-Fonseca, 480 US 421, 437; 107 S Ct 1207, 1216; 94 L Ed 2d 434 (1987), emphasis added.

[123] Such sources could include UNHCR guidance, as well as the statutes and court decisions of other signatory nations and international tribunals such as the Inter-American Court of Human Rights and the European Court of Human Rights. *See* the discussion of *Abbott v. Abbott, infra* at *** for an example of the use such sources by the Supreme Court in interpreting a statute that derives from international treaty obligations.

[124] It should be noted that this approach has never been noncontroversial. Justice Scalia, though concurring in the opinion in *Cardoza-Fonseca*, disagreed vigorously with the majority on its reliance on extra-statutory sources to determine congressional intent. He took the textualist position that the statute itself conveyed its meaning and that reference to legislative history, purpose, and the underlying Protocol was therefore both unnecessary and unwise. *Cardoza-Fonseca*, 480 US at 452-55. This difference of opinion would persist in *Chevron* jurisprudence down through the years. Justice Scalia would famously maintain his suspicion of extra-textual sources for divining congressional intent – indeed of the ability of any court to know Congress's intent at all – and insist on reliance on the statutory text alone. Scalia, 517…. Gluck, Imperfect Statutes, at 82 ("Textualism's founders were heavily influenced by the legal realists, who argued that collective legislative intent is an impossible notion."). By the same token, Justice Stevens, writing in a concurrence decades after *Cardoza-Fonseca*, confirmed again his position that even where a statute is silent, it can be appropriate to use other sources to determine congressional intent in *Chevron*'s Step One. *Negusie*, at 518 (J. Stevens, concurr.) [**Justice Stevens concurrence starts on page 528? I did find "After

However, general reference to the intent of Congress is not the only "ordinary canon of statutory construction" that supports reference to international and comparative authority in interpreting asylum and withholding provisions under *Chevron*'s Step One. The 1804 case of *Murray v. The Schooner Charming Betsy* and its progeny established the principle of statutory construction that statutes should be construed where possible to avoid conflict with international law.[125] This case law is rooted in the Supremacy Clause of the Constitution, which provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made*, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land…."[126] Relying on this constitutional prioritizing of treaty law, the Supreme Court in *Charming Betsy* held that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains…."[127] And while it is true that Congress can choose to enact domestic law that conflicts with international law, it must give a "clear indication" of that intent in order to do so.[128] Absent express language indicating such an intent, statutes should not be interpreted to conflict with international obligations.[129] This principle has become a "classic tenet of statutory interpretation"[130] based on the assumption that Congress takes into account the nation's treaty obligations and the sovereign interests of other nations when it legislates.[131] Courts thus can, should and do look to international law to interpret a statute that incorporates treaty obligations.[132]

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considering the INA's language, its legislative history, and the United Nations Protocol that Congress had implemented, the Court determined that the two standards are not the same." On page 532 in the concurrence.*****] Nonetheless, the Court as a whole undoubtedly shifted in a textualist direction during Justice Scalia's tenure (Jellum, Rise and Fall, Part I.B.3; Gluck, at 66 (arguing that the entire Supreme Court now accepts a textualist approach to statutory interpretation: "The real divide is over how a Court that unanimously agrees on the priority of text-focused interpretation sees its own role in relation to Congress's written plans.").) and the Court has never taken anything more than "guidance" from international sources of law to understand the underlying provisions of the Convention or to interpret the INA's asylum or withholding of removal provisions. INS v. Aguirre-Aguirre, 526 U.S. 415, 427-428 (1999) (holding that the "[t]he U.N. Handbook may be a useful interpretative aid, but it is not binding on the Attorney General, the BIA, or United States courts").

125 2 Cranch 64, 6 U.S. 64, 2007 A.M.C. 887, 890 (1804).

126 United States Const., Art. VI, cl. 2 (emphasis added).

127 2007 A.M.C. 887, 890 (1804).

128 Federal-Mogul Corp v US, 63 F.3d 1581.

129 Id.

130 SNR Roulements, 341 F.Supp.2d at 1341-42

131 Sale v. Haitian Centers, 509 US 155, 178 (acknowledging that a treaty obligation could provide the "controlling rule of law" over a narrower statutory provision). *See also*, F. Hoffmann-LaRoche, 542 US 155, 164-5 (2004)(assumes legislators take account of the legitimate sovereign interests of other nations, citing, *inter alia*, *Charming Betsy*).

132 F. Hoffmann-LaRoche, 542 US at 164-5.

The Supreme Court did just that relatively recently in *Abbott v. Abbott*,[133] a case involving a U.S. statute that incorporated the Hague Convention on Civil Aspects of International Child Abduction. The Court unabashedly looked to interpretations of the Hague Convention's requirements in order to interpret the U.S. statute. It appealed to ordinary principles of treaty interpretation and considered the text of the Convention, the views of the U.S. State Department on the meaning of the Convention, decisions of sister signatory states, and the purposes of the Convention.[134] Though there was an incorporating statute, the Court spent the first six pages of its legal analysis interpreting the Convention rather than the statute.[135] It is also worth noting that while it gave "great weight" to the Department of State's interpretation, it was the Department's interpretation *of the Convention*, not of the statute, that the Court considered.[136] The Court also looked to international consensus on the meaning of certain aspects of the Convention that developed after the Convention was drafted, relying on materials from scholars, international meetings, articles and books.[137] And it interpreted the Convention in light of its stated purpose of preventing the wrongful removal of children across international borders.[138]

In the same way, it would be fitting for courts to look to international and comparative law as authoritative sources in interpreting language imported into the INA from the Refugee Convention, as did Justice Stevens in *Cardoza-Fonseca* and analogous to what the Court did in *Abbott*.[139] This would require a recalibration of the way courts and the BIA have treated such sources in much of the Refugee Act jurisprudence, in which they have often been willing to bat down guidance or interpretations from non-U.S. sources as "non-binding" without engaging them substantively.[140] Asylum decisions makers would need to treat as persuasive the guidance of international bodies such as the United Nations High Commissioner for Refugees (UNHCR) and decisions of regional human rights bodies such as the Inter-American Commission and Court of Human Rights and the European Court of Human Rights on the proper interpretation of refugee protection standards rooted in the Refugee Convention.[141] They should also take seriously the interpretations of those obligations

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133 560 US 1 (2010).

134 Abbott v. Abbott, 560 US 1, 9-10 (2010).

135 560 US at 8-13.

136 560 US at 15.

137 560 at 18-19.

138 560 at 11 (citing the Convention preamble). Vienna Convention on Conventions.

139 These ambiguities represent unresolved details passed along from the international instrument itself, and the international community is the proper locus of an ongoing interpretive, adjudicative process to flesh out the meaning of the Convention's provisions. As national and international bodies around the world interpret the Convention's language, they build a body of authority on the proper meaning of the Convention. It is fair to assume that Congress intended that the Refugee Act would ensure compliance with the international obligations of the U.S. under the Convention on an ongoing basis and in conformity with evolving international understandings of the Convention's demands.

140 *See, supra* *; Aguirre-Aguirre, not binding. [BIA case on same]

141 [Abbott citation, citing {intl sources}]. Relevant sources on refugee law would include, e.g. The UNHCR Handbook, Guidance on …. [decisions from IACHR and ECHR].

incorporated into the domestic law of sister signatory states.[142] Finally, just as the Supreme Court did in *Abbott*, adjudicators would have to look to the terms, purpose, and history of the underlying Convention for guidance on interpreting its provisions and, by extension, the INA provisions enacted to incorporate it.[143]

For *Chevron* purposes, it must be noted that this analysis is a Step One enterprise when it is done by a court - ordinary statutory construction interpreting in light of congressional intent and employing the *Charming Betsy* canon of statutory interpretation. It is the court's to do without reference to any agency interpretation. It can be contrasted with the interpretation of other undefined or ambiguous terms in the INA, such as "good moral character" or "extreme hardship."[144] These (non-Convention-based) terms are, in fact, the product of congressional policy decisions in a more ordinary sense, and courts often defer to agency interpretations of them, giving the agency what Daniel Kanstroom calls "general interpretive discretion."[145] In contrast, here, where the terms derive from an external instrument with which Congress simply intended to comply, ordinary statutory interpretation weighs in favor of giving courts primary responsibility for construing those terms and of having them consult directly sources related to that external instrument.[146] This is what the Court did in *Cardoza-Fonseca*, finding that a rigorous process of statutory construction resolved the apparent ambiguity in the statute.[147]

As noted earlier, the Supreme Court has engaged in similar pre-*Chevron* analysis of other (non-Refugee Act) INA provisions. One example is the case of *INS v. St. Cyr* in 2001, applying statutory construction principles regarding retroactivity and lenity to resolve the question of whether a recent change in the INA should be applied retroactively: "Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve."[148] Because the "normal tools of statutory

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142 [examples from other countries]

143 [Abbott references to the Convention and its purposes].

144 *See,* e.g. INA 101(f) and 212(h).

145 Daniel Kanstroom, 71 Tul. L. Rev. 703, 761, Tulane Law Review, February 1997, SURROUNDING THE HOLE IN THE DOUGHNUT: DISCRETION AND DEFERENCE IN U.S. IMMIGRATION LAW

146 Furthermore, as Kanstroom notes, the interpretation of such terms is more "law-like" and less "policy-like" than many questions of statutory implementation and there is both theoretical support and precedent in the Supreme Court's *Chevron* jurisprudence for deferring less broadly to executive interpretation of such terms than to pure policy decisions. *See* Kanstroom, at 806.

147 Cardoza-Fonseca, 480 U.S. 421, 447-449 (1987) ("The question whether Congress intended the two standards to be identical is a pure question of statutory construction for the courts to decide. Employing traditional tools of statutory construction, we have concluded that Congress did not intend the two standards to be identical").

148 INS v St Cyr, 533 US 289, 320 n. 45 (2001) (citing *Landgraf,* 511 U.S., at 264, in striking down the BIA's retroactive application of the elimination of the commonly used Section

construction" resolved the question, the Court declined the Justice Department's invitation to accord *Chevron* deference to the agency's retroactive application of the new provision.[149]

Another, slightly different way of conceptualizing the dynamics created by statutes incorporating international obligations is proposed by Thomas Merrill, who suggests that courts should consider international law obligations in a *Chevron* "Step Zero" analysis in which courts would exercise independent judgment from an agency.[150] This would be analogous to the way that courts consider preliminary questions of constitutionality or preemption before considering the agency's views.[151] Such an approach would acknowledge the growing importance of international human rights instruments as an authoritative legal framework in the last 50 years[152] and would accord them interpretive primacy as the "law of the land" analogous to the Constitution under the Supremacy Clause.[153] This pre-*Chevron* consideration would befit the nature of a framework rooted in fundamental and universal human rights, which operates explicitly as a check on sovereign national powers, usually in the form of the nation's executive power. The human rights framework operates precisely by *not* deferring to a nation's potentially self-serving interpretations of its own obligations, consistent with a Step Zero *Chevron* analysis and would be in keeping with both *Chevron*'s concern for a structural balance of governmental powers and with a Step One *Charming Betsy* analysis.

In sum, courts are required to engage in a rigorous effort to interpret a statute before engaging any claim of executive deference. The ordinary canons of statutory interpretation require courts to interpret the INA's asylum and withholding provisions to implement the intent of Congress (to comply with the external obligations of the Refugee Convention) and to avoid conflict with the Convention under *Charming Betsy*. To the extent that international and comparative law sources can clarify the meaning of statutory terms or phrases that derive from the Convention - like "persecution," "well-founded fear" and "particular social group" - courts should look to and rely on those sources. This is a *Chevron* Step One (or perhaps Step Zero) exercise of determining "what the law is"[154] and requires a court to interpret directly without deference to any executive interpretation.

2. Step Two: The Question of Deference to the Justice Department on Humanitarian Protection

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212(c) waiver for individuals who had resolved criminal cases with the assumption that the waiver would be available to them).

149 *Id.* at 320 n. 45.

150 Merrill, Step Zero after City of Arlington, 83 Fordham L.Rev. 753, 785 (2014).

151 Merrill, Step Zero, at 785, fn 189.

152 [fn rise of HRts and efforts to rely on intl law in many domestic legal contexts in the US and elsewhere?]

153 Supremacy Clause. *See also,* Louis Henkin, THE CONSTITUTION AND UNITED STATES SOVEREIGNTY: A CENTURY OF CHINESE EXCLUSION AND ITS PROGENY, 100 Harv L Rev 853, 886 (1987) ("International law is the law of the land").

154 cite to Cardoza-Fonseca? or other Step One case and Marbury.

Assuming that the analysis proceeds beyond Step One statutory construction, the Supreme Court's recent *Chevron* jurisprudence also raises a number of questions about the appropriateness of deference to the Justice Department in humanitarian protection cases, even at Step Two where there may remain some ambiguity in the statute. As we've discussed earlier, the Court's recent cases have shown a willingness to conclude that Congress did not necessarily intend to delegate deference-worthy authority to a particular executive agency on every issue on which it has general administrative authority.[155] Different statutory provisions and agency actions implicate different aspects of the agency's commitments and capacity, and the Court, often referring to separation of powers concerns, has found that not all agencies and not all interpretive questions are to be considered equally appropriate for deference. "The subject matter of the relevant provision - for instance, its distance from the agency's ordinary statutory duties" is one factor that is clearly relevant in the Court's willingness to defer to agency expertise in the wake of *King v. Burwell*, where the Court declined to defer to the IRS on a question of health care policy.[156] This is one aspect of a context-specific adaptation of deference doctrine, a "more grounded, realist's stance on the deference issue" that Richard Pildes maintains courts have long taken despite *Chevron*'s broad technical claims.[157] Perhaps not surprisingly, courts defer more to agencies they trust than to those they don't.[158]

The Court's willingness to take into account the relationship between the nature of the question at issue and the institutional mandate and capacities of the agency raises a number of important questions in the immigration context generally and the refugee context specifically. First, is it ever appropriate to defer to an enforcement agency on politically sensitive questions of relief from enforcement, especially when the stakes for individual rights are so high? Second, as a practical matter, does the BIA have interpretive expertise or the institutional resources that would warrant deference on interpretation of provisions that implicate international and foreign sources of law? And finally, can treaty-mandated humanitarian protection obligations be considered matters of "policy" for which political accountability is desirable or even permissible?

a. Prosecutor as protector?

The first question of institutional mandate and capacity is fundamental: whether it makes sense as a matter of balance of powers to entrust (without a meaningful check) the

155 King. See also UARG, City of Arlington, Breyer concurrence (ambiguity alone does not necessarily indicate congressional intent to delegate authority to the executive).

156 City of Arlington, Breyer concurrence (listing factors that affect appropriateness of deference); King, *** (finding it unlikely that Congress intended to delegate deference-worthy authority to the IRS in its administration of the Affordable Care Act because of its lack of expertise in health care policy).

157 2013 Sup. Ct. Rev. 1, at 29, Supreme Court Review 2013, INSTITUTIONAL FORMALISM AND REALISM IN CONSTITUTIONAL AND PUBLIC LAW, Richard H. Pildes.

158 Pildes, at 30 ("Empirical studies confirm what common sense suggests: courts engage in institutional realism at least some of the time. Not all agencies are treated the same.").

protection of vulnerable individuals to an agency that is deeply committed to enforcing the law against those very same individuals? In other words, given the entrenched institutional commitment of the Justice Department to stopping irregular migration, does it make sense to defer to that same agency on the humanitarian protection of irregular migrants? As we will see, this question has been highlighted in the tenure of Attorney General Jeff Sessions, but the inherent institutional conflict is structural and longstanding.

i. The Department of Justice as an Immigration Enforcement Agency

The Department of Justice is one of the principal federal agencies that carries out enforcement of immigration laws as part of its "ordinary statutory duties.".[159] The Attorney General, as head of the Department, is also the nation's principal law enforcement officer.[160] While the Department is also charged with granting relief from deportation, Attorney General Sessions regularly emphasizes the law enforcement and deterrence role. For example, in a recent speech on immigration to the Criminal Justice Legal Foundation, he said, "We know whose side we're on: we're on the side of police and we're on the side of the American people."[161] He repeatedly describes a "crisis" of "lawlessness" at the border and in the immigration system (even as he cites statistics indicating that 88% of those entering illegally go on to establish a credible fear of persecution in their home countries and the legal right to seek asylum).[162] In a recent speech at the Executive Office for Immigration Review, he described the Department's commitment to enforcement:

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159 *See*, *City of Arlington*, Breyer conc. Numerous federal agencies perform immigration functions, including, most obviously, enforcement and application adjudication in the Department of Homeland Security, but also, for example, visa processing operations in the Department of State and refugee resettlement and detention of minors in the Department of Health & Human Services. Given the deep investment of the DHS in the expulsion of unauthorized noncitizens and in the deterrence of irregular migration [add some of the excised explanation and data to support?], the argument in this section - against deference to an enforcement agency - could also be made in the context of challenges to DHS decisions restricting a variety of forms of relief from removal, including for example, the decision to terminate a country's designation under Temporary Protected Status.

For purposes of *Chevron* deference in asylum and withholding cases, the decisions of the executive agencies reach the courts through Justice Department decisions, so the DOJ will be our focus here.

160 https://www.justice.gov/ag/about-office. The DOJ webpage on the Office of the Attorney General explains the history and role of the office of the AG: "The Judiciary Act of 1789 created the Office of the Attorney General which evolved over the years into the head of the Department of Justice and chief law enforcement officer of the Federal Government."

161 Attorney General Sessions Delivers Remarks to the Criminal Justice Legal Foundation Los Angeles, CA, Tuesday, June 26, 2018, https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-criminal-justice-legal-foundation

162 *See,* e.g., Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review, Falls Church, VA, Thursday, October 12, 2017

> Let's be clear: we have a firm goal, and that is to end the lawlessness that now exists in our immigration system. This Department of Justice is committed to using every available resource to meet that goal. We will act strategically with our colleagues at DHS and across the government, and we will not hesitate to redeploy resources and alter policies to meet new challenges as they arise…. I have put in place a "zero tolerance" policy for illegal entry on our Southwest border. If you cross the Southwest border unlawfully, then we will prosecute you. It's that simple.[163]

And it is furthermore discernable from the Attorney General's repeated remarks that the enforcement policies of the Department, including the prosecution of asylum seekers, are rooted in the political commitments of the administration. Sessions regularly mentions President Trump and speaks on his behalf when discussing immigration, invoking the President's election as a demonstration of the political will of the American people to "end the lawlessness" of the immigration system:

> I am convinced that the people of this country support these efforts. In the 2016 election, voters said loud and clear that they wanted a lawful system of immigration that serves the national interest. They said we've waited long enough. I believe that this is one of the main reasons that President Trump won. He promised to tackle this crisis that had been ignored or made worse by so many before him. And now he's doing exactly what the American people asked him to do.[164]

While Attorney General Sessions is more vocal about the immigration enforcement role of the Justice Department, that role is not new under his leadership. Long before the Trump administration, prosecutions for the offenses of illegal entry and illegal reentry,[165] actually represented the majority of criminal prosecutions brought nationwide by the Department. In Fiscal Year 2016, under President Obama, DOJ prosecuted 64,297 cases on just these two offenses of irregular migration.[166] This number outstripped the Department's total for *all* non-immigration-related criminal prosecutions, including for drugs, weapons, fraud and terrorism cases, which totaled 63,405 for FY16.[167] These high rates of prosecution have

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https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review; and Attorney General Sessions Delivers Remarks to the Executive Office for Immigration Review Legal Training Program, Washington, DC, Monday, June 11, 2018, https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-executive-office-immigration-review-legal.

163 Attorney General Sessions Delivers Remarks to the Executive Office for Immigration Review Legal Training Program, Washington, DC, Monday, June 11, 2018, https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-executive-office-immigration-review-legal.

164 See, e.g. Attorney General Sessions Delivers Remarks to the Criminal Justice Legal Foundation Los Angeles, CA, Tuesday, June 26, 2018, https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-criminal-justice-legal-foundation

165 *See* 8 USC §1325 and §1326.

166 *See* Table 2, Top Charges Filed, http://trac.syr.edu/tracreports/crim/446/.

167 http://trac.syr.edu/tracreports/crim/446/.

been consistent trends in the Department's allocation of its resources for the last decade,[168] demonstrating the Department's sustained investment in criminal prosecution of immigration violations. Of course, with its "zero tolerance" policy of criminally prosecuting *all* those who cross the border illegally, the Trump Justice Department has made it an even "higher priority."[169] Attorney General Sessions has encouraged U.S. Attorneys to use the full extent of the criminal law to, among other things, "deter[] first-time improper entrants" and has directed every district in the country to designate a "Border Security Coordinator" who is to convene regular meetings with DHS to coordinate immigration enforcement initiatives, training and information sharing. Finally, using a longstanding but previously seldom invoked INA provision, Sessions has given the order to for his U.S. Attorneys to bypass separate removal proceedings entirely and to directly seek judicial orders of deportation in the U.S. District Courts in "each federal [criminal] case" where it is practicable.[170]

ii. Sensitivity of the Immigration Court System to the Politicized Executive Will

The Immigration Courts and the Board of Immigration Appeals are institutionally located within this politically responsive, prosecutorial Justice Department. The National Association of Immigration Judges (NAIJ) and others have long objected to the inherent structural conflict of having the immigration courts within the Justice Department. Judge Dana Leigh Marks, past president of NAIJ, has pointed out how "highly problematic" it is to have the nominally independent immigration courts located institutionally within a law enforcement agency and serving at the Attorney General's pleasure.[171] Judge Marks points out the "untenable conflict" inherent in the fact that the Department of Justice classifies and considers both Immigration Judges and Members of the Board of Immigration Appeals to be "agency attorneys representing the United States government," the very same government that appears in every case as one of the parties before them.[172] Retired Immigration Judge and former BIA chairman Paul W. Schmidt confirms that the troubling

168 *Id.*, Figure 1: Criminal Immigration Prosecutions over the last 20 years. *See also* Michael T. Light, Mark Hugo Lopez And Ana Gonzalez-Barrera, *The Rise of Federal Immigration Crimes: Unlawful Reentry Drives Growth* (Pew Research Center, March 18, 2014) (showing that illegal reentry convictions increased 28-fold from 1992 to 2012, representing 48% of the growth in the number of individuals sentenced in federal criminal proceedings over that period).

169 [announcement of zero tolerance policy]. Attorney General Sessions memo to all federal prosecutors, *Renewed Commitment to Criminal Immigration Enforcement*, April 11, 2017, https://www.justice.gov/opa/speech/file/956856/download.

170 Attorney General Sessions memo to all federal prosecutors, *Renewed Commitment to Criminal Immigration Enforcement*, April 11, 2017, https://www.justice.gov/opa/speech/file/956856/download.

171 Marks, at 49. See also, Lory Rosenberg, *The Harm That Confirmation of Jeff Sessions as Attorney General Can Do to Immigration Law and Due Process*, http://blogs.ilw.com/entry.php?9629-The-Harm-That-Confirmation-of-Jeff-Sessions-as-Attorney-General-Can-Do-to-Immigration-Law-and-Due-Process.

172 Marks, at 50. *See also* 8 CFR §1003.1(a)(1)(identifying Board Members as "the Attorney General's delegates").

dynamics are not just theoretical, but that decision-makers feel the influence of the politically appointed Attorney General: "[T]he DOJ's … internal message to Immigration Judges and Board Members is, 'You exist to implement the power of the Attorney General, you aren't "real" independent Federal Judges.'"[173]

The influence of the politicized will of the executive is felt in the court system in any number of ways, from the bureaucratic to the jurisprudential. Former BIA Member Lory Rosenberg describes the Attorney General as having "an exclusive level of authority over the course of immigration law and policy" by virtue of the twin powers (1) to hire and fire immigration judges and BIA members and (2) to certify and decide substantive questions of immigration law.[174] Attorney General Jeff Sessions, who engaged the immigration issue for decades in the political arena and has made immigration issues one of the hallmarks of his political career, has used both of these powers aggressively in his first 18 months heading the Justice Department. He has made no secret of his skepticism of and desire to limit asylum and withholding claims or of the administration's priority of speeding up and increasing the number of deportations,[175] and he is wielding his considerable power as Attorney General in pursuit of both these goals.

On the personnel side, the Sessions Justice Department has been accused of using political considerations to shape the political leanings of the immigration bench. Despite a push to increase the number of immigration judges hearing cases, the Department has been accused of blocking or delaying the hiring of individuals provisionally offered immigration judge positions near the end of the Obama administration.[176] At the same time, it has tied challenging case completion requirements to performance standards for immigration judges, raising the specter that judges who spend more time hearing evidence and making findings to substantiate all the elements of eligibility for complex cases like asylum will be sanctioned or even fired.[177] And Sessions has not been subtle in reminding judges and Board members

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173 http://www.asylumist.com/2016/09/28/former-bia-chairman-paul-w-schmidt-on-his-career-the-board-and-the-purge-part-1/.

174 *See* Lory Rosenberg, *The Harm That Confirmation of Jeff Sessions as Attorney General Can Do to Immigration Law and Due Process*, http://blogs.ilw.com/entry.php?9629-The-Harm-That-Confirmation-of-Jeff-Sessions-as-Attorney-General-Can-Do-to-Immigration-Law-and-Due-Process.

175 Cite asylum fraud speech.

176 Letter from Representatives Elijah E. Cummings, Lloyd Doggett, Joaquin Castro, and Donald S. Beyer, Jr. to Jeff Sessions, April 17 2018, https://cummings.house.gov/sites/cummings.house.gov/files/Dems%20to%20DOJ%20re.%20EOIR%20Politicization.pdf; Jeff Sessions accused of political bias in hiring immigration judges, June 16, 2018, The Guardian, https://www.theguardian.com/us-news/2018/jun/16/jeff-sessions-political-bias-hiring-immigration-judges

177 [Sessions memo - is there something more complete than this?: http://cdn.cnn.com/cnn/2018/images/04/02/immigration-judges-memo.pdf]. Amid turmoil on the border, new DOJ policy encourages immigration judges to cut corners. Russell Wheeler, Brookings, June 18, 2018, https://www.brookings.edu/blog/fixgov/2018/06/18/amid-turmoil-on-the-border-new-doj-policy-encourages-immigration-judges-to-cut-corners/. Former Board Member Lory

that they serve at his pleasure and are expected to implement his decisions. On the same day that he issued *Matter of A-B-*, a controversial decision attempting to limit the reach of asylum law for many illegal entrants,[178] the Attorney General gave a speech to employees of the immigration court system and pointedly reminded them of the chains of command within the Department: "As the statute states, Immigration Judges conduct designated proceedings 'subject to such supervision and shall perform such duties as the Attorney General shall prescribe'."[179] Later in the same speech he emphasized: "All of us should agree that, by definition, we ought to have zero illegal immigration in this country. Each of us is a part of the Executive Branch, and it is our duty to 'take care that the laws be faithfully executed'."[180] The message to judges and Board Members appeared to be as articulated by Former Board Chair Schmidt: "You exist to implement the power of the Attorney General."

But this is not the first Attorney General to wield his power in this way. Under George W. Bush, the Justice Department engaged in both politically biased hiring and changes (and demotions) of existing personnel in a bid to shape the substance of immigration decisions. Subsequent investigations by the Inspector General and the Office of Professional Responsibility found that the Bush administration relied on improper political considerations to hire immigration judges more likely to agree with the administration's immigration policies.[181] At the same time, Attorney General John Ashcroft conducted what has been described as a "purge" of more liberal-leaning, Clinton-appointed BIA members whose views were disfavored by the incoming administration.[182] Studies have since shown that the

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Rosenberg points out that it takes more time to write a decision justifying a grant of asylum than to deny one. For this reason, the apparently neutral administrative push to speed up cases actually operates against asylum applicants and it is likely that judges sanctioned for low case completion will be those who more often grant asylum. [Cite.] [Cite to analysis contrasting Art. III fed court management systems, which take into account the relative complexity of different sorts of cases.]

178 *See infra*, discussion of *Matter of A-B-*, *** (overturning *Matter of A-R-C-G-*, which recognized domestic violence as potential grounds for asylum). For a perspective on the controversial nature of the decision in the opinion of certain retired immigration judges and BIA Members, see Retired Immigration Judges and Former Members of the Board of Immigration Appeals Statement in Response to Attorney General's Decision in *Matter of A-B-*, June 11, 2018, https://www.jeffreyschase.com/blog/2018/6/11/statement-in-response-to-matter-of-a-b-.

179 Attorney General Sessions Delivers Remarks to the Executive Office for Immigration Review Legal Training Program, Washington, DC, Monday, June 11, 2018, https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-executive-office-immigration-review-legal.

180 *Id.*

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182 Peter J. Levinson, The Façade of QuasiJudicial Independence in Immigration Appellate Adjudications 15 (2004) (conference paper delivered at the 2004 Annual Meeting of the American Political Science Association), 9 Bender's Immigr. Bull. 1154 (Oct. 1, 2004). About a week after the new Attorney General arrived in office, then-BIA Chairman Paul Schmidt was informed by the director of EOIR that the DOJ leadership no longer wanted him as Chair, despite his distinguished record. In part to avoid a fight that might damage the Board, Chairman Schmidt stepped down to the position of Board member. Within two years, Attorney General Ashcroft implemented a "reorganization" that eliminated five Board member positions; not coincidentally, the five members who were cut were the more liberal

Ashcroft "reforms" resulted in making it considerably more difficult for asylum seekers to prevail on appeal to the BIA.[183] At the same time, they are now generally agreed to have seriously damaged both the quality of adjudication in individual cases and the reputation of the agency.[184] Subsequent case law developments at the Board and in the federal courts eventually vindicated many of the legal positions taken by the purged members of the Board on such issues as the recognition of gender-based forms of persecution as grounds for asylum and the categorical analysis used to impose removability for convictions.[185]

Beyond hiring and firing, the immigration courts are subject to a range of politically motivated bureaucratic pressures within the Department of Justice. Judge Marks has used the example of the upending of the system's dockets in response to administration enforcement priorities, which began under the Obama administration.[186] That administration first prioritized the cases of Central American women and children asylum seekers following the "surge" of entrants in 2014, in an attempt to deter future irregular migration.[187] But the move served no positive purpose within the court system; to the contrary, it cast the system into considerable chaos.[188] Furthermore, the transient political nature of the prioritization decision was confirmed when the Trump administration, in a reflection of its own enforcement priorities, cancelled the policy, causing the courts to have to reshuffle dockets and case priorities once again.[189] Attorney General Sessions' recent imposition of case-completion minimums on immigration judges is another example of bureaucratic pressure being put on judges, pressure designed to allow the administration to claim credit for moving cases faster, whether or not that speedy processing allows for meaningful due process.[190]

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members, including former Chairman Schmidt, who was reassigned as an immigration judge. Lest there be any doubt as to the motivation for the "reorganization," former Chairman Schmidt reports that he was told at the time that he was being cut because the DOJ leadership did not like the substance of his decisions:

> The reason I was cut is because they did not like my opinions—Ashcroft apparently wanted a cowed, compliant Board where nobody would speak up against Administration policies or legal positions that unfairly hurt migrants or limited their due process.

http://www.asylumist.com/2016/10/05/former-bia-chairman-paul-w-schmidt-on-his-career-the-board-and-the-purge-part-2/.

183 Refugee Roulette.

184 Cite to ? Levinson, Schmidt? Rosenberg?

185 http://www.asylumist.com/2016/10/05/former-bia-chairman-paul-w-schmidt-on-his-career-the-board-and-the-purge-part-2/. *See, e.g.,* [gender based BIA/court decisions - ****]; *Descamps*, [cite]; *Mathis*, [cite]; and *Matter of Silva-Trevino*, [cite] ("Silva-Trevino III").

186 Marks 50.

187 Marks 50.

188 Marks 50. [immigration court chaos in the wake of the surge]. Asylumist blog?

189 Sessions memo.

190 Sessions quotas memo. Analysis, reaction of former IJs, BIA members.

The other prong of the Attorney General's power noted by former Board Member Rosenberg is his power to certify to himself decisions about the substantive interpretation of immigration law. As the head of the Justice Department, Attorneys General have – and have historically exercised – a highly personal authority to direct the substance of executive branch interpretation of the law. Despite the nominal independence of the immigration courts and the Board, regulations give the Attorney General the authority to unilaterally refer any legal question or case to himself and to impose his opinion as the binding interpretation for both DHS and the immigration courts, regardless of any prior BIA adjudication.[191] Attorneys General have used the power to intervene and overturn BIA case law on a variety of important legal questions, including asylum claims based on domestic violence, coercive family planning policies, and female genital mutilation; as well as the bars to eligibility for withholding of removal and the standard for protection under the Convention Against Torture.[192] These decisions are often responsive to political imperatives within a presidential administration. For example, Attorney General Michael Mukasey notoriously used this power in the waning days of the George W. Bush administration in an attempt to overturn decades of BIA and federal court case law in the *Matter of Silva-Trevino* to increase the range of convictions that would trigger deportation as "crimes of moral turpitude."[193] After eight years of chaos and inconsistent rulings in the courts (often contingent on whether or not the controlling federal circuit court deferred to the Attorney General's decision), the traditional analysis was vindicated and reinstated.[194] But thousands of people were improperly deported during those years, illustrating the very serious human consequences of giving the nation's chief law enforcement officer the power to unilaterally shape the interpretation of immigration law, even if the courts can eventually restore a legally proper interpretation.

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191 8 C.F.R. §1003.1(h)(1)(i) ("The Board shall refer to the Attorney General for review of its decision all cases that: (i) The Attorney General directs the Board to refer to him.") The INA also provides that the "determination and ruling by the Attorney General with respect to all questions of law [relating to immigration] shall be controlling." 8 U.S.C. 1103(g). Regulations also provide generally that the BIA shall be bound by decisions of the Attorney General. 8 C.F.R. §1003.1(d)(1)(i).

192 *See,* e.g., *Matter of A-B-,* 27 I.&N. Dec. 316 (A.G. 2018)(domestic violence); *Matter of R-A-*, 22 I. & N. Dec. 906 (A.G. 2001), 24 I. & N. Dec. 629 (A.G. 2008) (domestic violence. AG vacated….); Matter of J-S-, 24 I&N Dec. 520 (A.G. 2008) (coercive family planning); *Matter of A-T-*, 24 I&N 296 (2007), vacated, 24 I&N Dec. 617 (A.G. 2008), remanded to Immigration Judge, 25 I&N Dec. 4 (BIA 2009) (female genital mutilation); Matter of Y-L-, 23 I&N Dec. 270 (AG 2002)(**subject matter**); J-F-F-, 23 I&N Dec. 912 (A.G. 2006)(**subject matter**).

193 Silva-Trevino, 24 I&N Dec. 687 (A.G. 2008)… Need full citation, including subsequent history.

194 *Matter of Silva-Trevino*, 26 I & N Dec. 826 (BIA 2016)("*Silva-Trevino III*", holding that "the categorical and modified categorical approaches provide the proper framework for determining when a conviction is for a crime involving moral turpitude.").
Cite commentary on S-T.

Attorney General Sessions has made aggressive use of the authority to certify cases,[195] with the apparent goals of limiting both procedural rights and substantive legal claims, especially in the asylum arena. In certified these decisions, he describes the "extraordinary and pervasive role" that the Attorney General has over immigration matters as "virtually unique" and the power accorded him as "an unfettered grant of authority" including "broad powers."[196] In a period of less than six months in early 2018, he certified to himself and decided cases that (1) give ICE attorneys the unilateral power to keep a case from being administratively closed (to await adjudication of a petition, for example, or for other reasons), (2) struck down a published BIA case that required a full evidentiary hearing on every asylum claim, (3) overturned *Matter of A-R-C-G-*, the BIA case that recognized domestic violence as grounds for asylum in some circumstances, (4) drew broad conclusions purporting to restrict asylum in circumstances where the individual has been persecuted by a non-governmental actor (discussing specifically domestic violence and gang-related claims), and (5) authorized summary pretermission of asylum claims before a hearing.[197] In the context of the Department's new case-completion performance standards for judges (issued in the same period), the Attorney General has unilaterally set up both a legal framework and strong incentives for immigration judges to summarily deny many asylum claims quickly and without a hearing.[198] Immigration courts around the country are already issuing orders requiring respondents to submit briefs explaining why their cases should not be summarily denied under the new decisions.[199] The decision overturning *Matter of A-R-C-G-* is particularly concerning, as *A-R-C-G-* had represented the considered result of fifteen years of agency adjudication - at the immigration judge, BIA and Attorney General levels - on whether domestic violence claims should be recognized within the asylum framework.[200] And the politicized enforcement concerns that animate the decision are evident in its repeated claims to broadly limit the very types of Central American claims the administration has struggled to stem at the border - despite the fact that asylum claims are considered on a

195 While the Attorneys General under the Obama administration invoked this authority an average of once every two years, Sessions certified four cases to himself in the first three months of 2018.

196 Matter of A-B-, 27 I&N Dec. 316, ***.

197 Matter of Castro-Tum, cert Jan.4 and decision May 17; Matter of E-F-H-L-, cert and decision on Mar. 5 (without giving the parties or *amici* the opportunity to brief any issues); Matter of A-B-, cert Mar 7 and decn June 11; Matter of A-B-, 27 I&N Dec. 316, ***. *See* Are Summary Denials Coming to Immigration Court?, Jeffrey S. Chase, June 24, 2018, https://www.jeffreyschase.com/blog/2018/6/24/are-summary-denials-coming-to-immigration-court.

198 *See* Are Summary Denials Coming to Immigration Court?, Jeffrey S. Chase, June 24, 2018, https://www.jeffreyschase.com/blog/2018/6/24/are-summary-denials-coming-to-immigration-court.

199 *See*, e.g., Notice for All Asylum/Withholding/CAT Applicants, Immigration Judge Elise Manuel, Newark, New Jersey Immigration Court; Notice for All Asylum/Withholding/CAT Applicants, Immigration Judge Shifra Rubin, Newark, New Jersey Immigration Court; Scheduling Order for Matter of A-B- Cases, [Respondent information redacted], June 20, 2018, Arlington, Virginia Immigration Court (on file with the author).

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case by case basis, on their own facts and legal claims.[201] The current president of the National Association of Immigration Judges, Judge Ashley Tabaddor, has expressed concern at the Department's efforts: "A lot of what they are doing raises very serious concerns about the integrity of the system. Judges are supposed to be free from these external pressures."[202]

And so we can see that the structural dependency of the immigration courts within the Justice Department hierarchy and their vulnerability to the unilateral decisions of the politically appointed Attorney General operates on many levels to allow the Department's law enforcement mission to affect its work of rendering decisions in individual immigration adjudications. The appointment of an Attorney General like Jeff Sessions, who has long taken restrictionist positions on immigration in the political arena[203] (and of a President who is willing to tweet that unlawful entrants should be deported with no due process, "immediately, with no Judges or Court Cases"[204]) highlights the danger this can pose to individual protection, but the danger is in fact institutional and not personal to any one Attorney General or specific to any one administration. As an agency with a primary mandate for and deep investment in immigration enforcement, the Justice Department is simply not a neutral institutional home for adjudication of high-stakes asylum applications by vulnerable individuals. This is one reason that the National Association of Immigration Judges advocates for Congress to create a new, truly independent immigration court system under its Article I authority,[205] a position that has been supported by the American Bar Association, the Federal Bar Association, and an increasing number of other organizations and jurists.[206]

iii. *Chevron* and the Enforcement Agency

In the absence of such a fundamental remaking of the immigration court system, however, asylum and withholding applications will continue to be adjudicated through the Justice Department, and the federal circuit court of appeals will continue to represent an asylum applicant's first access to a decision-maker who is not part of an immigration enforcement agency.[207] How should the politically responsive, law enforcement nature of the Department

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201 Matter of AB. Broad claims about viability of DV and gang based applications. Odd reference to "Central American" DV claims (despite the applicability of ARCG worldwide), signaling deterring those claims as the true concern.

202 Sessions Pushes To Speed Up Immigration Courts, Deportations, March 29, 2018, https://www.npr.org/2018/03/29/597863489/sessions-want-to-overrule-judges-who-put-deportation-cases-on-hold

203 *See, e.g.,* [AIC brief in Matter of A-B-.]

204 cite the tweet of June 24, 2018.

205 Marks, at 51. Endorsed by the ABA, etc. [Look at the NAIJ website for details.]

206 ABA, FBA, etc. [find others]

207 Affirmative asylum applications are decided by Asylum Officers from DHS. Applications that are not approved there are referred to the immigration courts for review by an immigration judge who works for DOJ. Immigration judges also hear "defensive" asylum claims filed initially by people who are already in removal proceedings and claims for withholding of removal. Immigration judge decisions are appealable to the Board of Immigration Appeals, also part of DOJ. Applicants whose

of Justice affect the question of whether courts should extend *Chevron* deference to the Department's decisions? To frame the question from a different angle, if *Chevron* deference represents a structural presumption based on a belief that a separation of powers supports balanced governmental decision-making, does it make sense - as a structural matter - to defer to an enforcement agency's decisions to limit (or not) its own enforcement power with such high stakes for a vulnerable individual?

We have seen that the Supreme Court has in recent years repeatedly reached back to the touchstone of the balance of powers principles underlying *Chevron*, concerned more often than not about unchecked power in executive agencies. Beginning in Chief Justice Roberts' dissent in *City of Arlington*, members of the Court have expressed a growing concern about "the danger posed by the growing power of the administrative state," worried that the *Chevron* doctrine has allowed agencies to usurp both legislative power that should be held by Congress and interpretive power that should be exercised by the courts.[208] In both *Utility Air Regulatory Group v. EPA* and *King v. Burwell*, the Court balked at the importance of the question on which the administrative agency was demanding deference and found it unlikely that Congress would have intended to grant such power to the agency, especially, as in *UARG*, where the agency's resolution would have enhanced the scope of its authority.[209] Most recently, Justice Kennedy warned of the "abdication of the Judiciary's proper role in interpreting federal statutes" in *Pereira v. Sessions*.[210]

The encounter between the immigration enforcement agency, invested as it is in the enforcement mission of sanctioning and deterring irregular migration, and the persecuted and disenfranchised individual asylum applicant, is a perfect example to demonstrate the importance of these justices' concerns about the abuse of executive power. The Justice Department, whose "ordinary statutory duties" do not involve the protection but rather the prosecution of irregular migrants, has its own executive imperatives. It has every incentive to interpret Refugee Act provisions to maximize its ability to deny protection and to remove or repel those who arrive or stay in the country outside normal channels. The Attorney General, furthermore, is politically appointed and demonstrably sensitive to the volatile political consequences of irregular migration, even in the form of asylum seekers. He (or she) often acts as an instrument of the broader administration and for its political purposes. It is not at all a stretch to imagine that these incentives, pressures, and lack of accountability could color the Department's interpretations to improperly limit the availability of asylum as relief from deportation. To the contrary, history shows that they have and predictably continue to do so. Given the distorting influence of the Justice Department's structural investment in its role as an immigration enforcement agency, courts serve as a crucial check

asylum cases are denied by the BIA have the right to petition for review at the federal circuit court of appeals. [cite to INA].

[208] City of Arlington, 133 S. Ct. at 1886, Roberts dissenting (warning against "the dramatic shift in power over the last 50 years from Congress to the Executive—a shift effected through the administrative agencies" and declaring, "Our duty to police the boundary between the Legislature and the Executive is as critical as our duty to respect that between the Judiciary and the Executive.")

[209] UARG, 134 S.Ct. 2427, 2444; King at ***.

[210] Pereira at *14.

on the agency's considerable enforcement power and should rigorously review Department asylum and withholding decisions.

Alina Das, considering deference in the federal *habeas* context in the wake of *City of Arlington*, argues that the separation of powers concerns highlighted by Chief Justice Roberts in his dissent can and should affect a court's consideration of whether Congress likely intended to delegate a question to an executive agency.[211] She poses the two-sided question: (1) Are there reasons to think that Congress intended to delegate its law-making authority and (2) Are there reasons th think it would *not* delegate its authority on the particular question at issue? Das argues that the strong liberty interest at issue in *habeas* and the prominence in the Constitution of the protection of the right to petition for *habeas* relief give rise to a kind of "anti-deference" with which a court should regard the detaining executive agency, becuase Congress would have been unlike to cede primary law-making authority on such an important liberty issue to the very Executive responsible for the detention. Where an individual who has lost her liberty confronts a government agency's detention power, Das argues for the court as a robust check on agency power. She concludes that where individual liberty is at stake in a *habeas* proceeding, it is proper for the courts to exercise robust review of the executive detention decision.

This argument finds echoes in the separation of powers rationale of *Chevron*, and its principles apply equally well to the context of applications for asylum and withholding of removal. These likewise involve a strong, fundamental individual right (to the personal security inherent in humanitarian protection and to relief from persecution), guaranteed by an authoritative external source of law (the Refugee Convention), and at potential risk of abuse by an executive otherwise empowered to compromise the right (through its authority to exclude or deport individuals not authorized to be present in the country). All of these factors function as reasons Congress would not want to defer to the executive agency, as "anti-deference" factors. There are significant reasons to think that Congress would not – or may not even have the power to – delegate to the enforcement agency unchecked authority to interpret provisions implementing the nation's obligation of *non-refoulement*.[212] *Non-refoulement*, the obligation to *not* deport an individual in danger of persecution, operates in direct opposition to the executive agencies' immigration enforcement mission and authority, and it operates as a direct check on the executive power to exclude or deport. It has profound, even life-threatening consequences for individuals and is rooted in the most basic human rights. In short, it is unlikely that Congress would have intended to delegate to one of the very agencies charged with fighting illegal immigration unchecked interpretive authority over the nuanced and critically important decision of when *non-refoulement* requires them *not* to deport someone who is otherwise in the country illegally. The vital role of the courts in protecting individual liberty with checks and balances on a strong executive weighs

[211] This whole paragraphs needs to be footnoted.

[212] See Das at 173-74.

against the value of the administrative efficiency otherwise facilitated by *Chevron*'s presumption of agency deference.[213]

A refusal to defer to the Justice Department in matters of asylum is akin to the principle that there is no deference due to a prosecutor's interpretation of a criminal statute.[214] As Justice Scalia observed in his concurrence in the case of *Crandon v. United States*, prosecutors have an incentive to "err in the direction of inclusion rather than exclusion – assuming, to be on the safe side, that the statute may cover more than is entirely apparent."[215] For this reason, again in Justice Scalia's words, "we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."[216] To do otherwise would create a "rule of severity" rather than the traditional rule of lenity.[217]

While it is true that Justice Scalia and the majority dismissed the "fox guarding the henhouse" concern in the civil regulatory context in *City of Arlington*,[218] there are important differences between that situation and the question of deference in *non-refoulement* and humanitarian protection. For one thing, *non-refoulement*, like the liberty interest in the criminal or habeas context, is a fundamental interest with profound consequences for liberty and even the survival of the individual. For another, there is an important structural institutional difference. The Court in *City of Arlington* was considering who should decide the breadth of an agency's power to regulate third parties. By contrast, with asylum and withholding – as in the criminal or *habeas* context – the question is who should police the agency's *self*-regulation on a matter of fundamental individual liberty. The need for an external check in that circumstance is amplified.

As a matter of separation of powers, there are thus good reasons to believe that Congress would not have left the fundamental principle of *non-refoulement* in the unchecked hands of the executive enforcement agencies. As with the criminal prosecutor, Congress would have expected the courts to exercise robust review of the enforcement agency's interpretations. Unlike the Department of Justice, the courts are not invested on an institutional level in the mission of punishing, deporting or excluding those not authorized to be in the country or of deterring future unlawful immigration. As such, they are in a better position as a structural matter to defend the principle and the nation's obligation of *non-refoulement*. In the absence of an express indication otherwise, the only reasonable conclusion is that Congress intended them to do so vigorously.

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213 Das at 166-67, citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 363 (1986) (discussing themes in administrative law contrasting "the need for regulation" with "the need for checks and controls").

214 Crandon, 494 U.S. 152 (1990).

215 Crandon, 494 U.S. 152, 178, Scalia concurrence.

216 Crandon, at 177. Cf. *Touby v. United States*, 500 U.S. 160, 165-166 (1991)(noting but not deciding whether a higher standard may be required to overcome the non-delegation doctrine that would permit Congress to delegate to an executive agency the power to promulgate regulations creating criminal liability).

217 Das at 189.

218 City of Arlington,

b. Interpretive Deference in Light of Agency Expertise and Capacity

As we have seen, another possible justification for *Chevron* deference is that the agency has a subject matter expertise that the courts do not. How does a possible claim of expertise by the BIA affect the *Chevron* calculus?

The EPA expertise to which the Supreme Court gave deference in *Chevron* was in the area of the regulation of industrial air pollution,[219] and involved understanding not just the structure and terms of a statute, but also the technical, scientific details of air quality and industrial outputs. In that substantively technical context, the Supreme Court held that the agency, immersed as it was in those fields of knowledge, was more likely than a court to have the technical know-how to fully understand and make the best decisions about policy matters that had been left ambiguous in the statutory scheme.[220] This expertise rationale would seem to support deference in such areas as environmental, health care, financial and other scientific or technical fields, where implementation policy questions require a kind of "scientific, technical, or other specialized knowledge" akin to that recognized in an expert witness in a trial context.[221] In fact, in a 2008 empirical study of cases reviewing agency decisions, Eskridge and Baer found that the Supreme Court appeared to act along lines of institutional competence, being more likely to defer to agencies in matters in which the Court concluded it was at an "institutional disadvantage" because of inferior knowledge either related to national security and foreign affairs or to technical or economic regulation.[222] (Notably, although the authors classified immigration agency decisions as relating to foreign affairs, they found the Court *less* likely to defer on immigration.)[223]

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

219 The case revolved around the meaning of the phrase "stationary source" in the 1970 Clean Air Act Amendments. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 845-46 (1984).

220 Chevron citation.

221 See, e.g., Fed Rule of Evidence 702

222 William N. Eskridge, Jr. & Lauren E. Baer, THE CONTINUUM OF DEFERENCE: SUPREME COURT TREATMENT OF AGENCY STATUTORY INTERPRETATIONS FROM CHEVRON TO HAMDAN, 96 Geo LJ 1083 (2008).

223 Eskridge & Baer, Continuum of deference, at 1144.

expertise that federal courts have.[224] Perhaps this comfort with adjudication and the lack of need for any technical expertise is one reason Eskridge and Baer found courts less likely to defer on immigration issues than on other agency decisions.

And in fact, the research and legal analysis required for asylum and withholding adjudications arguably require an even more specialized legal expertise than the average case or even the average immigration case, because they can implicate international and comparative law on the interpretation of the Refugee Convention. As discussed earlier, and in keeping with the Court's recent example in *Abbott v. Abbott*, proper interpretation of those Convention-based provisions requires reference to international law sources, either on grounds that the interpretation should fulfill congressional intent to comply with Convention obligations or because such obligations are themselves "the law of the land" as incorporated treaty provisions.[225]

The BIA is an administrative adjudicatory body with experience interpreting the INA, but none in interpreting international instruments or in comparative or international human rights jurisprudence.[226] Nor does it have expertise in the history of humanitarian concerns or the international context in which the Refugee Convention was negotiated and drafted or in which the United States signed on to the 1967 Protocol.[227]

Furthermore, even if they had the institutional will to do so, the immigration courts and the Board do not have the capacity to develop expertise in the international and comparative law of refugee protection. The immigration court system suffers from serious institutional capacity challenges that compromise its decision making and limit the time and consideration it can give to any single case. While the history of this dysfunction is longstanding,[228] the immigration courts are in more crisis now than ever. Approximately 300 immigration judges nationwide are struggling under the weight of a backlog of nearly

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224 Andrew Tae-Hyun Kim, RETHINKING REVIEW STANDARDS IN ASYLUM, 55 Wm & Mary L Rev 581, 630–31 (2013), citing John Kane, John S. Kane, Refining Chevron-Restoring Judicial Review to Protect Religious Refugees, 60 Admin. L. Rev. 513, 522 (2008).

225 *See supra*, Part **; *Cardoza-Fonseca*. *See also* Louis Henkin, THE CONSTITUTION AND UNITED STATES SOVEREIGNTY: A CENTURY OF CHINESE EXCLUSION AND ITS PROGENY, 100 Harv L Rev 853, 886 (1987) (arguing that "International law is the law of the land").

226 No agency expertise in interp intl law. Merrill 786. "does not follow that they have much, if any, understanding of constitutional law, international law, or federalism."

227 *See* Irene Scharf, Un-Torturing The Definition Of Torture And Employing The Rule Of Immigration Lenity, 66 Rutgers LR 1, 42 (arguing for similar reasons against deference to the BIA on interpretation of the Convention Against Torture because the Board lacks international legal or humanitarian expertise).

228 Immigration Judge Dana Leigh Marks sees the chronic and crisis-level under-resourcing of the immigration courts as a longstanding indication of their being "dramatically overshadowed" by the parts of the agencies charged with enforcement. Dana Leigh Marks, Now is the time to reform the immigration court, International Affairs Forum, Winter 2016, at 49.

700,000 cases, and the average case takes 672 days to complete.[229] And they do so in the midst of a chronic lack of resources and antiquated systems. The current Justice Department approach to reducing the backlog of cases is to implement policies to pressure judges to speed up adjudications, including the new requirement that immigration judges close out at least 700 cases a year in order to keep a satisfactory job performance rating.[230] This pressure to complete cases quickly will certainly not foster an environment in which research into areas of law seen as extraneous (and politically undesirable) is likely to be encouraged. And despite their enormous caseloads and case completion expectations, immigration judges have less institutional support than Article III federal judges. They often share law clerks rather than having one or more clerks assigned solely to them. There is no electronic filing in immigration courts, so file management is an ongoing challenge. The chronic lack of legal representation also hampers the system, both slowing cases down and worsening the quality of case preparation and, presumably, decision making.[231] And asylum and withholding cases are already among the most complicated cases presented in these courts, often including complicated legal questions, factual contexts requiring nuanced understanding of the applicant's personal circumstances and social dynamics in the home country, evidentiary difficulties incident to the applicant's flight from persecution, and applicants and witnesses who often suffer the effects of trauma. This severe and chronic under-resourcing of the system makes it unlikely that the immigration courts will develop additional expertise in identifying and understanding international and comparative sources of law.

As noted earlier, courts already recognize a number of areas of statutory interpretation in which the Board and the immigration courts are not given deference because of a lack of expertise, such as constitutional questions or questions of the applicability of the crime-based grounds of removal to particular offenses. Just as the Board lacks expertise that would warrant deference in these areas of legal interpretation, it has no interpretive advantage over the federal courts in applying Refugee Act provisions rooted in international law and interpreted by an international legal community. Where international and comparative law are implicated - as they are in Refugee Act cases - it thus makes little sense for the federal courts to defer to the BIA on expertise grounds.

C. Fundamental Human Rights and the Question of "Policy" Subject to Political Accountability

Finally, there is the question of whether interpretation of Refugee Act provisions is truly a question of "policy" of the type for which the *Chevron* Court counseled deference to the

[229] Recent sources, trac on avg days?

[230] [Sessions memo - is there something more complete than this?: http://cdn.cnn.com/cnn/2018/images/04/02/immigration-judges-memo.pdf]. For a good discussion of why this one-size-fits-all requirement is likely to lead to problematic limitations on due process in many courts, *see* Amid turmoil on the border, new DOJ policy encourages immigration judges to cut corners. Russell Wheeler, Brookings, June 18, 2018, https://www.brookings.edu/blog/fixgov/2018/06/18/amid-turmoil-on-the-border-new-doj-policy-encourages-immigration-judges-to-cut-corners/.

[231] CAIR report, others.

executive. Does interpretation of the proper reach of asylum and withholding law implicate "competing views of the public interest"[232] among which immigration agencies are free to choose? And is it a matter on which Congress was likely to find political accountability to be an advantage, or even acceptable?

As discussed earlier, much of the INA represents the results of congressional choices on questions of public policy on which there continue to be competing views of the public good. For example, there are genuine debates about whether it is in the public interest to have more or fewer visas issued each year based on family relationships, and about whether higher or lower levels of immigration are good for economic growth and security, and about whether it will enhance or harm the public good to regularize the status of individuals who entered the country illegally.[233] Thus, where the statute leaves a gap regarding implementation details of those legislative policy choices, *Chevron* doctrine would find it preferable for the executive agency to make further policy choices, rather than the courts, on grounds that the political system allows for electoral accountability for those choices.

For example, under the Obama administration, USCIS developed a procedure by regulation to facilitate provisional approval of the waiver needed for spouses of US citizens who had entered the country illegally to become permanent residents.[234] There was nothing in the statute that required this procedure, but it was an implementation decision that took into account several interacting provisions of the law – the allocation of immigrant visas for spouses of US citizens,[235] a disqualification for those who had entered illegally from obtaining permanent residence without leaving the country,[236] a ban on reentry for someone who has left the country after a period of unlawful presence in the U.S.,[237] and a waiver of that ban.[238] In this case, the executive agency filled a procedural gap left by Congress, acting to implement a policy favoring the unification of the families of U.S. citizens. This was an example of a normative, policy-based, prescriptive decision by an executive agency in a matter on which there were competing visions of the public interest. This was one of a series of immigration related policy choices for which the Obama administration and the Democrats were arguably held accountable in the 2016 election, in which immigration issues featured prominently. Implementation of the Deferred Action for Childhood Arrivals (DACA) program is another.[239]

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232 Chevron 866

233 See, e.g., The Reforming American Immigration for Strong Economy Act, a bill recently proposed in the United States Senate that proposes policy choices that would significantly alter the INA with regard to some of these issues. *Compare* Section **, allocating permanent resident visas on the basis of a point system that takes into account many factors but does not include close family ties; with 8 USC §1153(a), allocating permanent resident visas on the basis of family sponsorship.

234 8 CFR [I-601A provisional waiver procedure]

235 8 USC §1153(a).

236 8 USC § [INA 245(a)…]

237 8 USC § 1182(a)(9)(B)(i).

238 8 USC §1182(a)(9)(v)

239 [articles and/or admin claims that these issues played a role in the election]

Contrast these with the provisions of the Refugee Act, which did not implement policies chosen freely by Congress, but rather served to incorporate the nation's non-negotiable obligations under the Refugee Convention. Implementing that Act, then, the executive is no more free than Congress was to make decisions to favor or disfavor policies of its own choosing to affect the meaning of those obligations. While there may be aspects of asylum and withholding law that go beyond Convention requirements on which there is room to legislate policy choices, to the extent that INA provisions derive from the Refugee Convention, the executive is obligated to implement them in accordance with the nation's treaty responsibilities. This is a fundamental difference in the nature of the statutory provisions at issue. These provisions do not represent independent policy choices, and it is incumbent on the courts to engage in robust review to ensure that the executive's interpretations comply with the nation's international obligations and with the intent of Congress to fulfill those obligations.

Another indication that Refugee Act provisions are not the type of "policy" matters contemplated by the *Chevron* Court is the inappropriateness of political accountability as a value in decision making about the fundamental right to humanitarian protection. The *Chevron* Court presumed that political accountability would be preferable for the decider of the policy questions it envisioned – to reflect the will of the majority on substantive questions of normative importance.[240] Yet the will of the majority has never been a useful touchstone in the protection of persecuted minorities. To the contrary, in many cases political accountability and pressure are likely to be negative influences and actually impair the quality of protection decisions for vulnerable individuals who may defy majority expectations in some way. Asylum and withholding of removal law are specifically intended to protect individuals with minority political views, those with unpopular religious beliefs or practices, and members of marginalized social groups such as those who defy gender norms, all of whom face serious harm and sometimes even the threat of death because of who they are and what they believe.[241] The protection of these vulnerable outsiders is the last context in which we should want political accountability to influence decision making.

Furthermore, large movements of refugee populations can and do obviously evoke large scale political opposition that has nothing to do with the legitimacy of their claims as refugees, as evidenced by the backlash against Syrian refugees in both Europe and the United States.[242] Another illustrative example has been the treatment of mainly Central American asylum seekers who have arrived at the southwest U.S. border in recent years. Successive federal administrations have made a series of decisions designed to discourage these applicants from arriving and from seeking protection, at least in part because of the political ramifications to the administration of being seen as weak on immigration issues and

240 *See,* e.g., Kenneth Starr, 3 Yale J on Reg 283, 1986 (executive deference allows agencies to pursue "what it perceives to be the will of the people"), cited in Pappas at 979, n 6.

241 Cite to some cases for each of these types of claims.

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out of control of the border.[243] These decisions had nothing at all to do with the legitimacy of the protection claims these applicants asserted but rather represented efforts by politically accountable leaders to restrict access to protection for their own purposes.

The role of the courts in guaranteeing individual humanitarian protection is analogous to their role in the civil rights context, where it has long been recognized that a higher level of protection and scrutiny is appropriate for discrete, insular and vulnerable minorities.[244] Asylum seekers are universally disenfranchised, by definition, as individuals who are outside their countries of citizenship. The Supreme Court has recognized that because "noncitizens cannot vote, they are particularly vulnerable to adverse legislation."[245] It follows that they are – equally by definition – not able to advance their own interests through normal political channels, rendering meaningless for them the justification and any purported advantage factored into *Chevron* doctrine of having those interests decided by the political branches of government. The political vulnerability of individuals seeking humanitarian protection requires both the application of the international Convention establishing their basic individual rights as refugees and robust, independent judicial review exercised without fear of political repercussion. These dynamics weigh heavily against *Chevron* deference in the refugee context.

Conclusion

243 [Articles about political repercussions for generous refugee policy in Germany, US policy trying to dissuade asylum seekers from coming or applying.] For a time, the Obama administration explicitly justified its policy of detaining women and children who turned themselves into Customs and Border Protection agents as a means of deterring further asylum seekers from making the journey to the United States. This policy was applied to the applicants regardless of the merits of their asylum claims. Groups representing the families report that **% of the families they have represented through their removal proceedings have been recognized as refugees and granted asylum.

244 *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

245 INS v. St. Cyr, 533 U.S. 289, 315 (2001). *See generally* Paul Chaffin, Expertise And Immigration Administration: When Does Chevron Apply To BIA Interpretations Of The INA?, 69 N.Y.U. Ann. Surv. Am. L. 503 (2013).