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EXPERTISE AND IMMIGRATION ADMINISTRATION: WHEN DOES *CHEVRON* APPLY TO BIA INTERPRETATIONS OF THE INA?

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INTRODUCTION

The Immigration and Nationality Act (INA)[1] governs which noncitizens may enter the United States and remain in the United States, determining whether millions of individuals may remain near loved ones or free from persecution in another country. An individual's immigration status often hinges on the meaning of a single word or phrase in the statute. For example, if a non-citizen commits an "offense relating to the obstruction of justice,"[2] a category that provides little guidance on its own, he or she loses eligibility for both cancellation of removal and a waiver of grounds of inadmissibility.[3] When language is vague, unclear, or ambiguous, the mechanism by which that language is given meaning has significant consequences for noncitizens.[4] Courts frequently determine the meaning of unclear phrases in the INA by deferring to the opin-

1. 8 U.S.C. § 1101 *et. seq.* (2012).

2. 8 U.S.C. § 1101(a)(43)(S) (2012).

3. 8 U.S.C. § 1229b(a) (2012) ("The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien . . . has been an alien lawfully admitted for permanent residence for not less than 5 years, . . . has resided in the United States continuously for 7 years after having been admitted in any status, and . . . has not been convicted of any aggravated felony.").

4. Additionally, the mechanism by which definitional meaning is given to the code has significant consequences for federal courts of appeals, as immigration cases make up a significant part of their docket. *See* Judge Robert A. Katzmann, *Bench, Bar and Immigrant Representation: Meeting an Urgent Need*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 585, 588 (2012) ("Since 2006, the Second Circuit has adjudicated more than 16,000 immigration cases.").

ions of the Board of Immigration Appeals (BIA) under the doctrine laid out in *Chevron*.[5]

In *Chevron*, the Supreme Court established the rule that courts should defer to an executive agency's reasonable interpretation of ambiguous provisions in a statute it is charged to administer.[6] In the 1990s, commentators hailed the *Chevron* regime as a valuable tool for ensuring an appropriate division of power between the judiciary and the political branches,[7] and for establishing consistency across the circuits.[8] However, as *Chevron* has developed into a near universal framework for deference,[9] it has become clear that these

5. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); *see infra* note 8.

6. *Chevron*, 467 U.S. at 842–43.

7. Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 822 (1990) (characterizing *Chevron* as "simply a sound recognition that a political branch, the executive, has a greater claim to make policy choices than the judiciary").

8. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989) ("[T]he sheer volume of modern dockets made it less and less possible for the Supreme Court to police diverse application of an ineffable rule.").

9. Since *Chevron*, the Court has made clear that the *Chevron* deference framework applies in a broad range of administrative contexts. *See, e.g.*, Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81 (2007) (deferring to Department of Education interpretation of Federal Impact Aid Program); Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232 (2004) (deferring to Federal Reserve Board interpretation of Truth in Lending Act); AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366 (1999) (deferring to FCC interpretation of Communications Act); INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) (deferring to BIA interpretation of INA); United States v. Haggar Apparel Co., 526 U.S. 380 (1999) (deferring to Treasury Department interpretation of Internal Revenue Code); Holly Farms Corp. v. NLRB, 517 U.S. 392 (1996) (deferring to NLRB interpretation of NLRA); Babbitt v. Sweet Home Chapter of Ctys. for a Great Oregon, 515 U.S. 687 (1995) (deferring to Department of the Interior interpretation of Endangered Species Act); NationsBank of North Carolina v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995) (deferring to Office of -the Comptroller of the Currency interpretation of National Bank Act); Reno v. Koray, 515 U.S. 50 (1995) (deference to Bureau of Prisons interpretation of Bail Reform Act); Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992) (deferring to Interstate Commerce Commission interpretation of Rail Service Passenger Act); Good Samaritan Hosp. v. Shalala, 508 U.S. 402 (1993) (deferring to Department of Health and Human Services interpretation of Social Security Act); Pauley v. BethEnergy Mines, Inc., 501 U.S. 680 (1991) (deferring to Department of Labor interpretations of Black Lung Benefits Act); Rust v. Sullivan, 500 U.S. 173 (1991) (deferring to the Department of Health and Human Services interpretation of Title X of Public Health Service Act); K Mart Corp. v. Cartier, 486 U.S. 281 (1988) (deferring to Treasury Department interpretation of Tariff Act of 1930); *Chevron*, 467 U.S. at 866 (deferring to EPA interpretation of Clean Air Act).

benefits are only realized in some cases. Recognizing that a bright-line deference rule is not desirable in every scenario, the Supreme Court has cut back on *Chevron*'s "domain" in several cases, most notably in *United States v. Mead*.[10] Despite Justice Scalia's contention that *Chevron* ought to provide a bright-line rule for reviewing all agency interpretations,[11] the Court has in practice acted to "tailor deference to variety."[12]

As a general matter, *Chevron* undoubtedly applies to the BIA's[13] interpretation of the INA.[14] But in practice courts have applied *Chevron* inconsistently to reach varying results in the immigra-

10. 533 U.S. 218 (2001) (establishing procedural formality as a prerequisite for *Chevron* deference).

11. Scalia, *supra* note 8, at 512 (noting the "seemingly categorical nature of [*Chevron* doctrine]").

12. *Mead*, 533 U.S. at 236.

13. The Attorney General is entrusted to administer the INA, but has delegated the authority to administer the statute to the BIA. *See Agency Deference & Brand X*, EXEC. OFFICE OF IMMIGRATION REVIEW (outlining *Chevron* principles as relevant to immigration context).

14. *See* INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999) ("It is clear that principles of *Chevron* deference are applicable to [the INA]."); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 448–49 (1987) (declining to grant deference to the BIA, but explaining that "Congress had delegated the responsibility for administering the statutory program" to the BIA, which gave ambiguous provisions "concrete meaning through a process of case-by-case adjudication"). Following the Supreme Court's announcement that *Chevron* applies to BIA interpretations in *INS v. Cardoza-Fonseca*, all of the federal courts of appeals have adopted the *Chevron* framework in the immigration context. *See, e.g.*, Hamama v. INS, 78 F.3d 233, 239 (6th Cir. 1996) (applying the *Chevron* framework to defer to a BIA interpretation); Franklin v. INS, 72 F.3d 571, 572 (8th Cir. 1995) (same); Ahmetovic v. INS, 62 F.3d 48, 51 (2d Cir. 1995) (same); Hernandez-Vivas v. INS, 23 F.3d 1557, 1560 (9th Cir. 1994) (same); De Osorio v. INS, 10 F.3d 1034, 1036 (4th Cir. 1993) (same); Jaramillo v. INS, 1 F.3d 1149, 1152 (11th Cir. 1993) (same); Mosquera-Perez v. INS, 3 F.3d 553, 558 (1st Cir. 1993) (same); Katsis v. INS, 997 F.2d 1067, 1069 (3d Cir. 1993) (same); Nguyen v. INS, 991 F.2d 621, 623 (10th Cir. 1993) (same); Iredia v. INS, 981 F.2d 847, 849 (5th Cir. 1993); Leybourne v. BIA, 871 F.2d 1149, 1149 (D.C. Cir. 1989) (same); Variamparambil v. INS, 831 F.2d 1362, 1366 (7th Cir. 1987) (same).

In a move inconsonant with the *Chevron* framework, particularly after *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (holding that agencies receive deference for inconsistent interpretations of ambiguous statutory provisions), the Court also asserted in *Cardoza-Fonseca* that "[a]n additional reason for rejecting the INS's request for heightened deference to its position is the inconsistency of the positions the BIA has taken through the years." 480 U.S. at 446 n.30. Even prior to *Chevron* the BIA received substantial deference for some of its interpretations. *See, e.g.*, INS v. Jong Ha Wang, 450 U.S. 139, 144 (1981) (deferring to an ambiguous provision in the INA because "the [INA] commits [the provision's] definition in the first instance to the Attorney General and his delegates, and their construction and application of this standard should not be over-

tion context. This has resulted in a lack of uniformity that raises both efficiency and justice concerns.[15] An increase in immigration litigation over the past decade has clogged the dockets of federal courts,[16] and disparate outcomes for similarly situated noncitizens residing in different circuits lead to an inequitably applied law.[17]

Some courts read *Chevron* to require lockstep deference to agency interpretations of ambiguous INA provisions.[18] However, if courts read *Chevron* to adopt ambiguity as the sole touchstone of deference and systematically defer to all BIA interpretations of ambiguous INA provisions, they will fail to realize *Chevron*'s goal. The *Chevron* framework should allocate interpretive questions between courts and the BIA based on relative institutional competence.[19] This Note argues that the best solution to the concerns raised by inconsistent application of *Chevron* in the immigration context is not a bright-line deference rule, but instead a careful application of the principles underlying *Mead*. Whether courts defer to BIA interpretations of the INA should depend on whether a specific interpretation falls within the scope of Congress's delegation. Courts should determine the scope of Congress's delegation by applying

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turned by a reviewing court simply because it may prefer another interpretation of the statute").

15. *See infra* Part I.

16. *See supra* note 4.

17. *See, e.g.*, Butros v. INS, 990 F.2d 1142, 1149 (9th Cir. 1993) (Trott, J., dissenting) (contending that deference promotes "uniformity which is essential in promoting the goal of treating all people the same, regardless of the federal circuit in which they live"). Judge Trott went on to explain that by rejecting a bright-line deference rule, courts "substitute[ed] judicial judgment for that of the agency" and "contribute[d] to the utter disorder in which the INS . . . operates, disorder generated by dissonant circuit court opinions which can only be called 'all over the lot,' both in reasoning as well as result." *Id.*

18. *See, e.g.*, Trung Thanh Hoang v. Holder, 641 F.3d 1157, 1166–67 (9th Cir. 2011) (Bybee, J., dissenting) (arguing that the court should defer to a BIA interpretation of an ambiguous INA provision even when that interpretation does not expressly define the ambiguous phrase but merely asserts a conclusion, unless that interpretation is unreasonable); Alwan v. Ashcroft, 388 F.3d 507, 510 (5th Cir. 2004) (holding that because "interpretation of the term 'aggravated felony' has not been designated by Congress as a matter to be ultimately resolved by the courts," "we are obliged to accord the BIA *Chevron* deference as it gives the term concrete meaning through a process of case-by-case adjudication") (internal citation omitted).

19. *See* Negusie v. Holder, 555 U.S. 511, 530 (2009) (Stevens, J., concurring) ("[*Chevron*] accounts for the different institutional competencies of agencies and courts: Courts are expert at statutory construction, while agencies are expert at statutory implementation.").

the "traditional tools of statutory construction"[20] to discern congressional intent regarding delegation. They should defer to BIA opinions that manifest the application of the BIA's immigration-specific expertise,[21] diplomatic expertise,[22] expertise in the INA and administration of the immigration laws.[23] Absent these factors, courts possess superior expertise in interpreting statutes[24] and they should not defer to BIA interpretations that do not implicate any immigration-specific terminology, that rely on provisions of the criminal code,[25] or that give meaning to procedural provisions in the INA.[26] Thus, as Justice Stevens argues, the judicial deference regime should "account[ ] for the different institutional competencies of agencies and courts: Courts are expert at statutory construc-

20. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 n.9 (1984); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987) (employing "traditional tools of statutory construction" to determine congressional intent and denying *Chevron* deference).

21. As a specialized administrative body, the BIA has a "special competence" in matters uniquely particular to the immigration context. *See, e.g.*, Tran v. Gonzales, 414 F.3d 464, 467 (3d Cir. 2005) (refusing to defer to a BIA interpretation of subject matter "outside the BIA's special competence and congressional delegation"). In *Tran*, the BIA interpreted a federal criminal statute. *See id.*

22. As a politically accountable executive agency, the BIA is far more competent to make decisions implicating foreign policy than courts. *See* INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (recognizing that "judicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations'") (quoting INS v. Abudu, 485 U.S. 94, 110 (1988)).

23. In *Barnhart v. Walton*, the Court considered, among other factors, "the complexity of that administration [of the statute]" in determining whether *Chevron* applies. 535 U.S. 212, 222 (2002); *see also* Shi Liang Lin v. DOJ, 494 F.3d 296, 316 (2d Cir. 2007) (Katzmann, J., concurring) ("When a governmental body with substantial experience in interpreting a complex statutory scheme concludes that a statute is ambiguous, that determination should give us pause."); Bamidele v. INS, 99 F.3d 557, 562 (3d Cir. 1996) (discussing cases which "concerned matters labyrinthine in their complexity in which our analysis would be bolstered by our reliance on the expertise of the INS").

24. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

25. *See, e.g.*, Francis v. Reno, 269 F.3d 162, 168 (3d Cir. 2001) (denying deference to BIA interpretation of a federal criminal statute because "the BIA did not rely upon any expertise" in its interpretation and because "*Chevron* instructs that we accord deference only to the BIA's 'construction of the statute which it administers'") (citation omitted).

26. *See, e.g.*, Sandoval v. Reno, 166 F.3d 225, 239 (3d Cir. 1999) ("An issue concerning a statute's effective date is not one that implicates agency expertise in a meaningful way, and does not, therefore, appear to require *Chevron* deference.").

tion, while agencies are expert at statutory implementation."[27] Considering agency expertise at *Chevron* "step zero,"[28] at which courts determine whether the *Chevron* framework applies at all, would bring clarity in the immigration context without disrupting the law elsewhere, as many federal agencies' missions entail the application of expertise in a particular field.[29]

Part I of this Note provides a descriptive account of the widespread inconsistency that has resulted from confusion about the requirements of *Chevron* in immigration cases. Since the Supreme Court decided *Chevron*, inconsistency in judicial review of BIA interpretations of the INA has stemmed from two questions left open by *Chevron*. First, it is unclear whether the BIA should receive judicial deference for interpretations of "pure question[s] of statutory construction."[30] Second, it is unclear what procedural formalities the BIA must observe in order to receive judicial deference. Over the past three decades, the courts of appeals have largely reached consensus on the latter question, but remain deeply split over the former question. Part II explores the continuing vitality of agency expertise as a rationale for deference after *Chevron* and analyzes the implications of agency expertise for *Chevron* deference to the BIA. Part III examines different types of INA provisions that the BIA has interpreted and the judicial response to these interpretations, and then explains how the principles outlined in this Note resolve inconsistent judicial approaches.

I.
INCONSISTENCY IN MODERN IMMIGRATION ADMINISTRATION

The principle that courts ought to defer to agency interpretations is nearly as old as the American legal system, and has nearly

27. *See* Negusie v. Holder, 555 U.S. 511, 530 (2009) (Stevens, J., concurring). Elsewhere Justice Breyer has suggested that courts ought to accord deference based on relative "institutional capacities and strengths." Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 398 (1986). Thus, courts should make judgments about questions of law, in which they have a comparative advantage in expertise, and agencies should make judgments about matters of policy, where they have comparative expertise. *See id.*

28. *See infra* Part I.B (discussing analysis at *Chevron* step zero).

29. *See supra* note 9 (listing agencies to which the Supreme Court has found *Chevron* applicable).

30. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987) (reviewing de novo the question of whether the INA's well-founded fear standard was identical to the "clear probability of persecution" standard de novo because the identity of the two standards was a "pure question of statutory interpretation").

always been tied to the goal of achieving uniformity in the law.[31] Despite this objective, as a general matter, the Court's deference jurisprudence under *Chevron* has often been unclear and caused considerable difficulty in application for federal circuit courts,[32] particularly in the immigration context.[33] This Part explores the ways in which the *Chevron* framework has led to inconsistency in immigration administration. Part I.A argues that uniformity is particularly important in the immigration context for both efficiency and equity reasons. Part I.B provides an overview of the relevant *Chevron* doctrine. Part I.C surveys the circuit splits that have arisen due to inconsistent application of *Chevron* principles to particular INA provisions. Part I.D describes the ways in which the courts of appeals have migrated toward consensus on the procedural requirements the BIA must satisfy to receive judicial deference.

A. The Virtues of Uniformity in the Immigration Context

Uniformity serves goals of efficiency and equitable application of the law—goals that would be "especially desirable" in the immigration context.[34] A uniform immigration law ensures that nonci-

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31. *See, e.g.*, United States v. Vowell, 9 U.S. 368, 372 (1810) ("If the question [of statutory interpretation] had been doubtful, the court would have respected the uniform construction which it is understood has been given by the treasury department of the United States upon similar questions.").

32. *See, e.g.*, Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 296 (2009) (Scalia, J., concurring) ("[O]ur misguided opinion in *Mead*, whose incomprehensible criteria for *Chevron* deference have produced so much confusion in the lower courts that there has now appeared the phenomenon of *Chevron* avoidance—the practice of declining to opine whether *Chevron* applies or not.") (citing Lisa Schultz Bressman, *How* Mead *has Muddled Judicial Review of Agency Action*, 58 VAN. L. REV. 1443, 1464 (2005)); Wolpaw v. C.I.R., 47 F.3d 787, 790 (6th Cir. 1995) ("[T]he degree to which courts are bound by agency interpretations of law has been like quicksand. The standard seems to have been constantly shifting, steadily sinking, and, from the perspective of the intermediate appellate courts, frustrating.") (quoting Ohio State Univ. v. Secretary, 996 F.2d 122, 123 n.1 (6th Cir.1993)).

33. *See* John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of* INS v. Ventura, 18 GEO. IMMIGR. L.J. 605, 622 (2004) ("When a circuit court relies on an exception to *Chevron* deference to reject an agency interpretation, the practical effect is to create a patchwork immigration law with different results depending upon controlling circuit authority."); *see also* Butros v. INS, 990 F.2d 1142, 1153 (9th Cir. 1993) (Trott, J., dissenting) ("The INS continues to be pulled in all directions at once by fractious circuits. Maybe the Supreme Court will iron out all of these impossible wrinkles, or maybe the INS will take this to Congress for repair."). Nearly two decades later, the circumstances that incited Judge Trott's concern persist.

34. Jian Hui Shao v. BIA, 465 F.3d 497, 502 (2d Cir. 2006). *See also* 8 C.F.R. § 1003.1(d)(1) (2009) ("[T]he Board, through precedent decisions, shall provide

tizens have some notice of the legal consequences of their actions, that immigration hearings have predictable outcomes, and that noncitizens in all parts of the United States are subject to the same immigration laws.[35] A uniform immigration law also produces efficiencies, both in terms of the federal government's ability to enforce immigration laws at efficient costs and in terms of minimizing litigation costs imposed on parties, the immigration adjudication system, and the federal courts.

Because the BIA makes rules binding for all immigration courts,[36] the BIA is uniquely positioned to establish uniform rules for immigration.[37] One argument in favor of categorical deference to the BIA is that lockstep deference enables the BIA to produce a fully uniform national immigration law, as opposed to a fragmented immigration law that varies from circuit to circuit.[38] However, this

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clear and uniform guidance to . . . the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations."); Matter of Cerna, 20 I. & N. Dec. 399, 405 (BIA 1991) ("We note that a principal mission of the Board of Immigration Appeals is to ensure as uniform an interpretation and application of this country's immigration laws as is possible."); EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL 1 (2004), *available at* http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/chap1.pdf ("The Board is responsible for applying the immigration and nationality laws *uniformly* throughout the United States.") (emphasis added).

35. *See, e.g.*, Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 473 (2007) ("The moral imperative of equal justice, the needs for certainty and predictability, the benefits of efficiency, and the objective of public acceptability all demand attention to consistency in any adjudicative framework."); *see also Matter of Cerna*, 20 I. & N. Dec. at 408 (expressing concern over "a patchwork application of the law—with the most profound decisions affecting aliens . . . tied to the mere happenstance of where their cases arise geographically").

36. 8 C.F.R. § 1003.1(g) (2009) ("[D]ecisions of the Board, and decisions of the Attorney General, shall be binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States.").

37. In addition to the BIA, the Supreme Court or Congress has the power to establish nationally binding rules. However, the Supreme Court has a small docket and rarely hears immigration cases, and Congress has not passed comprehensive immigration legislation since 1996 amendments.

38. *See Butros*, 990 F.2d at 1149 (Trott, J., dissenting) ("Judicial adherence to this sensible and long-standing principle of review promotes national uniformity in an agency's application of federal law, uniformity which is essential in promoting the goal of treating all people the same, regardless of the federal circuit in which they live. Failure or refusal to adhere to this rule in the form of substituting judicial judgment for that of the agency contributes to the utter disorder in which the INS now operates, disorder generated by dissonant circuit court opinions which can only be called all over the lot, both in reasoning as well as result.") (internal

argument is ultimately unavailing. First, review of BIA decisions by federal courts provides crucial protections to noncitizens against executive overreach. Uniformity is only valuable as a means to the end of fair administration of the law. Second, the INA's reliance on state and federal criminal law to establish the predicate offenses that trigger immigration penalties already introduces unresolvable state-by-state inconsistencies into immigration administration.[39] Third, the federal judiciary also produces uniform federal law, although circuit splits can undermine this uniformity. In light of these considerations, this Note focuses on inconsistency in the application of the *Chevron* framework by the federal courts of appeals, which has resulted in inconsistent law. Consequently, a uniform approach to the *Chevron* framework in cases reviewing BIA decisions will generate greater uniformity in immigration law while nonetheless ensuring adequate judicial review of BIA decisionmaking.

B. Chevron *Doctrine as a Source of Inconsistency*

Inconsistent application of *Chevron* in the immigration context stems in part from the fact that the factors relevant to granting deference have changed over the past three decades. *Chevron* articulated the now well established two-step rule that if, at step one, the statute is "silent or ambiguous with respect to the specific issue," courts should defer to an agency interpretation if, at step two, that interpretation is reasonable.[40] *Chevron* "step zero," at which courts determine whether the *Chevron* framework should apply at all, considers whether the agency is entrusted to administer the statute.[41] In the 2001 *Mead* decision, the Supreme Court added the addi-

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quotations omitted); *see also* Thomas W. Merrill & Kristen E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 861 (2001) ("A . . . reason for preferring agency interpretation . . . is that this may be the only practical way today to achieve uniformity in federal law.").

39. *See* Andrew Moore, *Criminal Deportation, Post-Conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 669 (2008) ("The pressure put on the state and federal post-conviction relief system results in nonuniformity in the treatment of criminal convictions even with the limited effectiveness of post-conviction relief.").

40. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

41. *See, e.g.*, Edwards' Lessee v. Darby, 25 U.S. 206, 210 (1827) ("In the construction of a doubtful and ambiguous law, the contemporaneous construction of

tional step zero requirement by ruling that the *Chevron* framework only applies if Congress has "delegated authority to the agency generally" to promulgate "rules carrying the force of law"[42] and the agency has promulgated its regulation "in the exercise of" the authority delegated generally by Congress.[43]

Opportunities for inconsistent application arise at each "step" of the *Chevron* analysis.[44] At step zero,[45] it is unclear under which

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those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.").

42. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001). As a general matter, express congressional delegation of the power to engage in notice-and-comment rulemaking, formal adjudication, or agency interpretation "by some other indication of a comparable congressional intent" satisfies this requirement. *Id.* at 227 (stating that delegation entitled to *Chevron* deference may be shown "by an agency's power to engage in adjudication or notice-and-comment rulemaking").

43. *Id.* (noting that *Chevron* only applies if "[t]he agency interpretation claiming deference was promulgated in the exercise of [the authority delegated generally by Congress]"). In other words, the agency interpretation must fall within the scope of the congressional delegation. This is best characterized as a question of whether the particular gap within the statute was one that Congress intended the agency to interpret. *See* John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of* INS v. Ventura, 18 GEO. IMMIGR. L.J. 605, 620 (2004). Guendelsberger conceptualizes *Mead* as a two-step pre-*Chevron* inquiry. First, the court looks at whether "Congress has expressly delegated general authority to the agency to promulgate rules carrying the force of law." *Id.* Second, the court considers whether the "particular provision" interpreted falls within the delegation of authority. *Id.* at 620–21. *See also* F.D.A. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (denying *Chevron* deference when "Congress could not have intended to delegate a decision of such economic and political significance to the agency in so cryptic a fashion."); Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (displacing *Chevron* analysis with the avoidance of constitutional questions canon). These cases raise the question of whether deference is premised solely on the presence of ambiguity, as Justice Scalia has argued, or whether the touchstone of deference, from the perspective of a judge performing statutory interpretation, is ultimately congressional intent. The Court's opinions firmly established that congressional intent is the touchstone of deference.

44. Academics often view the *Chevron* framework as consisting of three distinct steps. *See, e.g.*, Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 190–91(2006); Merrill & Hickman, *supra* note 38, at 834–35. Thus, at step one, the court, "employing traditional tools of statutory construction," determines whether the statute is ambiguous. *Chevron*, 467 U.S. at 843 n.9. If the provision is ambiguous, the court proceeds to step two to determine whether the agency interpretation is reasonable, such that it falls within the range of permissible interpretations contained in the statutory ambiguity. *Id.* at 843 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."); *see also* Household Credit Servs. Inc. v. Pfennig, 541 U.S. 232, 239 (2004) (stating that at

circumstances courts should find an "implicit delegation" has occurred[46] and under what circumstances courts should find procedural "force of law" requirements satisfied. At the step one finding of ambiguity, judges' varying approaches to finding ambiguity produce an inconsistent deference regime.[47] At step two, it is unclear

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Step Two, "the agency's regulation is given controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute") (internal citations and quotations omitted). A third inquiry, dubbed "step zero" by commentators, determines whether the *Chevron* framework should apply at all. *See* Merrill & Hickman, *supra* note 38, at 836 (coining the phrase "step zero"). Courts analyze whether Congress intended the agency to interpret the statute. *See Mead*, 533 U.S. at 226–27 (stating that deference is due "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law"); *see also* EEOC v. Arabian Am. Oil, 499 U.S. 244, 257–58 (1991) (declining deference to the EEOC interpretation made through regulation because Congress only granted the EEOC the power to adjudicate cases, not to issue regulations). If Congress has delegated general interpretive authority, courts determine if the agency has acted with sufficiently formal procedures. *See Mead*, 533 U.S. at 226–27 (indicating that sufficient formality "may be shown in a variety of ways," including formal adjudication, "notice-and-comment rulemaking," or "some other indication of a comparable congressional intent"). In cases where the agency has interpreted particular statutory provisions that do not implicate agency expertise, courts also look at whether the agency decision served to fill a particular gap within the scope of the congressional delegation.

45. Step zero consists of both procedural and substantive requirements. To receive deference, the agency must meet procedural requirements by promulgating its interpretation with the "force of law" and must promulgate an interpretation that is substantively within the scope of Congress's delegation of interpretive authority. *See Mead*, 533 U.S. at 226–27.

46. *See Chevron*, 467 U.S. at 844 ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit."). Implicit delegations may also occur through statutory silence. *See id.* at 843 (deference is triggered "if the statute is *silent* or ambiguous with respect to the specific issue") (emphasis added).

47. Although not unique to the immigration context, the step one determination of ambiguity leaves space for divergent interpretations of the law, undermining uniformity. *See, e.g.*, Guendelsberger, *supra* note 33, at 623 ("The wide range of potentially applicable rules of statutory construction afford the courts considerable leeway in determining whether a plain meaning may be uncovered in any particular provision."). In *Chevron*, Justice Stevens cryptically explained that in finding ambiguity, courts should "employ the tools of traditional statutory construction." 467 U.S. 837, 843 n.9 (1984). It remains unclear whether the finding of ambiguity should be a purely textual determination or should involve more substantive tools of statutory interpretation. *See, e.g.*, Note, *"How Clear Is Clear" in* Chevron*'s Step One?*, 118 HARV. L. REV. 1687, 1687 (2005) (arguing that at the step one determination of ambiguity "courts identify various institutional considerations that speak to the likelihood that Congress meant to delegate interpretive authority to an agency rather than to a court"). Furthermore, it is unclear what degree of ambiguity is necessary to trigger *Chevron*. *See, e.g.*, Edelman v. Lynchburg Coll., 535 U.S. 106, 114 & n.8 (2002) (finding the agency interpretation to be "the position we

under what circumstances a court could find that Congress delegated interpretive authority to the agency but that the agency's interpretation was nonetheless unreasonable.[48] In the immigration context, inconsistency primarily stems from step zero and step one.[49] The following examination of inconsistency in the federal courts is intended to underscore the very real need for a consistent interpretive framework to produce uniformity in the law.

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would adopt even if . . . we were interpreting the statute from scratch," but with the caveat that the agency interpretation was not "the only one permissible").

48. *See* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1252 (2007) ("In general, scholars agree that *Chevron*'s step two nears the fully deferential end of the spectrum: Courts employing this standard retain little discretion and are required to defer to the agency's view unless it is unreasonable."). The Supreme Court has found few agency interpretations unreasonable under *Chevron* step two, and circuit courts generally resolve step two in favor of the agency. *See* 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, 31 (1998) (determining through empirical analysis that in 1995 and 1996 courts that reached step two "upheld the agency view in 89% of the applications"); *see also* Vasquez v. Holder, 635 F.3d 563, 569 (1st Cir. 2011) (stating that "[i]n light of the INA's enormously broad delegation to the Attorney General, we would be extremely reluctant to hold that his interpretation is unreasonable"); Abdulai v. Ashcroft, 239 F.3d 542, 552 (3d Cir. 2001) (same). Nonetheless, courts occasionally resolve the meaning of ambiguous provisions in the immigration code at step two by declaring the BIA's interpretation unreasonable. *See, e.g.*, Cuevas-Gaspar v. Gonzales, 430 F.3d 1013, 1022 (9th Cir. 2005) (holding that even though the statute was "silent" on the precise question at issue, the BIA's interpretation was unreasonable at step two), *abrogated by* Holder v. Martinez Gutierrez, 142 S. Ct. 2011 (2012). Ultimately, *Chevron* step two may not matter much because a court's determination that an interpretation is unreasonable results in remand rather than in a judicial determination of statutory meaning. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("*Chevron* established a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.") (internal quotations omitted). If a court determines that an agency has "not yet considered" an ambiguity, courts generally must remand for an agency interpretation rather than interpreting that provision de novo. INS v. Orlando Ventura, 537 U.S. 12, 16–17 (2002). The Supreme Court's holding in *Negusie v. Holder*, 555 U.S. 511, 530 (2009), requires courts to remand cases for a BIA ruling when the BIA performs a plain text analysis of the statute, rather than declaring the statute ambiguous and then filling the statutory gap, and the court then finds the statute ambiguous. Thus, though courts may have the power to reject BIA interpretations that they find unreasonable, this does not give courts the power to interpret the statute de novo. Rather, courts must remand for the BIA's reconsideration.

49. *See* Guendelsberger, *supra* note 33, at 619 ("[B]oth the 'delegation' requirement and the 'ambiguity' requirement provide large exceptions to the applicability of *Chevron* deference to the Board's interpretation of immigration law.").

C. Delegation and the "Specific Issue": Criminal Provisions, Procedural Provisions, and "Domestic Policy" Provisions

Even when the BIA issues an interpretation of the INA that satisfies *Mead*'s "force of law" requirement, not all BIA interpretations fall within the scope of Congress's delegation to the BIA.[50] In *Mead* the Supreme Court observed that a general delegation of interpretive authority does not necessarily grant an agency power to give meaning to every provision in a statute.[51] For example, courts do not defer to BIA interpretations of predicate criminal offenses listed in the immigration statute,[52] because Congress has not delegated the authority to interpret criminal law to the BIA.[53] As a result, courts defer to BIA interpretations that particularize the meaning of provisions in the INA but review de novo whether predicate criminal offenses qualify under those BIA interpretations.[54]

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50. *See, e.g.*, Marmolejo-Campos v. Holder, 558 F.3d 903, 909 (9th Cir. 2009) (en banc) ("Whether the Board's interpretations of the INA satisfy *Mead*'s second requirement depends on the form the Board's decision takes"). Whether agency action falls within the scope of the delegation is essentially a question of statutory interpretation. Thomas W. Merrill, *The* Accardi *Principle*, 74 GEO. WASH. L. REV. 569, 601 (2006) ("Determining the scope of delegated power is basically a question of statutory interpretation.").

51. *See* United States v. Mead Corp., 533 U.S. 218, 229 (2001) ("Congress . . . may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap.").

52. Under the INA, an alien is removable if he or she is convicted of a crime of domestic violence, meaning "any crime of violence (*as defined in [18 U.S.C. § 16]*)." 8 U.S.C. § 1227(a)(2)(E)(i) (2012) (emphasis added). The INA therefore necessitates that the BIA interpret the federal criminal code in order to determine whether a state law conviction qualifies as a crime of violence.

53. Flores v. Ashcroft, 350 F.3d 666, 671 (7th Cir. 2003) (explaining that per *Mead*, "Chevron deference depends on delegation"). Judge Easterbrook has hinted at the underlying threat of prosecutorial overreach, explaining that "just as courts do not defer to the Attorney General or United States Attorney when [a federal criminal statute] must be interpreted in a criminal prosecution, so there is no reason for deference when the same statute must be construed in a removal proceeding." *Id.* In *Flores*, Judge Easterbrook suggested that the BIA might receive something approximating *Skidmore* respect. *See id.* ("Although the agency's interpretation in [*Matter of Martin*, 23 I. & N. Dec. 491 (BIA 2002)] may have persuasive force, and we must give it careful consideration, it has no binding effect along *Chevron*'s lines."). The fact that 18 U.S.C. § 16 is expressly referenced in the INA does not amount to a delegation of authority to interpret that statute. *See* Francis v. Reno, 269 F.3d 162, 168 (3d Cir. 2001) (18 U.S.C. § 16 "is not transformed into an immigration law merely because it is incorporated into the INA.").

54. *See, e.g.*, *Marmolejo-Campos*, 558 F.3d at 907–08, 911 (granting deference to the BIA's interpretation of "crime of moral turpitude" but then reviewing "the BIA's finding regarding the specific act for which the petitioner was convicted *de novo*").

When Congress has not clearly expressed an intent to delegate authority to interpret a "specific issue," or particular provision,[55] courts must look to "the agency's generally conferred authority and other statutory circumstances" to determine if a congressional intent to delegate is implicit.[56] Relying on this type of analysis, courts have split on whether the BIA should receive deference for interpretations of some procedural provisions in the INA[57] and other provisions that do not "involve agency expertise in interpreting the immigration law."[58]

First, the circuits have split on whether to grant deference to the BIA's interpretations of procedural provisions in the INA, such as statutes of limitation or effective date provisions. For example, in *Bamidele v. INS*[59] the Third Circuit refused to defer to the BIA's interpretation of the five-year statute of limitations contained in 8 U.S.C. § 1256.[60] Other circuits have rejected the Third Circuit's reasoning and have deferred to BIA interpretations of § 1256's statute of limitations provision.[61] The *Bamidele* court reasoned that in cases where courts had deferred to the BIA, the provisions at issue were "labyrinthine in their complexity" and involved the interpretation of substantive provisions of the INA that bore some "unique" relation to immigration,[62] such that the BIA's familiarity with the INA could provide the court valuable guidance.[63] In contrast, the statute of limitations at issue in *Bamidele* "evoke[d] none of th[ose] considerations," as it was "a general legal concept with which the

55. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

56. *Id.* at 843–44.

57. *See infra* Part III.B.3.

58. Guendelsberger, *supra* note 33, at 621.

59. Bamidele v. INS, 99 F.3d 557 (3d Cir. 1996).

60. 8 U.S.C. § 1256 (1952).

61. *Compare Bamidele*, 99 F.3d at 557 (denying deference to BIA interpretation of § 1256), *and* Garcia v. Att'y Gen., 553 F.3d 724, 727 (3d Cir. 2009) (denying deference to BIA interpretation of § 1256 after 1996 amendment to INA), *with* Asika v. Ashcroft, 362 F.3d 264, 265 (4th Cir. 2004) (granting deference to BIA interpretation of § 1256). *See also* Alhuay v. Att'y. Gen., 661 F.3d 534, 545 (11th Cir. 2011) (finding § 1256 unambiguous and dismissing the appeal); Kim v. Holder, 560 F.3d 833, 837 (8th Cir. 2009) (finding § 1256 relatively unambiguous and deferring to the Attorney General's interpretation of provision).

62. *Bamidele*, 99 F.3d at 562 ("Moreover, the latter two cases addressed terminology which took on unique import and meaning informed by the INS's interpretation of its governing statute.").

63. *Id.* ("Each of these cases concerned matters labyrinthine in their complexity in which our analysis would be bolstered by our reliance on the expertise of the INS.").

judiciary can deal at least as competently as can an executive agency."[64]

Second, courts have split on whether to defer to the BIA's interpretations of numerous "domestic policy" provisions in the INA. Such provisions do not implicate foreign policy and are not procedural, but are open-ended questions of law that apply domestically. For example, courts have disagreed on whether to defer to the BIA's interpretation of 8 U.S.C. § 1101(a)(43)(S)'s "relating to obstruction of justice" provision.[65] Additionally, courts have split on whether to defer to the BIA's interpretation of the phrase "crime of moral turpitude."[66] As a final example, courts are divided on whether the BIA's interpretation of the provision "single scheme of criminal misconduct"[67] is eligible for deference.[68] Each of these provisions is ambiguous, but none implicates the BIA's immigration-specific expertise.

If courts read *Chevron* to adopt ambiguity as the sole touchstone of deference and systematically defer to all BIA interpretations of ambiguous procedural and domestic policy provisions in the INA, they will fail to realize *Chevron*'s goal. The *Chevron* framework should allocate interpretive questions between courts and the BIA based on relative institutional competence.[69] This Note will

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64. *Id.*

65. *Compare* Alwan v. Ashcroft, 388 F.3d 507 (5th Cir. 2004) (granting *Chevron* deference to the BIA's interpretation of "relating to obstruction of justice"), *with* Denis v. Att'y Gen., 633 F.3d 201 (3d Cir. 2011) (denying *Chevron* deference to the BIA's interpretation of "relating to obstruction of justice").

66. 8 U.S.C. § 1227(a)(2)(A)(i)(I) (2012). *Compare* Jean-Louis v. Att'y Gen., 582 F.3d 462, 477 (3d Cir. 2009) (stating that Congress did not intend for the Attorney General to decide the meaning of "crime involving moral turpitude" because the phrase "is a term of art, predating even the immigration statute itself."), *with* Smalley v. Ashcroft, 354 F.3d 332, 335–36 (5th Cir. 2003) ("[W]e accord 'substantial deference to the BIA's interpretation of the INA' and its definition of the phrase 'moral turpitude.'").

67. 8 U.S.C. § 1227(a)(2)(A)(ii) (2012).

68. *Compare* Akindemowo v. INS, 61 F.3d 282, 284–85 (4th Cir. 1995) (deferring to the BIA's interpretation of "single scheme of criminal misconduct."), *with* Gonzalez-Sandoval v. INS, 910 F.2d 614, 616 (9th Cir. 1990) (interpreting "single scheme of criminal misconduct" de novo, without mentioning *Chevron*). *But see* Michel v. INS, 206 F.3d 253, 267 n.1 (2d Cir. 2000) (Cabranes, J., concurring) (arguing that the majority should reach the *Chevron* question and contending that "there is no indication from the *Gonzalez-Sandoval* opinion that the panel in that case gave any consideration whatsoever to *Chevron*").

69. *See* Negusie v. Holder, 555 U.S. 511, 530 (2009) (Stevens, J., concurring) (*Chevron* "accounts for the different institutional competencies of agencies and courts: Courts are expert at statutory construction, while agencies are expert at statutory implementation.").

propose a rule to implement this principle.[70] Specifically, courts reviewing BIA interpretations should consider, as part of the *Chevron* step zero threshold inquiry, whether the BIA exercised its expertise in interpreting the statute.[71] Unless the ambiguous statutory provision in question implicates BIA expertise[72] and the BIA has applied its expertise to interpret that statutory provision, courts have no reason to believe that Congress intended to implicitly delegate interpretive authority to the BIA. By deferring only to expert BIA interpretations of the INA and reviewing all other questions of law de novo, courts honor the purposes of *Chevron* and respect legislative intent.

D. The Step Zero "Force of Law" Requirement: Procedural Requirements for Deference

Until the past few years, the federal courts of appeals have struggled toward consensus over the *Chevron* step zero analysis of the procedural sufficiency of BIA opinions. Part I.A described the manner in which the circuits have largely converged in developing rules concerning the formality with which the BIA must issue its opinions in order to receive deference, though a handful of inconsistencies remain unresolved. The process provides a template for how the circuits should similarly converge in developing a rule requiring consideration of the BIA's expertise with respect to the "specific issue" in question before deferring. Courts should establish a basic principle—in the "force of law" cases, procedural formality, and in the "specific issue" cases, agency expertise—and reason from that principle in specific cases rather than mechanically applying *Chevron* to defer in all cases.

The Supreme Court's *Mead* decision established procedural formality as a prerequisite to *Chevron* deference. At the outset, it is clear that the BIA, as the Attorney General's delegate, is entrusted with the administration of the INA.[73] At the most general level, the BIA also meets the "force of law" requirement, as the agency

70. *See infra* Part III.

71. *See, e.g.*, Higgins v. Holder, 677 F.3d 97, 109 (2d Cir. 2012) (Katzmann, J., concurring) (arguing that even if the INA is "silent" on the provision in question, courts should only defer to the BIA's interpretation "to the extent that it is within the domain of the agency's special expertise in immigration law, as long as it is reasonable").

72. *See infra* Part II.B (characterizing the BIA's expertise in immigration-specific subject matter and the INA).

73. *See* 8 U.S.C. § 1103 (2009) (giving the Attorney General the power to "establish such regulations . . . necessary for carrying out this section" of the INA and the power to "delegate such authority"); *see also* 8 C.F.R. § 1003.1(a)(1) (2009)

"give[s] concrete meaning [to the INA] through a process of case-by-case adjudication,"[74] understood under *Mead* as "[a] very good indicator of delegation meriting *Chevron* treatment."[75] However, the BIA produces opinions in multiple formats, and courts have found that some of these formats fail to satisfy the "force of law" requirement. Thus, rather than mechanically deferring to every interpretation issued by the BIA, courts defer only to BIA interpretations that satisfy the force of law requirement.

First, the BIA has the power to issue precedential decisions, which are specially designated as binding on immigration courts in future adjudications.[76] Courts generally defer to precedential BIA decisions, reasoning that these binding decisions are promulgated with the force of law.[77] BIA opinions not designated as precedential

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(giving the BIA the power "to act as the Attorney General's delegates in the cases that come before them").

74. INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987); *see also* Lin v. DOJ, 416 F.3d 184, 189 (2d Cir. 2005) (Katzmann, J., concurring) (explaining that "it is beyond cavil that Congress has, as a general matter, delegated the authority to make immigration rules carrying the force of law" to the Attorney General), *reh'g en banc granted* (Nov. 13, 2006).

75. United States v. Mead Corp., 533 U.S. 218, 229 (2001) ("A very good indicator of delegation meriting *Chevron* treatment is express congressional authorizations to engage in the rulemaking or adjudication process that produces the regulations or rulings for which deference is claimed."). In *Mead*, the Court also expressly lists *Aguirre-Aguirre* as an example of a case in which formal adjudication was due *Chevron* deference. *See id.* at 230 n.12. Outside of notice-and-comment rulemaking and formal adjudication, lower courts have applied varying versions of *Mead* and *Barnhart v. Walton*, 535 U.S. 212, 222 (2002). *See* Bressman, *supra* note 32, at 1445–46 (describing how circuit courts vacillate between applying factors set forth in *Mead* and factors set forth in *Barnhart* to determine whether interpretations handed down outside the notice-and-comment or formal adjudication contexts receive deference). In *Mead*, the Court explained that any interpretation that "foster[s] fairness and deliberation" and "bespeaks the type of legislative activity that naturally binds more than the parties to the ruling" might receive *Chevron* deference. 533 U.S. at 230, 232. In *Barnhart v. Walton*, the Court considered "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time . . . ." 535 U.S. 212, 222 (2002).

76. 8 C.F.R. § 1003.1(g) (2009) (providing that "[b]y majority vote of the permanent Board members, selected decisions of the Board rendered by a three-member panel or by the Board en banc may be designated to serve as precedents in all proceedings involving the same issue or issues").

77. *See, e.g.*, Marmolejo-Campos v. Holder, 558 F.3d 903, 909 (9th Cir. 2009) (en banc) (explaining that "the Board's precedential orders, which bind third parties, qualify for *Chevron* deference because they are made with a lawmaking pretense" whereas unpublished BIA opinions do not receive deference "because they do not bind future parties").

do not bind immigration judges in future cases, and therefore do not receive *Chevron* deference.[78] However, in some cases courts grant non-precedential decisions *Skidmore* "respect," a non-mandatory form of judicial deference based on the persuasiveness of an agency's reasoning rather than on the mere fact of delegation.[79]

Second, the BIA adjudicates in two formats: Adjudication by a single member and adjudication by a panel.[80] Generally, the BIA employs single-member adjudication "in these straightforward cases where there has been no historic disagreement within the Board over the result" and panel adjudication in cases in which there is a need to "correct clear errors of fact, interpret the law, and provide guidance regarding the exercise of discretion."[81] Precedential BIA decisions may only be issued by a panel, so single-judge BIA opinions do not generally receive *Chevron* deference. However, in many cases in which a single BIA member reviews a case, that member will issue a summary affirmance of the immigration judge's decision.[82] Summary affirmances are appropriate when the immigra-

78. *See, e.g.*, Arobelidze v. Holder, 653 F.3d 513, 520 (7th Cir. 2011) ("Today we hold that non-precedential Board decisions that do not rely on binding Board precedent are not afforded *Chevron* deference."). Overruling *Gutnik v. Gonzales*, 469 F.3d 683, 690 (7th Cir. 2006), the court in *Arobelidze* observed that "[o]ut of all the circuits to address the question, we are the only one to go the other way" and joined the other circuits in denying deference to non-precedential BIA decisions. *Id.* However, dicta contained in precedential opinions do not receive deference. *See, e.g.*, Velazquez-Herrera v. Gonzales, 466 F.3d 781, 783 (9th Cir. 2006) ("We decline to reach the question whether either of these two definitions (or any other definition) is a permissible construction of 8 U.S.C. § 1227(a)(2)(E)(i) because neither the dictum in *Rodriguez-Rodriguez* nor the definition the BIA adopted in this case constitutes a statutory interpretation that carries the 'force of law.'") (internal citations omitted).

79. *See Marmolejo-Campos*, 558 F.3d at 909 ("Recognizing that the BIA's interpretations of the I.N.A. are entitled to at least this much respect, we have applied *Skidmore* when reviewing its unpublished orders.").

80. By regulation the Attorney General has conferred on the BIA the power "to prescribe procedures governing proceedings before it." 8 C.F.R. § 1003.1(d)(4).

81. U.S. Dep't of Justice, FACT SHEET: BOARD OF IMMIGRATION APPEALS: FINAL RULE 3, *available at* http://www.justice.gov/opa/biafinalrule.pdf.

82. 8 C.F.R. § 1003.1(e)(4)(i) (2009) (providing that a BIA member "shall affirm the decision of the . . . immigration judge, without opinion, if the Board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial"; and that "[t]he issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation" or "[t]he factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case").

tion judge's decision below was correct, any errors were harmless or immaterial, and the factual and legal issues on appeal are insubstantial.[83] Alternatively, a single BIA member may write a non-precedential one-judge opinion.[84] Courts have found that summary affirmances are generally not entitled to deference because as non-precedential opinions they do not carry the force of law.[85] However, in the absence of a reasoned BIA opinion, courts directly review the immigration judge's decision and defer to precedential opinions cited by the immigration judge.[86] In these cases, the force of law requirement is satisfied by the promulgation of these past BIA precedential opinions.

Inconsistency remains in this area because some judges limit the rule requiring deference to immigration judge opinions that rely on BIA precedential opinions. In one case, the Seventh Circuit avoided *Chevron* entirely in reviewing what Judge Posner described

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83. *See id.*

84. *See* 8 C.F.R. § 1003.1(e)(5) (2011) ("If the Board member to whom an appeal is assigned determines, upon consideration of the merits, that the decision is not appropriate for affirmance without opinion, the Board member shall issue a brief order affirming, modifying, or remanding the decision under review . . . .").

85. *See, e.g.*, Arobelidze v. Holder, 653 F.3d 513, 520 (7th Cir. 2011) ("Today we hold that non-precedential Board decisions that do not rely on binding Board precedent are not afforded *Chevron* deference."). In overruling *Gutnik v. Gonzales*, 469 F.3d 683, 690 (7th Cir. 2006), the court in *Arobelidze* observed that "[o]ut of all the circuits to address the question, we are the only one to go the other way" and joined the other circuits in denying deference to non-precedential BIA decisions. *Id.* at 520. The Ninth Circuit found that single-member BIA opinions lacked the force of law "[i]n light of *Mead* . . . case law, the BIA's governing regulation, and its internal policies and practices." Garcia-Quintero v. Gonzales, 455 F.3d 1006, 1014 (9th Cir. 2006).

86. *See, e.g.*, Secaida-Rosales v. INS, 331 F.3d 297, 305 (2d Cir. 2003) (superseded by statute on other grounds) (noting that when the BIA issues a summary affirmance, "it is appropriate . . . to review the decision of the IJ directly"); Gao v. Ashcroft, 299 F.3d 266, 271 (3d Cir. 2002) (superseded by statute on other grounds) ("When the BIA does not render its own opinion, however, and either defers or adopts the opinion of the IJ, a Court of Appeals must then review the decision of the IJ."); Cuevas v. INS, 43 F.3d 1167, 1170 (7th Cir. 1995) ("If the BIA adopts the reasoning of the IJ, however, the IJ's analysis is the sole basis for our review . . . ."); Gandarillas-Zambrana v. BIA, 44 F.3d 1251, 1255 (4th Cir. 1995) (holding that "if the BIA 'chooses to rely on the express reasoning of the [IJ] . . ., that reasoning will be the sole basis for our review, and if we find that reasoning inadequate, we will . . . reverse the holding of the [IJ].'") (quoting Panrit v. INS, 19 F.3d 544, 546 (10th Cir. 1994)); *Panrit*, 19 F.3d at 546 ("If the Board chooses to rely on the express reasoning of the immigration judge in denying suspension of deportation, that reasoning will be the sole basis for our review, and if we find that reasoning inadequate, we will grant the petition for review and will reverse the holding of the immigration judge.").

as "a characteristically terse, one-member [BIA] opinion" denying a noncitizen petitioner withholding of removal on the ground that he was not a member of a "particular social group."[87] In that case, the petitioner was a gang member, and government lawyers argued that based on the "social visibility" test[88] the petitioner was not a member of a particular social group, citing to *In re S-E-G-*[89] and several other precedential BIA opinions.[90] However, the BIA's summary affirmance had not mentioned *In re S-E-G-*, and Judge Posner instead relied on judicial analysis of the social visibility question, citing *Gatimi v. Holder*,[91] in which the Seventh Circuit rejected the social visibility test.[92] This approach is consistent with the approach argued for in this Note: Because courts are just as competent to interpret "particular social group" as the BIA, there is little reason to defer to the BIA on the issue. On the other hand, the Tenth Circuit reviewed a single-member opinion denying a noncitizen asylum and cited *Chevron* in deferring to the BIA's construction of "particular social group" as based on the social visibility test.[93] Thus,

87. Benitez Ramos v. Holder, 589 F.3d 426, 429 (7th Cir. 2009).

88. Posner explains that the social visibility test is premised on the idea that one "can be a member of a particular social group only if a complete stranger could identify you as a member if he encountered you in the street, because of your appearance, gait, speech pattern, behavior or other discernible characteristic." *Id.* at 430.

89. 24 I. & N. Dec. 579 (BIA 2008).

90. *See id.* at 586; *In re* E-A-G-, 24 I. & N. Dec. 591, 594 (BIA 2008); *In re* A-T-, 24 I. & N. Dec. 296, 304 n.4 (BIA 2007) (vacated and remanded on other grounds by 24 I. & N. Dec. 617 (AG 2008)); *In re* C-A-, 23 I. & N. Dec. 951, 959–61 (BIA 2006).

91. Gatimi v. Holder, 578 F.3d 611 (7th Cir. 2009).

92. *Id.* at 615–16 ("We are mindful of the Supreme Court's admonition to the courts of appeals, in *Gonzales v. Thomas*, 547 U.S. 183 (2006) (per curiam), that the Board's definition of 'particular social group' is entitled to deference. The issue in that case was whether a family could be a particular social group, a difficult issue on which the Board had not opined; and the Court held that the Board should have an opportunity to do so. But regarding 'social visibility' as a criterion for determining 'particular social group,' the Board has been inconsistent rather than silent. It has found groups to be "particular social groups" without reference to social visibility, as well as, in this and other cases, refusing to classify socially invisible groups as particular social groups but without repudiating the other line of cases. When an administrative agency's decisions are inconsistent, a court cannot pick one of the inconsistent lines and defer to that one, unless only one is within the scope of the agency's discretion to interpret the statutes it enforces or to make policy as Congress's delegate. Such picking and choosing would condone arbitrariness and usurp the agency's responsibilities.") (internal citations omitted).

93. *See* Rivera-Barrientos v. Holder, 666 F.3d 641, 652 (10th Cir. 2012) (deferring to a one-member opinion relying on the social visibility test).

although courts have largely worked out the ambiguities in the "force of law" requirement, some inconsistent approaches remain.

Finally, even when the BIA issues precedential opinions via panels of judges, courts may not defer to portions of opinions that they find insufficiently binding on other immigration judges. In particular, some courts have denied deference to BIA interpretations that take the form of "guidelines," reasoning that BIA interpretations that do "not interpret a statute within the meaning of *Chevron*, but only provide[ ] a 'guide' for later interpretation" should not receive deference.[94] In *Estrada-Espinoza v. Mukasey*,[95] the Ninth Circuit reviewed the BIA's interpretation of "sexual abuse of a minor," an interpretation that took the form of a guide to interpreting criminal conviction. The court rejected the idea that *Chevron* applied to this guide because the BIA did not construe the specific text of the statute to provide a uniform statutory interpretation.[96] The Ninth Circuit compared the BIA's guide to "opinion letters-like interpretations contained in policy statements, agency manuals, and enforcement guidelines" of the kind the Supreme Court found unworthy of deference in *Christensen v. Harris County*.[97] Additionally, if a BIA interpretation does not define a particular term in the INA through its interpretation, then courts should apply arbitrary and capricious review under the Administrative Procedure Act[98] rather than deferring under *Chevron*.[99]

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94. Estrada-Espinoza v. Mukasey, 546 F.3d 1147, 1157 (9th Cir. 2008) (en banc); *but see* Gaiskov v. Holder, 567 F.3d 832, 835 (7th Cir. 2009) ("This court has concluded that the BIA's use [in *Rodriguez-Rodriguez*] of the broad definition found in 18 U.S.C. § 3509 as an interpretive touchstone is reasonable.").

95. *Estrada-Espinoza*, 546 F.3d at 1151.

96. *See id.* at 1157 ("According *Chevron* deference to *Rodriguez-Rodriguez* would be inappropriate because the BIA did not construe the statute and provide a uniform definition in the decision. Rather, it developed an advisory guideline for future case-by-case interpretation."); *but see* Restrepo v. Att'y Gen., 617 F.3d 787, 796 (3d Cir. 2010) ("We conclude that the BIA's definition of sexual abuse of a minor [in *Rodriguez-Rodriguez*] is a reasonable one and that it is appropriate to exercise *Chevron* deference.").

97. *Estrada-Espinoza*, 546 F.3d at 1157 (citing Christensen v. Harris County, 529 U.S. 576, 587 (2000)).

98. 5 U.S.C. § 551 *et seq.*

99. *See* Judulang v. Holder, 132 S. Ct. 476, 483 n.7 (2011) ("[T]he more apt analytic framework in this case is standard 'arbitrary [or] capricious' review under the APA . . . [when] [t]he BIA's . . . policy . . . is not an interpretation of any statutory language . . . .").

E. Conclusions

These various issues that arise in the application of *Chevron* to immigration law raise a significant concern: If the goals of *Chevron* include uniform and consistent application of the laws, then it is failing in the immigration context. In addressing inconsistencies that arose from *Mead*'s "force of law" inquiry, the circuits have largely converged. Courts can produce similarly consistent opinions on whether to defer to BIA interpretations of specific provisions in the INA by refocusing the inquiry at *Chevron* step zero on the BIA's expertise.

Part II discusses the continuing validity of expertise as a basis for judicial deference and describes the BIA's relevant immigration expertise. Part III states a clear test for deferring based on the application of agency expertise and applies that test to 8 U.S.C. § 1101(a)(43)(S)'s "relating to obstruction of justice" provision.

II.
IMMIGRATION EXPERTISE

Agency expertise has long played a role in justifying judicial deference to agency interpretations of statutes,[100] first as the overarching rationale for deference in *Skidmore v. Swift*[101] and later as a justification in *Chevron*.[102] This ongoing reliance on agency expertise has become doctrinally confusing in the wake of *Mead*'s construction of *Chevron*, which appears to dispose of the idea that deference is predicated on agency expertise, instead explaining that the underpinnings of deference are legislative delegation and

100. *See, e.g.*, United States v. Moore, 95 U.S. 760, 763 (1877) ("The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret.") (internal citations omitted).

101. *See* Hickman & Krueger, *supra* note 48, at 1294 ("[A]gency expertise is the principle that guides *Skidmore* as a doctrine and to which all the other factors relate.").

102. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865(1984) (noting that while agencies have expertise, "[j]udges are not experts in the field."); *see also* Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 651–52 (1990) ("Indeed, the judgments about the way the real world works that have gone into the [agency]'s . . . policy are precisely the kind that agencies are better equipped to make than are courts. This practical agency expertise is one of the principal justifications behind *Chevron* deference.") (internal citations omitted).

political accountability.[103] Nonetheless, even after *Mead*, the Supreme Court and lower courts have continued to consider agency expertise as relevant to granting deference in the immigration context as well as in others.[104]

There are two reasons courts should not defer to BIA interpretations of provisions in the INA that do not implicate the BIA's expertise. First, if a statutory provision does not implicate agency expertise, then courts, which possess substantial expertise in statutory interpretation, are the better readers of the statute.[105] Second, if agency expertise is not implicated, there is little reason to believe that Congress implicitly delegated interpretive authority to the BIA

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103. *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law . . . ."). Additionally, Justice Scalia has argued that after *Chevron*, agency expertise became irrelevant as a factor for determining deference. *See* Scalia, *supra* note 8, at 521 ("The opinions we federal judges read, and the cases we cite, are full of references to the old criteria of 'agency expertise,' 'the technical and complex nature of the question presented,' 'the consistent and long-standing agency position'—and it will take some time to understand that those concepts are no longer relevant, or no longer relevant in the same way.").

104. *See, e.g.*, Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 666 (2007) (finding that when two statutes seemingly mandate that the EPA act in different ways, "it is appropriate to look to the implementing agency's expert interpretation"); Barnhart v. Walton, 535 U.S. 222 (2002) ("In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that Chevron provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue."); Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co., 534 U.S. 327, 339 (2002) (granting deference after determining that "[a]s it was in [*Chevron*] the subject matter [in communications law] is technical, complex, and dynamic; and as a general rule, agencies have authority to fill gaps where the statutes are silent"); Sandoval v. Reno, 166 F.3d 225, 239 (3d Cir. 1999) ("*Chevron* appears to speak to statutory interpretation in those instances where Congress delegated rule-making power to an agency and thereby sought to rely on agency expertise in the formulation of substantive policy."); *see also* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Morality to Expertise*, 2007 SUP. CT. REV. 51, 66 (2007) (observing "the Court's refusal to grant *Chevron* deference to EPA's view of its statutory authority, especially in light of the *Brown & Williamson* precedent, suggests that for the current Court insulating expertise from politics is a greater imperative than forcing democratic accountability").

105. *See* Negusie v. Holder, 555 U.S. 511, 530 (2009) (Stevens, J., concurring) ("The *Chevron* framework thus accounts for the different institutional competencies of agencies and courts: Courts are expert at statutory construction, while agencies are expert at statutory implementation. That the distinction can be subtle does not lessen its importance.").

through statutory ambiguity.[106] However, if an ambiguous provision in the INA does implicate the BIA's "special administrative competence,"[107] a reviewing court should defer to the BIA's interpretation.

A. The Relevance of Expertise to Judicial Deference After Mead

Although some courts and commentators have taken *Chevron* as a bright-line rule requiring deference to agency interpretations of ambiguous statutory provisions, courts should instead follow the lead of other courts and commentators who view deference as dependent on the exercise of agency expertise. Part II.A sets out the arguments against and in favor of considering the application of agency expertise as a necessary condition for *Chevron* deference.

There are two strong arguments that courts need never independently consider agency expertise when deciding to defer. First, Justice Scalia has championed the conception of *Chevron* as a bright-line mandatory deference rule,[108] taking the position that after *Chevron*, the multi-factor test in *Skidmore* no longer has any utility.[109] Justice Scalia's view presumes that congressional delegation alone, not agency expertise, is determinative of deference.[110] Second, Justice Souter's majority opinion in *Mead* distinguishes deference based on expertise, or *Skidmore* deference, from deference based on an implied congressional delegation of interpretive authority, or *Chevron* deference, suggesting that expertise is not relevant to the *Chevron* question.[111] Commentators offer competing understandings of the significance of this schism in principles un-

106. *See, e.g.*, Martin v. OSHRC, 499 U.S. 144, 154 (1991) ("Because historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court, we presume here that Congress intended to invest interpretive power in the administrative actor in the best position to develop these attributes.") (internal citations omitted).

107. Marmolejo-Campos v. Holder, 558 F.3d 903, 907 (9th Cir. 2009) (en banc).

108. *See generally* Scalia, *supra* note 8.

109. *See* United States v. Mead Corp., 533 U.S. 218, 250 (2001) (Scalia, J. dissenting) (finding "the anachronism of *Skidmore*" unsuitable in modern administrative law).

110. *See id.*

111. *See id.* at 235 (majority opinion) (explaining that even though *Chevron* does not apply to an interpretation that was not issued with the force of law, *Skidmore* may nonetheless apply); *Cf.* Hickman & Krueger, *supra* note 48, at 1248–50 (debating whether *Chevron* and *Skidmore* are together best characterized as a "functionally similar" but with different emphases or as "fundamentally distinct, arising from different premises and serving different purposes").

derlying judicial deference to agency interpretation.[112] In one account, *Chevron* and *Skidmore* serve different purposes: *Chevron* deference responds to the idea that Congress intends to delegate some policymaking functions to agencies,[113] and *Skidmore* deference is a pragmatic doctrine that allows courts to reach better outcomes by relying on superior agency expertise.[114] As a practical matter, courts grant substantial—and effectively mandatory—deference under *Chevron* if the agency acted with the force of law, and courts grant respect—a more discretionary standard—under *Skidmore* to informally promulgated regulations.[115] It remains unclear to what extent agency expertise is relevant to *Chevron* deference after *Mead*. *Mead* associates expertise with *Skidmore*,[116] but *Chevron* itself cites expertise as one of several rationales for judicial deference.[117]

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112. Hickman & Krueger, *supra* note 48, at 1248–49 (noting that "[j]ust how different the two doctrines are remains a matter of some debate" and explaining that "one can view Chevron and Skidmore as fundamentally distinct" or "functionally similar").

113. *See, e.g.*, Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 746–47 (2002) (characterizing the Court's holding in *Mead* as "squarely locat[ing] the requirement of *Chevron* deference on a theory of an implied delegation of lawmaking power").

114. *See* Hickman & Krueger, *supra* note 48, at 1249 (contending that in one understanding, "*Skidmore* merely reflects a policy of judicial prudence").

115. The difference between *Chevron* and *Skidmore* deference may just be a matter of degree. Some commentators have characterized *Skidmore* as a more complex inquiry aimed at identifying congressional intent to delegate, similar to the *Chevron* inquiry. Functionally, *Skidmore* distinguishes which interpretations made by an entrusted agency ought to receive deference. *See id.* at 1289 (suggesting that in *Skidmore* analysis, the agency expertise factor has teeth when courts analyze whether an agency exercised its expertise in making a particular interpretation); *see also* Bradley Lipton, Note, *Accountability, Deference, and the* Skidmore *Doctrine*, 119 YALE L.J. 2096, 2099 (2010) (arguing that *Skidmore* deference is based in political accountability).

116. *See Mead*, 533 U.S. at 220 (providing that *Skidmore* should apply to informal agency interpretations and courts should defer based on agency expertise); *see also* Hickman & Krueger, *supra* note 48, at 1288 ("In our view [expertise] undergirds the *Skidmore* doctrine.").

117. In *Chevron*, Justice Stevens' majority opinion offered four rationales for deference without citing one rationale as more significant than another. First, deference might be warranted because Congress impliedly delegated legislative power to agencies. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."). Second, deference might be warranted because Congress intended that courts defer. *See id.* at 862 ("To the extent any congressional 'intent' can be discerned from this language, it would appear that the listing of

The best reading of background norms of administrative law and recent judicial precedent suggests that agency expertise remains a central rationale for judicial deference in spite of Justice Scalia's view and despite Justice Souter's opinion in *Mead*.[118] First, agency expertise traditionally served as the principal justification for judicial deference to agency interpretations. Prior to *Chevron*, there was no uniform deference rule. Instead, courts applied a collection of tools to determine whether an agency interpretation was due deference,[119] typically guided by the factors set out in *Skidmore*, which focused on agency expertise.[120] Even in 1980, shortly before the landmark *Chevron* decision, the Court characterized deference as "traditional acquiescence in administrative expertise."[121] The traditional deference doctrine under *Skidmore* was not mandatory for courts, but was instead based on the agency interpretation's "power to persuade." In 1984, *Chevron* established a broadly applica-

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overlapping, illustrative terms was intended to enlarge, rather than to confine, the scope of the agency's power . . . ."). Third, deference might be warranted because agencies are more politically accountable than courts. *See id.* at 865 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . ."). Fourth, deference might be warranted because agencies have greater technical expertise than courts. *See id.* (noting that while agencies have expertise, "[j]udges are not experts in the field.").

118. Justice Scalia was the sole dissenter in *Mead*. 533 U.S. at 250 (Scalia, J., dissenting).

119. *See generally* Merrill & Hickman, *supra* note 38, at 833 (prior to *Chevron*, "deference was not mandatory, but was grounded in the exercise of judicial discretion"); Colin S. Diver, *Statutory Interpretation in the Administrative State,* 133 U. PA. L. REV. 549, 562–67 (1985) (discussing the factors that judges used to determine whether to defer prior to *Chevron*).

120. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (The degree of this judicial deference "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

121. Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980). For example, in 1983's *Bureau of Alcohol, Tobacco and Firearms v. FLRA* the Court found that the Federal Labor Relations Authority (FLRA) was "entitled to considerable deference" when it exercised "its special function of applying the general provisions of the Act to the complexities of federal labor relations." 464 U.S. 89, 96 (1983) (internal citation omitted). The Court explained that "the FLRA was intended to developed specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the [Federal Labor Relations Act]." *Id.* Deference then followed if the FLRA's interpretation of its "enabling Act" was "reasonable and defensible." *Id.* In that case, the Court found that an FLRA grant of "official time" compensation to a union negotiator was not "reasonably defensible" and denied deference. *Id.* at 91. Thus, in the case of the NLRB, agency expertise in the regulated field was the principle justification for deference.

ble formula that mandated deference even in cases where delegation of interpretive authority was implicit rather than explicit, reducing judicial discretion.[122] However, Justice Breyer has taken the position that "[t]o read *Chevron* as laying down a blanket rule . . . would be seriously overbroad, counterproductive and sometimes senseless."[123] Instead, Justice Breyer advocates for a multi-factor assessment of whether the agency interpretation is due deference, proposing that "there is no reason why one could not apply . . . general principles [of statutory interpretation] . . . to the question of the extent to which Congress intended that courts should defer to the agency's view of the proper interpretation."[124] Justice Breyer suggests that courts ought to accord deference based on relative "institutional capacities and strengths."[125] Thus, courts should make judgments about questions of law, in which courts have a comparative advantage in institutional competence, and agencies should make judgments that require weighing competing policies, where agencies have a comparative advantage in institutional competence.[126]

Second, recent judicial precedent points to the continued centrality of agency expertise to judicial deference. Most prominently, Justice Breyer's opinion in *Barnhart v. Walton* suggests that expertise remains important to *Chevron* analysis.[127] Breyer appears to collapse

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122. *See* Merrill & Hickman, *supra* note 38, at 834 (explaining that *Chevron* "turned the doctrine of mandatory deference, formerly an isolated pocket of administrative law doctrine, into a ubiquitous formula governing court-agency relations"); *see also* Hickman & Krueger, *supra* note 48, at 1242 (The "application of compulsory judicial deference to so-called implicit delegations, more than the two-part test, is what made *Chevron* revolutionary.").

123. Breyer, *supra* note 27, at 373.

124. *Id.* at 370.

125. *Id.* at 398. *See also* Barnhart v. Walton, 535 U.S. 212, 222 (2002) (Breyer's majority opinion explains that: "[T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.").

126. For additional discussion, see Michael G. Heyman, *Judicial Review of Discretionary Immigration Decisionmaking*, 31 SAN DIEGO L. REV. 861, 872 (1994) [hereinafter *Judicial Review of Discretionary Immigration Decisionmaking*] ("If *Chevron* reflects the Court's views on the comparative competence of courts and agencies to decide technical, dynamic issues, then it offers sensible guidance.").

127. *Barnhart*, 535 U.S. at 222 (considering whether "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of

Skidmore and *Chevron* into a sliding scale,[128] a reading in line with courts of appeals' widespread practice of citing agency expertise as a reason to grant *Chevron* deference.[129] Even if congressional intent to delegate is the sole factor relevant to deference, agency expertise serves as evidence that Congress intended to delegate interpretive authority to the agency.

In sum, agency expertise has historically justified judicial deference to agency interpretations of statutes and many courts, including the Supreme Court, continue to rely on agency expertise to resolve cases implicating judicial deference. Nonetheless, courts have not consistently focused on agency expertise in reviewing BIA decisions, and frequently defer without determining whether the BIA has exercised its particular expertise or whether the particular ambiguous provision in question implicates agency expertise. Part II.B of this Note explores the concept of agency expertise generally and characterizes the BIA's particular expertise, which differs from the technical, scientific, or industry-specific expertise that many other agencies exercise. Part II.C explores arguments that, in the immigration context, suggest that courts should not defer to the BIA at all. However, because the Supreme Court has clearly found the BIA eligible for deference,[130] these arguments are best read to support denying deference only in a subset of immigration cases.[131]

B. Defining Agency Expertise

Though courts frequently invoke agency expertise as a reason for deference, the concept of expertise is not precisely defined. Courts include different types of competencies under the umbrella term "expertise," but most generally courts should view expertise as special administrative competence distinct from judicial compe-

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time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.").

128. *See* Hickman & Krueger, *supra* note 48, at 1248 (explaining that "Breyer demonstrates his approach most concisely in his opinion for the Court in *Barnhart v. Walton*, in which he incorporates *Skidmore*-like factors into his analysis of whether *Chevron* applies, even as he cites *Mead* in support of his analysis").

129. In *Krzalic v. Republic Title Co.*, the Seventh Circuit directly addressed the question of whether the difference between *Chevron* and *Skidmore* deference was a matter of degree or a fundamentally different inquiry. 314 F.3d 875 (7th Cir. 2002). The majority concluded that there has been "a merger between *Chevron* deference and *Skidmore*." *Id.* at 879. Judge Easterbrook thought differently and in his concurrence stated that he did "not perceive . . . any 'merger' between *Chevron* and *Skidmore*, which *Mead* took such pains to distinguish." *Id.* at 882.

130. *See* INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) (deferring to the BIA).

131. *See infra* Part III (proposing an expertise-based inquiry at *Chevron* step zero).

tence. First, expertise may refer to technical expertise in non-legal subject matter. Agencies staffed by technical experts are more competent than generalist judges to answer technical questions. Second, expertise may refer to expertise in the statute itself. When a statute is particularly complex, convoluted, or dependent on internal coherence for its consistency, an agency close to these intricacies and familiar with the ramifications of varying statutory readings is best positioned to interpret the statute. Additionally, agencies may be more competent than courts to answer some questions—particularly questions that implicate policymaking—because of their ability to channel political decisions that are exclusively the province of the Executive.

1. Technical Expertise

The need for technical expertise was the original justification for the creation of agencies and for judicial deference to administrative interpretations.[132] When agencies answer technical questions dealing with scientific or economic subject matter, courts are poorly positioned to second-guess those determinations. Judges typically do not have the extensive scientific background possessed by appointed experts in specialty agencies.[133] In technical regulatory areas, policymaking often requires analysis of "scientific, engineering, or other technical data that are beyond the experience and understanding of the average Article III judge."[134] Administrative contexts such as environmental regulation, food and drug regulation, and energy regulation frequently require this type of technical

132. *See, e.g.*, Skidmore v. Swift, Co., 323 U.S. 134, 140 (1944) (setting a standard of review for *Skidmore* "respect" due to an agency based on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control"); Soc. Sec. Bd. v. Nierotko, 327 U.S. 358, 368 (1946) ("The Social Security Board and the Treasury were compelled to decide, administratively, whether or not to treat 'back pay' as wages and their expert judgment is entitled, as we have said, to great weight."); Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977) ("Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise.").

133. *See, e.g.*, D. Zachary Hudson, *A Case for Varying Interpretive Deference at the State Level*, 119 YALE L.J. 373, 379 (2009) (arguing that the *Chevron* framework is less appropriate at the state level than at the federal because "most states do not have agencies analogous to those existing at the federal level that deal with complex scientific issues that may be beyond the grasp of liberally educated judges").

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

decision-making.[135] Thus, deference to expert agencies in such contexts promotes higher quality decisions.[136] Additionally, outside of the *Chevron* context, courts have honored agency superiority in technical matters by granting "super-deference" when reviewing scientific findings of expert agencies.[137]

Moreover, the exercise of technical expertise justifies deference because it is more likely that Congress intended to delegate interpretive authority to agencies tasked with making technical expert judgments. This presumption that Congress generally intends to delegate technical decision-making is supported both by the fact that agencies are better situated than Congress to make technical policy decisions and the fact that administrative agencies were originally created for the purpose of making technical decisions.[138] In one example of this reasoning, the Supreme Court deferred to the Department of Education's interpretation in *Zuni Public School District v. DOE*,[139] relying on the fact that a method for calculating

135. *Id.* at 1599 ("The Environmental Protection Agency, the Food and Drug Administration, the Federal Energy Regulatory Commission, for example, are all agencies whose responsibilities fuse the law with more scientific disciplines.").

136. *See, e.g.*, Dion v. Sec'y of Health & Human Servs., 823 F.2d 669, 673 (1st Cir. 1987) ("The deference due an agency's interpretation depends, in the first instance, on whether the matter is more properly viewed as within the agency's expertise or, on the contrary, as a clearly legal issue that courts are better equipped to handle.").

137. Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 734 (2011) (discussing "the principle that courts ought to be at their 'most deferential' when reviewing an agency's scientific determinations"); *see also* Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 377 (1989) ("Because analysis of the relevant documents 'requires a high level of technical expertise,' we must defer to the 'informed discretion of the responsible federal agencies.'") (citations omitted); Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 103 (1983) ("[A] reviewing court must remember that the [Nuclear Regulatory] Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.").

138. *See* Martin v. OSHRC, 499 U.S. 144, 154 (1991) ("Because historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court, we presume here that Congress intended to invest interpretive power in the administrative actor in the best position to develop these attributes.") (internal citations omitted); *see also* Hickman, *supra* note 134, at 1599 ("Given the agencies' comparatively greater expertise in these cross-disciplinary areas, it makes sense both that Congress would delegate substantial policy authority to the agencies and, consequently, would prefer the agencies to be the primary interpreters of the statutes under their administration.").

139. Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81 (2007).

whether a state aid program "equalizes expenditures" was the type of action most likely to be entrusted to an agency.[140] Additionally, Congress may intend that expert agencies interpret a statute because expert interpretation results in a more consistent national law.[141]

Another reason to defer to agency decisions requiring the application of technical expertise is because such decisions are more likely to entail policymaking. In *Chevron*, the Court found the EPA better suited to balance competing scientific and economic interests.[142] Courts are ill suited to make such cross-disciplinary judgments.[143] Even in the absence of scientific questions, expertise may generally be conceived of as policymaking expertise.[144] Policymaking expertise stems from experience in a particular administrative context and institutional knowledge developed over time.[145] Al-

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140. *Id.* at 81 ("For one thing, the matter at issue—*i.e.*, the calculation method for determining whether a state aid program ''equalizes expenditures''—is the kind of highly technical, specialized interstitial matter that Congress often does not decide itself, but delegates to specialized agencies to decide."). The Court furthered characterized the technical nature of the statute:

> The provision uses the technical term "percentile"; it refers to cutoff numbers ("95th" and "5th") often associated with scientific calculations; and it directly precedes another statutory provision that tells the Secretary to account for those districts, from among the middle 5th to 95th percentile districts, that remain ''noncharacteristic'' in respect to geography or the presence of special students (such as disabled students).

Id. at 91.

141. *See, e.g.*, Fed. Express Corp. v. Holowecki, 552 U.S. 389, 403 (2008) ("A rule of that sort might yield more consistent results. This, however, is a matter for the agency to decide in light of its experience and expertise in protecting the rights of those who are covered by the Act. For its decisions in this regard the agency is subject to the oversight of the political branches.").

142. *See generally* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

143. One of the arguments against judicial deference to Treasury regulations is that interpretations of the Internal Revenue Code do not require "cross-disciplinary" expertise. Hickman, *supra* note 134, at 1599 ("Interpreting the Internal Revenue Code, by contrast, rarely, if ever, requires cross-disciplinary scientific or technical expertise.").

144. Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 697 (1991) ("The Benefits Act has produced a complex and highly technical regulatory program. The identification and classification of medical eligibility criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns. In those circumstances, courts appropriately defer to the agency entrusted by Congress to make such policy determinations.").

145. *See* FTC v. Cement Inst., 333 U.S. 683, 720 (1948) ("[T]he Court called attention to the express intention of Congress to create an agency whose membership would at all times be experienced, so that its conclusions would be the result of an expertness coming from experience.").

though immigration law often implicates *policymaking* expertise, as the BIA or Attorney General must weigh competing interests in efficient administration and equitable application of immigration law,[146] immigration is a subject matter that does not inherently implicate *technical* expertise.[147]

2. Specialization: Expertise in the Statute

Courts have identified expertise in the statute as a trigger for deference.[148] Federal statutes are often very complicated, and judges may not be as well positioned as an entrusted agency to evaluate the full ramifications of interpreting the terms of the statute.[149] Because judges may misunderstand not only the ramifications of a particular interpretation of a complex statute but also the meaning of particular terms in a complex statute, deference to full-time agency personnel is in some cases necessary to ensure a complex statute's coherence.[150] Agency actors focusing solely on a complex statute have far more experience with that statute than a court adjudicating a discrete statutory issue, and also have firsthand knowledge of the potential consequences of interpreting

146. *See, e.g.*, Matter of Silva-Trevino, 24 I. & N. Dec. 687, 689 n.1 (AG 2008) ("[T]he definition in this opinion advances important aspects of immigration policy because it will provide aliens with clearer notice of which criminal convictions will trigger certain immigration consequences and will help ensure, both on its own terms and as a consequence of proper judicial deference, uniform application of the Act's moral turpitude provisions to similar cases no matter where they arise.").

147. *See, e.g.*, Hickman, *supra* note 134 (listing immigration as one of several "areas of law where *Chevron* regularly applies" that "does not require scientific or other technical training").

148. *See* Chem. Mfrs. Ass'n v. NRDC, 470 U.S. 116, 125 (1985) ("Th[e] view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that [the agency] might have adopted but only that [the agency's] understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of [the agency].").

149. *See, e.g.*, Merrill & Hickman, *supra* note 38 ("[F]ederal statutory programs have become so complex that it is beyond the capacity of most federal judges to understand the full ramifications of the narrowly framed interpretational questions that come before them.").

150. *See id.* at 862 ("There is the further problem that these purposes are often locked in a Byzantine web of interlocking provisions that can be fully comprehended only by a full-time legal expert. A strong practice of deference to agency interpretations may thus be necessary if we are to persist in seeking to make law internally coherent.").

the statute in a particular way.[151] As Stephen Legomsky explains in the context of the BIA:

> The link between specialization and expertise has several components. Members of specialized tribunals can be chosen because of their pre-existing experience and expertise. Once on board, their expertise grows. As others have observed, the growth results both from their frequent contacts with the governing legislation and from their exposure to the practical results of their decisions through immersion in the overall statutory scheme. If equipped with a specialized support staff and other specialized resources, and if their specialization allows them the time to participate in specialized professional associations and other forms of continuing professional development, then their specialized knowledge will expand further. That expertise, in turn, should aid them in achieving consistent outcomes. Familiarity with the issues should alone reduce the incidence of inadvertent deviations from established law and practice. Familiarity with one's own prior decisions and the prior decisions of colleagues is an additional avenue for uniformity.[152]

Thus, expertise in the statute can lead not only to consistency, but also to greater accuracy.

Additionally, complex statutes dealing with technical subject matter tend to contain greater ambiguity in order to give expert agencies the flexibility to achieve the statute's purpose.[153] In one pre-*Chevron* case, the Court connected the broad administrative discretion granted to the Secretary of Health and Human Services by the Social Security Act to the complexity of that Act, speculating that "[p]erhaps appreciating the complexity of what it had wrought, Congress conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain sections of the

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151. David R. Woodward & Ronald M. Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 ADMIN. L. REV. 329, 332 (1979) ("This expertise is assumed to result not only from the frequency of an agency's contact with the statute, but also from its immersion in day-to-day administrative operations that reveal the practical consequences of one statutory interpretation as opposed to another.").

152. Legomsky, *supra* note 35, at 440.

153. *See, e.g.*, Schweiker v. Gray Panthers, 453 U.S. 34, 43 (1981) (speculating that Congress had broadly delegated authority to the Secretary of Health and Human Services to administer the Social Security Act because of the Act's complexity).

Act."[154] The Supreme Court has also addressed this expertise-in-the-statute rationale in the tax and customs contexts.[155]

The INA is without a doubt a complex statute.[156] This complexity stems from the great length of the statute[157] and an intricate organization—the result of numerous revisions and a long legislative history.[158] The BIA is the interpretive body best positioned to assimilate not only the text of the INA, but also the extensive record of precedential opinions and judicial opinions. Creating a coherent law out of this massive body of judicial and administrative writing requires a deep familiarity with the statute and the foresight to anticipate inconsistencies, such that the agency's construction deserves special respect.[159] The BIA achieves economies of scale through its immersion in this statute where less specialized judicial review cannot.[160] Additionally, it may be the case that the very com-

154. *Id.* (citing Batterton v. Francis, 432 U.S. 416, 425 (1977)). In *Schweiker*, the Court also observed that "[t]he Social Security Act is among the most intricate ever drafted by Congress" and described the Act as "[b]yzantine" and "almost unintelligible to the uninitiated." *Id.* (quoting Friedman v. Berger, 547 F.2d 724, 727 n.7 (2d Cir. 1976)).

155. *See* United States v. Haggar Apparel Co., 526 U.S. 380, 394 (1999) ("The expertise of the Court of International Trade, somewhat like the expertise of the Tax Court, guides it in making complex determinations in a specialized area of the law; it is well positioned to evaluate customs regulations and their operation in light of the statutory mandate to determine if the preconditions for *Chevron* deference are present.").

156. *See* Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010) (characterizing provisions in the INA as a "maze of statutory cross-references"); Maurice A. Roberts, *The Exercise of Administrative Discretion Under the Immigration Laws*, 13 SAN DIEGO L. REV. 144, 145 (1976) ("The statutory provisions [of the INA] are highly technical and exceedingly complex, so that even the officials charged with their enforcement sometimes make mistakes and erroneously admit inadmissible aliens, who have established roots here by the time the error is later discovered.").

157. *See* Legomsky, *supra* note 35, at 441 ("[T]he Immigration and Nationality Act now spans more than five hundred pages and is supplemented by hundreds of pages of administrative regulations issued by the Departments of Homeland Security, Justice, Labor, and State, among others, as well as thousands of administrative and judicial decisions.").

158. *See id.* ("[The INA] is organizationally intricate. Passed in 1952 and amended countless times, the Act is a 'hideous creature' whose 'excruciating technical provisions . . . are often hopelessly intertwined.' It is not unusual for one provision to be qualified by other provisions located in distant reaches of the same statute.").

159. *See, e.g.*, Shi Liang Lin v. DOJ, 494 F.3d 296, 316 (2d Cir. 2007) (en banc) (Katzmann, J., concurring) ("When a governmental body with substantial experience in interpreting a complex statutory scheme concludes that a statute is ambiguous, that determination should give us pause.").

160. *See* Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29, 38 (1977) ("The expertise concentrated in the

plexity of a statute indicates Congress's intent that courts defer more readily to an agency's construction of that statute.

However, this advantage that the BIA has in interpreting the INA is not implicated in every interpretation, and there are good reasons that expertise in the INA alone insufficiently justifies deference to the BIA. First, the immigration adjudication system in practice often generates inconsistent results, indicating that expertise in the statute is not producing desirable uniformity.[161] Second, as the number of immigration cases heard before the courts of appeals has rapidly increased, the comparative expertise of the BIA in the INA has decreased.[162] As courts hear more immigration cases,[163] judges are increasingly better positioned to understand the ramifications of particular interpretations of the INA. If the BIA's specialization in immigration law confers no advantages over judicial interpretation, courts have less reason to defer to the agency.

Board, with its relatively small staff, makes it the ideal place for the formulation of what is now the definitive decision in this highly complex field of law. In terms of actual cost to the Government, good Board decisions are a bargain. More opinions can be ground out, of course, in less time and with an even more inadequate staff; but the resulting dilution in quality, while not only unfair to the parties involved, would also cost much more in the long run. Economies of this sort can only result in passing the buck to others with less expertise. The slack would have to be taken up elsewhere in the Department; if not, the already overburdened courts will have to confront the task, for dilution in the quality of Board decisions can only cause greater recourse to the courts for redress.").

161. *See* Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond* Chevron, 60 DUKE L.J. 1059, 1113 (2011) ("The immigration courts and the BIA regularly fail to achieve uniformity in their construction of INA provisions over time."); *see generally* JAYA RAMJI-NOGALES ET AL., REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 289 (2009) (presenting results of an empirical study of inconsistency in immigration adjudication).

162. Farbenblum, *supra* note 161, at 1112 (observing that "structural reforms have resulted in an explosion in the number of immigration cases that the courts of appeals consider each year" and that "[g]iven these changes, it is not clear that that the BIA retains sufficiently greater expertise than federal courts" in interpreting provisions in the INA).

163. Recent Cases, *Immigration Law—Administrative Adjudication Third and Seventh Circuits Condemn Pattern of Error in Immigration Courts*—Wang v. Attorney General*, 423 F.3d 260 (3d Cir. 2005), and* Benslimane v. Gonzales*, 430 F.3d 828*, 119 HARV. L. REV. 2596 (2006) (observing in 2006 that "appeals of immigration decisions have swollen in the past five years from three percent to eighteen percent of all federal appeals").

3. Expertise in Statutory Interpretation

The BIA's work primarily involves statutory construction.[164] Beyond the argument that the BIA's specialization in the INA gives them a comparative advantage in assimilating the statute and surrounding case law into a coherent whole, there is little case to be made that the BIA has a superior expertise in statutory interpretation than federal courts.[165] Questions of "pure . . . statutory interpretation"[166] remain the "province of the courts."[167] Courts have broad experience reading statutes in many contexts, and are best positioned to integrate a particular statute into the broader body of law. Additionally, federal judges enjoy life tenure and presumably do not carry the political bias for which *Chevron* praises agencies.[168]

Courts also possess a particular expertise in interpreting criminal statutes,[169] which contain provisions bearing great similarity to provisions in the INA. The INA borrows many provisions directly from the federal criminal code, which courts have exclusively interpreted for many years.[170] Although Congress's desire that the Attorney General and BIA interpret these provisions anew in the

164. *See* 8 C.F.R. § 1003.1(d)(1) (2009) (stating that the BIA "shall provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the [INA] and its implementing regulations"); *id.* at § 1003.1(d)(3)(ii) ("The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo*.").

165. *See* Woodward & Levin, *supra* note 151, at 334–35 ("[C]ourts are much less willing to defer to an agency interpretation when the meaning of the statute must be determined by reference to subjects in which courts have the greater degree of competence, such as when the statute must be construed by reference to the common law, the Constitution, or prior judicial precedents.").

166. INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987).

167. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

168. *See* Melissa M. Berry, *Beyond* Chevron*'s Domain: Agency Interpretations of Statutory Procedural Provisions*, 30 SEATTLE U. L. REV. 541, 588 (2007) ("Furthermore, courts have important institutional advantages over agencies when construing statutes. For instance, because federal judges enjoy life tenure and salary guarantees, they are substantially insulated from politics and are thus generally able to avoid the pitfalls of self-interested behavior that agency officials may exhibit.").

169. Justice Scalia's concurring opinion in *Crandon v. United States* highlights the fact that "a criminal statute . . . is not administered by any agency but by the courts." 494 U.S. 152, 177 (1990).

170. In one example, the INA borrows the phrase "obstruction of justice." *Compare* 18 U.S.C. § 1503(a) (2012) (providing that whoever "obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished"), *with* 8 U.S.C. § 1101(a)(43)(S) (2012) (providing that aggravated felonies include "an offense relating to obstruction of justice, perjury

immigration context could justify judicial deference, one might also presume that Congress desired the Attorney General and BIA to adopt the already developed judicial interpretations of these provisions.[171]

When BIA interpretation takes the same form that judicial statutory construction takes, there is less reason to think that the BIA is making expertise-based policy judgments. The BIA applies judicial tools of statutory interpretation, looks to and frequently relies on judicial precedent, and examines legislative history and congressional intent.[172] This type of interpretation bears a closer resemblance to the analysis undertaken by judges than the cross-disciplinary balancing that characterized the EPA policymaking challenged in *Chevron*,[173] and thus there is little reason to presume that the BIA has any particular advantage over courts in making such interpretations.[174] In one example, in *In re Rodriguez-Rodriguez*, the BIA gave meaning to the phrase "sexual abuse of a minor."[175] At the outset, the BIA's analysis appears no different from judicial

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or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year"). For further discussion, see *supra* Part II.B.2.

171. *See, e.g.*, Jean-Louis v. Att'y Gen., 582 F.3d 462, 477 (3d Cir. 2009) (stating that Congress did not intend for the Attorney General to decide the meaning of "crime involving moral turpitude" because the phrase "is a term of art, predating even the immigration statute itself").

172. *See, e.g.*, Matter of A-M-, 25 I. & N. Dec. 66, 72–74 (BIA 2009) (scrutinizing the legislative history of the Violence Against Women Act in order to find that one of the act's purposes was "to improve access to immigration relief for groups of battered immigrant spouses and children who were not previously eligible"); *but cf.* Matter of Lok, 18 I. & N. Dec. 101, 105 (BIA 1981) ("[W]e conclude that *the policies of the Act* would best be served by deeming the lawful permanent resident status of an alien to end with the entry of a final administrative order of deportation.") (emphasis added).

173. *See, e.g.*, Michael G. Heyman, *Immigration Law in the Supreme Court: The Flagging Spirit of the Law*, 28 J. LEGIS. 113, 141–42 (2002) [hereinafter *Immigration Law in the Supreme Court*] ("It is unclear, though, exactly what the Board did in *Aguirre*. Certainly, unlike the EPA, it did not fill in substance to the open texture of a statute . . . . [T]he Board simply decided a case. It lent no new interpretation to the Refugee Act and did not even mention the Convention."); *see also* Matter of Velazquez-Herrera, 24 I. & N. Dec. 503, 508–09 (BIA 2008) (characterizing the BIA's gap-filling as "seeking to identify the 'federal policies' ").

174. For example, there is no reason to suppose that the BIA is better situated to discern congressional intent than a federal court, but the BIA's process of policymaking through interpretation nonetheless relies on BIA determinations of congressional intent. *Cf.* Bracamontes v. Holder, 675 F.3d 380, 386 (4th Cir. 2012) (denying deference to a congressional intent-based BIA interpretation of 8 U.S.C. § 1101(a)(13)(A) because "[r]egardless of the BIA's speculation concerning congressional intent, however, the statute plainly says what is says").

175. 22 I. & N. Dec. 991 (BIA 1999).

interpretation, as the BIA "begin[s] [its] analysis by looking to principles of statutory construction" and asserts that "interpretation of the statutory language begins with the terms of the statute itself, and if those terms, on their face, constitute a plain expression of congressional intent, they must be given effect."[176] The BIA then indicated that it has the authority to fill gaps based on reasonable policy "[w]here Congress's intent is not plainly expressed, we then need to determine a reasonable interpretation of the language and fill any gap left, either implicitly or explicitly, by Congress."[177] But despite this turn toward policymaking, the BIA concludes by emphasizing that "the paramount index of congressional intent is the plain meaning of the words used in the statute taken as a whole."[178] The BIA then defined the ambiguous provision by reference to a definition contained in another federal statute.[179] Courts of appeals have upheld this interpretation as reasonable and granted deference under *Chevron*[180]—yet it remains unclear why the BIA was better positioned than a federal court to make this interpretation considering that the BIA merely applied the "traditional tools of statutory construction."

4. Political Accountability

In *Chevron*, the Court emphasized the importance of executive agency political accountability as a rationale for deference.[181] Agency interpretations are more politically accountable than judicial interpretations because the political branches supervise agencies through legislation passed by Congress and through direct

176. *Id.* at 993.

177. *Id.*

178. *Id.*

179. The BIA imported 18 U.S.C. § 3509(a)(8) to define "sexual abuse of a minor." *Id.* at 996. 18 U.S.C. § 3509(a)(8) provides that "the term 'sexual abuse' includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children." The BIA did not definitively define "sexual abuse of a minor" through section 3509, but invoked it as a guide. *Id.* ("We are not adopting this statute as a definitive standard or definition but invoke it as a guide in identifying the types of crimes we would consider to be sexual abuse of a minor.").

180. *See, e.g.*, Restrepo v. Att'y Gen., 617 F.3d 787 (3d Cir. 2010) (deferring to the BIA interpretation in *In re Rodriguez-Rodriguez*).

181. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 865 (1984) ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . . . policy choices . . . .").

supervision by the Executive.[182] Whereas agencies are well positioned to make policy, federal courts do not make policy, and lack even state courts' power to make policy-like common law.[183] Deference allows agencies to answer policy questions, which agencies are more competent to answer than courts.[184] Thus, though not expertise per se, political accountability is an institutional competence that is relevant to determining whether an agency is the appropriate interpreter of a statute.

The precise contours of political accountability[185] are difficult to define. In *Chevron*, the Court favored the EPA's interpretation because the agency was accountable to the Executive. However, in the immigration context there are good reasons to prefer congressional policy to executive policy.[186] The Supreme Court has explained that in the immigration context, the deference due to the BIA is particularly appropriate because of the sensitive political nature of immigration decisions,[187] arguing that the BIA is more polit-

182. *See, e.g.*, *Chevron*, 467 U.S. at 866 ("The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones . . . ."); *see also* Krzalic v. Republic Title Co., 314 F.3d 875, 878 (7th Cir. 2002) (Easterbrook, J., concurring) ("Small-d democrats might question *Chevron*'s shift of legislative power to the bureaucracy. But realists, while acknowledging the point and also that it is a fiction to suppose *Chevron* itself an interpretation of the statutes to which it applies or that the exercise of power by appointed officials is democratic merely because it is authorized by elected officials, will applaud the Supreme Court's recognition that the interpretation of an ambiguous statute is an exercise in policy formulation rather than in reading.").

183. *See, e.g.*, Hudson, *supra* note 133, at 378 ("While federal courts primarily decide issues based on statute and precedent, state courts often rely exclusively on their own policy perceptions. Viewed from this perspective, state courts have a far higher level of institutional competency than federal courts with respect to engaging in common law making.").

184. *See, e.g.*, Babbitt v. Sweet Home Chapter of Ctys. for a Great Oregon, 515 U.S. 687, 708 (1995) (granting deference and explaining that "[t]he proper interpretation of a term such as 'harm' involves a complex policy choice").

185. Commentators have conceived of political accountability through a "transmission belt model in which accountability flows from the elected representatives to those appointed—and able to be fired—by them" and more broadly as "responsibility to balance the competing political forces at work in society." *See, e.g.*, Lipton, *supra* note 115, at 2101–02.

186. *See, e.g.*, Negusie v. Holder, 555 U.S. 511, 546 n.2 (2009) (Thomas, J., dissenting) ("It also is important to acknowledge that the object of the INA is to codify Congress' policy decisions pertaining to the entry of aliens and their right to remain in the United States—decisions that are entrusted exclusively to Congress.") (internal quotations omitted).

187. *See, e.g.*, INS v. Abudu, 485 U.S. 94, 110 (1988) ("INS officials must exercise especially sensitive political functions that implicate questions of foreign rela-

ically accountable than courts.[188] However, this logic overlooks the distinction between executive and legislative decisions. Although the BIA may be more politically accountable than the courts, it is not necessarily more accountable than Congress. Some immigration decisions, particularly those decisions affecting rights associated with citizenship, are of the sort that only Congress should make.[189] Additionally, the establishment of criminal punishments is viewed as uniquely within the province of Congress.[190] Whether a particular issue is of the sort that Congress should decide directly or one that the BIA is competent to decide is ultimately a question of congressional intent. As one court has observed, "[t]he resolution of [the issue of which crimes are crimes of moral turpitude] depends on whether the character, the gravity, the moral significance of particular crimes is a topic that Congress, had it thought about the matter, would have wanted the Board to decide rather than the courts."[191] In another example, the political branches are uniquely competent to make decisions implicating foreign policy and the relations of the United States to other sovereign entities in the world.[192] The Court has often exclusively reserved foreign policymaking and decisions implicating foreign affairs for the political

tions, and therefore the reasons for giving deference to agency decisions on petitions for reopening or reconsideration in other administrative contexts apply with even greater force in the INS context.").

188. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) (explaining that "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do," namely executive agencies).

189. *See, e.g.*, *Negusie*, 555 U.S. at 546 n.2 (Thomas, J., dissenting) ("It . . . is important to acknowledge that the object of the INA is to codify Congress' policy decisions pertaining to the entry of aliens and their right to remain in the United States—decisions that are entrusted exclusively to Congress.") (internal quotations omitted). Justice Thomas argues that the best way for courts to realize congressional intent is through judicial statutory interpretation based on plain language. *Id.*

190. United States v. Bass, 404 U.S. 336, 348 (1971) ("[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.").

191. Mei v. Ashcroft, 393 F.3d 737, 739 (7th Cir. 2004).

192. *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003) ("While Congress holds express authority to regulate public and private dealings with other nations in its war and foreign commerce powers, in foreign affairs the President has a degree of independent authority to act."); *see also* Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) ("If there be any just ground of complaint on the part of China, it must be made to the political department of our government, which is alone competent to act upon the subject.").

branches.[193] This practice stems from a concern that judicial procedures are inadequate to accommodate the chaotic state of international relations, and is justified by a belief that politically accountable branches, "those directly responsible to the people whose welfare they advance or imperil," are best suited to make decisions.[194]

Even in cases where a BIA accountable to the Executive is preferable, it is unclear that the BIA is in fact directly accountable. Department of Justice regulations promulgated by the Attorney General require the BIA to exercise "independent judgment and discretion"[195] but nonetheless maintain that "[t]he Board shall refer to the Attorney General for review of its decisions in all cases that . . . [t]he Attorney General directs the Board to refer to him."[196] However, the Supreme Court has found that the BIA has a duty to interpret statutes independently of the Attorney General,

193. *See* Zadvydas v. Davis, 533 U.S. 678, 700 (2001) (Courts should "listen with care when the Government's foreign policy judgments . . . are at issue, and . . . grant the Government appropriate leeway when its judgments rest upon foreign policy expertise."); Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 196 (1983) (explaining that "the foreign policy of the United States" is "much more the province of the Executive Branch and Congress than of this Court").

194. Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.").

195. 8 C.F.R. § 1003.1(d)(1)(ii) (2009).

196. 8 C.F.R. § 1003.1(h)(1)(i) (2009). The BIA's ability to mete out independent judgment is hampered because the Attorney General has the power to certify BIA opinions for his own review and issue a final ruling without party entitlement to briefing. *See* Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. Rev. 1766, 1768 (2010) (arguing that "there should be an entitlement to briefing and other procedural protections when the Attorney General certifies a matter for review"). The BIA must also refer to the Attorney General cases that "[t]he Chairman or a majority of the Board believes should be referred to the Attorney General for review" and cases that the Secretary of Homeland Security refers to the Attorney General. 8 C.F.R. § 1003.1(h)(1)(ii) (2009). The BIA's subordination to the Attorney General stems largely from the fact that the Board is borne not of congressional statute but of longstanding regulation written by the Attorney General. *See* 8 C.F.R. § 1003.1(d)(1) (2009) (limiting the BIA's jurisdiction to "those administrative adjudications . . . that the Attorney General may by regulation assign to it"); *see also* Roberts, *supra* note 160, at 44 (Roberts, a former BIA member, argues for administrative independence from the Attorney General:

regardless of the Attorney General's supreme power over the Board.[197] In *Accardi v. Shaughnessy*,[198] the Court established the rule that administrators must follow their own regulations, holding that the Attorney General cannot compromise the BIA's ability to make independent judgments.[199] Yet, Justice Jackson's dissent in *Accardi* also noted the BIA's utter lack of independence from the Attorney General, deeming the BIA "neither a judicial body nor an independent agency" but merely a body "created by the Attorney General as part of his office."[200] Jackson goes on to analyze congressional intent, asserting that "[i]t overtaxes our naiveté about politics to believe Congress would entrust [discretionary power to remove noncitizens] to a board which is not the creature of Congress and whose members are not subject to Senate confirmation."[201] Tasked with these competing mandates of independence and subordination, the BIA is not well positioned to function as either a policymaker worthy of judicial deference or an impartial adjudicator of questions of law.[202] Because the BIA is required to make judgments independently of the Attorney General, it is likely that in at least some cases the immigration policy established by the BIA may not represent the assumedly politically accountable judgment of the Attorney General,[203] and the Attorney General has indeed superseded the BIA's judgments with his or her own precedential opinions,[204] suggesting that the BIA's policy does not reflect politi-

"It is time to give the Board statutory standing. Its existence as a quasi-judicial tribunal within the Department of Justice should be recognized by Congress.").

197. *See* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 266–67 (1954) (holding that the Attorney General must follow his own regulation by allowing the BIA to exercise independent judgment, even when he has the discretion to overturn that judgment).

198. *Id.* at 260.

199. *See id.* at 260.

200. *Id.* at 269–70 (Jackson, J. dissenting).

201. *Id.* at 270.

202. Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures and Courts—Except When They're Not*, 59 ADMIN. L. REV. 79, 103 (2007) ("[U]nlike courts whose only function is to adjudicate, agencies have rulemaking and, most problematically in this context, law enforcement functions that do not sit easily with the role as a neutral adjudicator.").

203. Perhaps in recognition of this fact, the majority opinion in *Aguirre-Aguirre* emphasizes that the BIA is a creature of the Attorney general, who "retain[s] ultimate authority." INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999).

204. *See, e.g.*, Matter of Silva-Trevino, 24 I. & N. Dec. 687, 687 (AG 2008) ("On July 10, 2007, pursuant to 8 C.F.R. § 1003.1(h)(1)(i) (2007), Attorney General Gonzales directed the Board of Immigration Appeals to refer to him for review its decision in this matter."). *See also* Margaret H. Taylor, *Behind the Scenes of* St. Cyr *and* Zadvydas*: Making Policy in the Midst of Litigation*, 16 GEO. IMMIGR. L.J. 271, 284

cally accountable executive policy.[205] On the other hand, the fact that the Attorney General can and does review the BIA indicates that the power of the BIA is cabined by the ultimate authority of the political branches—and this may be a sufficient degree of accountability.[206]

As a result of this conflicted position, the BIA functions largely as a specialized court, a forum poorly suited to enact policy.[207] Most BIA decisions rely on statutory interpretation rather than a balancing of competing cross-disciplinary interests informed by executive will.[208] And even in the foreign affairs context, where the agency receives the greatest deference, the BIA rarely makes judgments de-

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(2002) (characterizing referral of decision to the Attorney General as a power "rarely exercised").

205. Furthermore, responsibility for immigration administration sprawls across multiple agencies within the Department of Justice. *See* Taylor, *supra* note 203, at 293–94 ("[T]he [DOJ's] Civil Division has a unit dedicated exclusively to conducting immigration litigation, reflecting a degree of specialization that is somewhat unusual within DOJ. The Office of Immigration Litigation ("OIL") is regularly consulted for its opinion on the litigation consequences of policy initiatives. At the behest of OLP, for example, OIL reviews proposed immigration regulations. On occasion OIL may be asked to comment on pending legislation. And OIL attorneys participate in working groups convened to address a particular issue or draft a regulation. OIL's staffing doubled in the early 1990's, even as INS's budget for legal programs remained relatively stagnant—a fact that has enhanced OIL's reputation as an agency that is responsive to other components of the immigration bureaucracy.").

206. *But see id.* at 288 ("To critics, Attorney General review of BIA decisions violates the independence of the Board, and (especially when review is at the behest of the INS) breaches the separation of function between the immigration enforcers at INS and the adjudicators at the Executive Office for Immigration Review.").

207. *See* Negusie v. Holder, 555 U.S. 511, 531 (2009) (Stevens, J., concurring) ("In cases involving agency adjudication, we have sometimes described the court's role as deciding pure questions of statutory construction and the agency's role as applying law to fact. While this phrasing is peculiar to the adjudicatory context, the principle applies to *Chevron*'s domain more broadly. In the context of agency rulemaking, for instance, we might distinguish between pure questions of statutory interpretation and policymaking, or between central legal issues and interstitial questions.").

208. Farbenblum, *supra* note 161, at 1105 ("Although some decisions made by immigration officials—such as tourist or business visa grants—may legitimately implicate foreign relations concerns, the balancing of competing policy considerations that prompted the Court's deference in Chevron is fundamentally at odds with [Congress's] acceptance of international law as a constraint on policy choices and a limit on government freedom to deal as it pleases with individuals possessing rights under international agreements like the Convention.") (internal quotation marks omitted).

signed to implement policy coordinated with executive foreign policy.[209]

C. Variety in Deference and the Unique Nature of the Immigration Context

Despite the universal view that *Chevron* applies to BIA interpretations, there are strong arguments that *Chevron* should not be appropriate at all in the immigration context. The immigration context implicates foreign policy issues, unusual and harsh penalties resembling those imposed in the criminal context, and political process issues stemming from noncitizens' lack of political representation. These unique characteristics of the immigration context counsel against deference to the BIA in the absence of clear indicia of congressional intent that courts defer. This backdrop strengthens the case for limiting the INA provisions eligible for application of the *Chevron* framework based on a review of the relative expertise of courts and agencies.

There is a tension between the notions that administrative law principles should apply similarly in all administrative contexts[210] and that administrative law principles should be adapted to different circumstances. On the one hand, the Court recently asserted in *Mayo Foundation v. United States* that "we have expressly recognized the importance of maintaining a uniform approach to judicial review of administrative action."[211] Yet, approximately a decade ear-

209. *See, e.g.*, *Immigration Law in the Supreme Court*, *supra* note 173, at 142 ("The members of the Board do not, and must not, play any role in the formulation of foreign policy. They are administrative law judges whose function is to decide immigration appeals. Their job . . . is to decide cases on principle, not to formulate foreign policy in the guise of deciding cases.").

210. *See* Merrill & Hickman, *supra* note 38, at 834 (characterizing *Chevron* as a "ubiquitous formula governing court-agency relations.").

211. Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 713 (2011) (recognizing "the importance of maintaining a uniform approach to judicial review of administrative action") (quoting Dickinson v. Zurko, 527 U.S. 150, 154 (1999)). Until January of 2011, the Supreme Court's deference jurisprudence for IRS regulations interpreting ambiguous statutory provisions was unclear because the Court applied different tests in different cases without explanation. *See id.* at 712 (observing that "[s]ince deciding *Chevron*, we have cited both *National Muffler* and *Chevron* in our review of Treasury Department regulations"). Prior to *Chevron*, the Court established a test for deference in *National Muffler*:

> In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congres-

lier in *Mead* the Court expressed that "[t]he Court's choice has been to tailor deference to variety."[212] The facts in these two cases can be distinguished: The issue in *Mead* was whether interpretations promulgated with varying degrees of formality should receive the same level of deference,[213] whereas the issue in *Mayo Foundation* was whether interpretations in the tax context should be reviewed under a different standard than interpretations in other administrative contexts.[214] But nonetheless, administrative context has, at least in some cases, historically mattered for deference.[215] Within the *Chevron* framework, administrative context is relevant as evidence of congressional intent to delegate.[216]

In *Mayo Foundation*, the Court asserted that *Chevron* was the appropriate standard for reviewing treasury interpretations, observing that "[i]n the absence of [some] justification, we are not inclined to carve out an approach to administrative review good for tax law only."[217] It remains unclear what might justify this "*Chevron* excep-

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sional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.

Nat'l Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472, 477 (1979).

212. United States v. Mead Corp., 533 U.S. 218, 236 (2001).

213. This inquiry could also be seen as the issue of what type of agency action is at issue. *See* Woodward & Levin, *supra* note 151, at 330 ("To a great extent, the degree of deference shown by a court is determined by the type of agency action under review (e.g., rulemaking pursuant to delegated authority as opposed to a licensing proceeding), the technical knowledge required to resolve the issue, the agency's experience, and even the reasonableness of the agency result.").

214. *See Mayo Found.*, 131 S. Ct. at 712 ("In this case . . . the parties disagree over the proper framework for evaluating an ambiguous provision of the Internal Revenue Code.").

215. *See, e.g.*, Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1939 (2006) ("Despite this formal content neutrality, however, the Court's attitude towards the EEOC's interpretation of Title VII, the ADA, and the ADEA reveals that substantive context matters quite a lot.").

216. *See generally* Woodward & Levin, *supra* note 151, at 331 ("There are also numerous contexts in which an agency may act, ranging from a press release to formal legislative rulemaking. It cannot be overlooked that the agencies themselves vary in their experience, composition, and involvement with the legislation under which they operate. All these factors will inevitably affect (and should affect) a court's perception of the administrative process. This is not to suggest that the courts should abdicate their responsibility to interpret the law. But they must be allowed to recognize the unique role each administrative agency is intended to play in formulating the law.").

217. *Mayo Found.*, 131 S. Ct. at 713. At least one court following this opinion has observed that *Chevron* provides a more deferential standard of review than *Na-*

tionalism" in a particular administrative context. In the tax context, the *Mayo* petitioners unsuccessfully argued that the Supreme Court's continued use of the *National Muffler* deference test—a multi-factor test that differs significantly from *Chevron*'s two-step analysis[218]—in the three decades following *Chevron* indicated that Congress had acquiesced to the *National Muffler* test.[219] Beyond the scope of *Mayo Foundation*, Kristin Hickman summarizes the normative factors that counsel against *Chevron* deference to tax regulations: The longstanding tradition of a unique deference regime,[220] the severity of penalties attached to tax violations,[221] the potential

tional Muffler did. *See* Dickow v. United States, 654 F.3d 144, 149 (1st Cir. 2011) (cert. denied) (observing that the *National Muffler* test was less deferential than *Chevron*).

218. *See* United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 219 (2001) (applying *National Muffler* rather than *Chevron*); Cottage Sav. Ass'n v. Comm'r., 499 U.S. 554, 560–61 (1991) (same). The Court also applied *Chevron* in other cases during this time period, creating further confusion as to the appropriate standard of review for Treasury regulations. *See* Atl. Mut. Ins. Co. v. C.I.R., 523 U.S. 382, 387 (1998) (citing *Chevron*); United States v. Boyle, 469 U.S. 241, 246 n.4 (1985) (citing *Chevron* in footnote).

219. *See* Hickman, *supra* note 134, at 1590–91 ("The notion of implicit congressional delegation is admittedly a fictional one, as Congress most likely gives little if any consideration to deference doctrine in drafting statutes. If the tax community generally perceives there to be a unique tax deference tradition that requires less deference in tax cases than in those from other areas of administrative law, then one could argue that Congress drafts the tax laws with that same tradition in mind."). On congressional acquiescence, see for example Foti v. INS, 375 U.S. 217, 223 (1963) ("It must be concluded that Congress knew of this familiar administrative practice and had it in mind when it enacted [the statute]. These usages and procedures, which were actually followed when the provision was enacted, must reasonably be regarded as composing the context of the legislation.").

220. *See* Hickman, *supra* note 134, at 1590–91 ("The notion of implicit congressional delegation is admittedly a fictional one, as Congress most likely gives little if any consideration to deference doctrine in drafting statutes. If the tax community generally perceives there to be a unique tax deference tradition that requires less deference in tax cases than in those from other areas of administrative law, then one could argue that Congress drafts the tax laws with that same tradition in mind.").

221. *See id.* at 1592 ("Some who support different deference standards in the tax context suggest that the severity of the penalties imposed for taking a tax position contrary to that of a Treasury regulation makes civil tax enforcement comparable to criminal cases, where *Chevron* deference is considered inappropriate"). As an argument against the relevance of penal severity in deference, Hickman cites the immigration context. *See id.* at 1594–95 ("Finally, the Court regularly applies *Chevron* deference in immigrant deportation cases. Having compared deportation to criminal sanction, the Court employs the rule of lenity in evaluating the deportation provisions of immigration statutes, and occasionally that doctrine may trump *Chevron*. Nevertheless, because it is clear that Congress has delegated to the executive branch the primary responsibility for administering the immigration

danger of Treasury overreach,[222] and the fact that interpreting the Internal Revenue Code may not require deference-worthy scientific or technical expertise.[223] Notwithstanding Hickman's arguments, *Mayo Foundation* remains the last word on the Court's distaste for exceptions to *Chevron*.

Although the Supreme Court rejected *Chevron* exceptionalism in the tax context, the Court's deference jurisprudence in the discrimination context has historically deviated from its deference jurisprudence in other administrative contexts.[224] In reviewing Equal Employment Opportunity Commission (EEOC) interpretations, the Court has taken various approaches to the deference question. In some cases, the Court has merely applied ordinary statutory interpretation to reach a resolution on the meaning of ambiguous text, and then expressly found deference irrelevant.[225] And in other instances, the Court has applied *Chevron* or *Skidmore* to find EEOC regulations inadequate.[226] These mixed-up doctrinal explanations

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laws, the Court also extends *Chevron* deference to interpretations rendered through adjudication before the Board of Immigration Appeals.").

222. *See id.* at 1596 ("The primary function of Treasury tax personnel and the IRS is to collect government revenues; and in light of this goal, Treasury and the IRS may be biased toward revenue maximization and may adopt regulations and rulings that test the boundaries of reasonableness in pursuit of that goal.").

223. *Id.* at 1599 ("Interpreting the Internal Revenue Code, by contrast, rarely, if ever, requires cross-disciplinary scientific or technical expertise.").

224. *See* Hart, *supra* note 215, at 1938 ("[T]he Court has consistently refused to define what level of deference the agency's regulations are owed, preferring to retain a broad and undefined discretion to accept or reject agency analysis.").

225. *See, e.g.*, Edelman v. Lynchburg Coll., 535 U.S. 106, 114 (2002) ("[T]here is no need to resolve any question of deference here. We find the EEOC rule not only a reasonable one, but the position we would adopt even if there were no formal rule and we were interpreting the statute from scratch. Because we so clearly agree with the EEOC, there is no occasion to defer and no point in asking what kind of deference, or how much."). In *Edelman*, the Court was reviewing a procedural regulation promulgated under expressly delegated authority to make such regulations in Title VII. *See also* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004) (finding deference irrelevant because "regular interpretive method leaves no serious question, not even about purely textual ambiguity in the ADEA"). In *Cline*, the Court explained that there was simply "no need to choose between *Skidmore* and *Chevron*, or even to defer, because the EEOC . . . is clearly wrong." *Id.*

226. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257–58 (1991) (applying *Skidmore* to EEOC substantive guideline and denying deference); Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976) (applying *Skidmore* to EEOC substantive interpretive guideline); Pub. Emps. Ret. Sys. of Ohio v. Betts, 492 U.S. 158, 171 (1989) (denying *Chevron* deference to the EEOC's interpretation of the ADEA's "subterfuge" provision); *but see* Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 84 (2002) (granting *Chevron* deference to the EEOC's interpretation of the ADA's

do not fully encompass the Court's reasoning. Instead, normative factors likely explain these decisions.[227] First, the Court may deny the EEOC deference because discrimination is not a subject matter susceptible to the development of expert knowledge.[228] Second, the Court may perceive itself as the primary repository of expertise in discrimination based on its history of interpreting the equal protection clause of the Fourteenth Amendment.[229]

Although the Court has seemingly rejected *Chevron* exceptionalism in the absence of some "justification," contextual variances in deference suggest that the particularities of administrative context matter.[230] The Court's frequent unwillingness to defer in the dis-

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"direct threat" provision). Interestingly, the Court did grant the EEOC "special deference" on at least one occasion before *Chevron* for an interpretation of the word "public" in Title VII. *See* EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 600 n.17 (1981) ("Moreover, such a contemporaneous construction deserves special deference when it has remained consistent over a long period of time."). *Chevron* deference to EEOC interpretations of Title VII may not be appropriate due to the informality of EEOC interpretive guidelines and the fact that Title VII only delegates to the EEOC the "authority from time to time to issue . . . suitable procedural regulations to carry out the provisions of this subchapter." 42 U.S.C. § 2000e-12(a) (1964). For a fuller discussion of the Court's approach to deference, see Hart, *supra* note 215, at 1938–49.

227. Hart, *supra* note 215, at 1938 ("To some extent, the Court may assume that discrimination is not a topic susceptible to the development of expertise, and therefore that the reasons for deferring to administrative agencies do not particularly apply in employment discrimination cases. Further, the Court may perceive itself as having a certain expertise in defining and recognizing discrimination as a consequence of its role in interpreting the Equal Protection Clause of the Fourteenth Amendment, and it may therefore be unwilling to relinquish control of this area.").

228. *Id.* at 1951 ("The Court's reluctance to defer to the EEOC may stem from a view that discrimination is a subject of common knowledge, not susceptible to expert analysis.").

229. *See id.* at 1954–55 (contending that one "source of perceived expertise in [discrimination] might flow from the Court's work interpreting the Constitution's Fourteenth Amendment"). Hart also suggests that the roles that individual justices have played in anti-discrimination efforts and the fact that federal courts have played a significant role in the enforcement of Title VII and other antidiscrimination laws might influence the Court's thinking on this issue. *Id.* at 1954–55; *see also id.* at 1954 ("Another possible explanation for the Court's reluctance to defer to the EEOC's interpretations of federal laws prohibiting discrimination is that the Court simply does not want to relinquish its own perceived authority and expertise in this context.").

230. Commentators have also made the case against *Chevron* as being equally applicable across different administrative contexts. *See, e.g.*, *Immigration Law in the Supreme Court*, *supra* note 173, at 143 ("*Chevron* does not create an administrative monolith. The same level of deference need not be afforded to all members of this administrative community in all circumstances. Deference should be highest when

crimination context also suggests different treatment is appropriate in the immigration context, as the BIA does not rely on expert knowledge in many decisions and the law relies heavily on the criminal code entrusted to the courts. At the very least, the EEOC deference cases can be read to suggest that the comparative expertise of courts and administrative agencies plays a non-trivial role in deference decisions.

1. Foreign Policy Implications

The longstanding plenary power doctrine[231] embodies the principle that courts possess limited authority to review immigration decisions because immigration implicates national sovereignty[232] and foreign policy,[233] areas in which the political branches possess superior competence.[234] In *Zadvydas v. Davis*, the Court characterized this competence as flowing from general "immigra-

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agencies demonstrate serious focus on the issues."); *Judicial Review of Discretionary Immigration Decisionmaking*, *supra* note 126, at 870 ("Although the various areas of administrative law share many characteristics, it is more apt and more useful to candidly recognize that the overarching concept of a unitary administrative law appeals more to sentiment than reality.").

231. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990) ("The [plenary power] doctrine declares that Congress and the executive branch have broad and often exclusive authority over immigration decisions.").

232. *See* Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893) ("The United States are a sovereign and independent nation, and are vested by the constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control . . . ."); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.").

233. *See* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1–2 (1984) ("Immigration law often implicates the nation's basic foreign policy objectives, a circumstance that has sometimes provoked the Supreme Court . . . to be less scrupulous in safeguarding constitutional values and more deferential to the other branches of government."); *see also* Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) ("If there be any just ground of complaint on the part of China, it must be made to the political department of our government, which is alone competent to act upon the subject.").

234. *See* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 196 (1983) (explaining that "the foreign policy of the United States" is "much more the province of the Executive Branch and Congress than of this Court"); Zadvydas v. Davis, 533 U.S. 678, 700 (2001) (Courts should "listen with care when the Government's foreign policy judgments . . . are at issue, and . . . grant the Government appropriate leeway when its judgments rest upon foreign policy expertise.").

tion-related expertise," "the serious administrative needs and concerns inherent in the necessarily extensive INS efforts to enforce [a] complex statute," and "the Nation's need to 'speak with one voice' in immigration matters."[235] The potential diplomatic ramifications of immigration law have long played a role in justifying the plenary power doctrine.[236]

In recent years the Court has softened the once seemingly absolute plenary power doctrine.[237] In part, this change may be the result of a changing world: Whereas "traditional foreign policymaking required speed, secrecy, and singular responsibility, qualities antithetical to judicial process,"[238] today international relations are far less chaotic.[239] As an additional matter, although traditional legal doctrines suggest that the BIA, as an executive agency, should be viewed as a repository of foreign relations expertise,[240] there are good reasons to believe that the BIA is not better than courts at interpreting refugee laws. First, the BIA has no comparative advantage over courts in construing international treaties[241] that are incorporated into the INA's definition of refugee status via the Refugee Act.[242] Second, the *Charming Betsy* canon suggests that statutes be construed to avoid conflicts with international law,[243] which

235. 533 U.S. 678, 700 (2001).

236. *See* Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 349 (2002) (explaining that the plenary power doctrine arose because "[i]mmigration policy inherently implicated foreign relations, and those relations were, up until recently, characterized by great instability and risk").

237. *Id.* at 344 (contending that the standard for judicial review of the political branches' foreign policy judgments in *Zadvydas*, to "'listen with care . . . and grant . . . appropriate leeway,'" "is a far cry from the stance, in effect, of nonjusticiability found in other plenary power cases").

238. *Id.* at 349.

239. *Id.* at 352 ("The fact that foreign relations no longer pose its historical dangers makes it a less weighty interest relative to individual rights.").

240. Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 659 (2000) ("Since early in the nation's history, courts have been reluctant to contradict the executive branch in its conduct of foreign relations.").

241. *See* Farbenblum, *supra* note 161, at 1112 ("The BIA especially lacks expertise in the application of formal treaty interpretation principles to determine U.S. obligations under international law.").

242. *See id.* at 1068–69 ("[T]he legislative history of the Refugee Act explicitly acknowledges congressional intent to bring the domestic laws of the United States into full conformity with the nation's international obligations under the Protocol, specifically with respect to Article 1 (refugee status) and Article 33 (nonrefoulement) of the Convention.").

243. Murray v. The Charming Betsy, 6 U.S. 64, 118 (1804) ("It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is

conflicts with the notion that ambiguous statutory provisions implicating international law be resolved by the Executive under *Chevron*.

2. Immigration Penalties Are Severe

When Congress delegates authority to the BIA implicitly through ambiguity, the quasi-criminal penalties provided for in immigration statutes conflict with the constitutional norm that punishment must be legislatively defined.[244] Reflective of this norm, the rule of lenity, a longstanding norm of statutory interpretation,[245] problematizes the very idea that Congress might delegate the authority to impose criminal punishments on individuals to an agency.[246]

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warranted by the law of nations as understood in this country."). For further discussion, see generally Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 486 (1998); *Immigration Law in the Supreme Court*, *supra* note 173, at 137 ("*Charming Betsy* is significant not simply because it compels an adherence to definitive international norms, but because the very recognition of that concept reflects a willingness to grasp the magnitude of the issues regarding the Court's position in the international legal community.").

244. In *United States v. Bass*, Justice Marshall highlighted the twin requirements of notice and legislative supremacy in criminal law:

> First, a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.

404 U.S. 336, 338 (1971) (citations and internal quotation marks omitted). Assumptions underlying criminal law include the ideas that "only Congress may legitimately define crime," "fair warning of the line between legal and illegal activity is required before an individual may be criminally punished," and "criminal statutes should be construed narrowly to counter risks of prosecutorial overreaching." Sanford N. Greenberg, *Who Says It's a Crime?:* Chevron *Deference to Agency Interpretations of Regulatory Statutes that Create Criminal Liability*, 58 U. PITT. L. REV. 1, 3 (1996).

245. *See* Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 749–51 (1935).

246. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 332 (2000) (explaining that lenity displaces *Chevron* because "[o]ne function of the lenity principle is to ensure against delegations").

The rule of lenity requires that ambiguous provisions[247] in criminal statutes be construed in favor of the defendant.[248] The rationales for lenity are threefold: First, lenity ensures that the public has fair notice of what qualifies as criminally culpable behavior; second, lenity cabins the discretion of law enforcement; and third, lenity ensures that Congress alone defines criminal punishments.[249] Lenity functions to distribute the power to interpret federal criminal law between courts that interpret the criminal law and Congress, enforcing a preference for congressional decision-making.[250]

Although immigration proceedings are indisputably civil in nature,[251] the Supreme Court adopted the immigration rule of lenity[252] based on the principle that the penalty of removal created by the INA has particularly harsh consequences for noncitizens.[253]

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247. It is unclear what degree of ambiguity is necessary to trigger the rule of lenity. *Compare* Muscarello v. United States, 524 U.S. 125, 138–39 (1998) (explaining that "[t]o invoke the rule [of lenity], we must conclude that there is a grievous ambiguity or uncertainty in the statute") (internal quotations omitted), *with* Crandon v. United States, 494 U.S. 152, 158 (1990) ("[I]t is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage.").

248. *See, e.g.*, United States v. Wiltberger, 18 U.S. 76 (1820) (applying the rule that "penal laws are to be construed strictly"); *Bass*, 404 U.S. at 347 ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.") (citations omitted).

249. Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 345–46 (1994) ("Narrow construction of criminal statutes, it is proclaimed, assures citizens fair notice of what the law proscribes; it constrains the discretion of law enforcement officials; and, most fundamentally, it embodies our legal system's instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.").

250. *See id.* at 348 (Before the Supreme Court, "the current debate [over lenity] really isn't about notice, prosecutorial discretion, individual liberty, or any of the other values conventionally associated with lenity; it is about how criminal lawmaking power should be allocated between Congress and the judiciary.").

251. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("The order of deportation is not a punishment for crime."); INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime."). In *Lopez-Mendoza* the Court enumerates the various procedural protections available to criminal defendants but not available to immigrants in removal proceedings. *See id.*

252. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 449(1987) (discussing "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor" of the noncitizen).

253. *See* Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (explaining that "[w]e resolve the doubts in favor of that construction because deportation is a drastic measure"); *see also* Boutilier v. INS, 387 U.S. 118, 132 (1967) ("Deportation is the equivalent to banishment or exile. Though technically not criminal, it practi-

The Court has also frequently spoken to the severe, punitive nature of immigration penalties, terming these penalties "harsh,"[254] so "drastic" as to be "the equivalent of banishment or exile,"[255] and even "as great if not greater than the imposition of a criminal sentence."[256] Additionally, the need for fair notice and the dangers of unchecked prosecutorial discretion are equally present in the immigration context.[257] Despite the severity of immigration penalties,

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cally may be. The penalty is so severe that we have extended to the resident alien the protection of due process. Even apart from deportation cases, we look with suspicion at those delegations of power so broad as to allow the administrative staff the power to formulate the fundamental policy."); Barber v. Gonzales, 347 U.S. 637, 642–43 (1954) ("Although not penal in character, deportation statutes as a practical matter may inflict the equivalent of banishment or exile, and should be strictly construed."); Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947) ("Deportation can be the equivalent of banishment or exile."); Bridges v. Wixon, 326 U.S. 135, 164 (1945) ("The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever. Return to his native land may result in poverty, persecution and even death."); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (Deportation "may result also in loss of both property and life, or of all that makes life worth living."); Aris v. Mukasey, 517 F.3d 595, 600 (2d Cir. 2008) (describing immigrants as "a vulnerable population who come to this country searching for a better life, and who often arrive unfamiliar with our language and culture, in economic deprivation and in fear"); Margaret McKeown & Allegra McLeod, *The Counsel Conundrum: Effective Representation in Immigration Proceedings*, *in* RAMJI-NOGALES ET AL., *supra* note 161, at 289 ("At risk in immigration proceedings are aspects central to human life and dignity: the unity of family, the ability to work to support oneself and one's children, access to medical treatment and education, and sometimes the prospect of being returned to a country where one would face torture or persecution on account of race, religion, nationality, or political opinion."). Distinguishing between the BIA's interpretation of the INA and interpretation of the federal criminal code, the Court has also acknowledged that "ambiguities in criminal statutes referenced in immigration laws should be construed in the noncitizen's favor." Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2589 (2010).

254. *Cardoza-Fonseca*, 480 U.S. at 449 ("Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country.").

255. *Fong Haw Tan*, 333 U.S. at 10 ("[D]eportation is a drastic measure and at times the equivalent of banishment or exile.").

256. *Wixon*, 326 U.S. at 164 ("The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence.").

257. Prosecutorial overreach has also caused concern among some commentators in other areas where agencies assume a prosecutorial function. *See, e.g.*, Hickman, *supra* note 134, at 1596 ("The primary function of Treasury tax personnel and the IRS is to collect government revenues; and in light of this goal, Treasury and the IRS may be biased toward revenue maximization and may adopt regulations and rulings that test the boundaries of reasonableness in pursuit of

the Court has taken the position that removal does not legally qualify as punishment[258] because immigration penalties are civil, rendering the traditional rule of lenity inapplicable.[259]

In addition to harshness, the Court stated that the immigration rule of lenity was based on implied congressional intent, explaining that "since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."[260] Here, the Court treats lenity as a type of nondelegation canon to ensure that Congress alone makes the decision to dole out harsh punishment.[261] When penal provisions are ambiguous, the role of courts is not to behave as delegates of interpretive authority, but instead to ensure that the "most democratically appropriate institution" makes those decisions—in other words, lenity reflects the fact that "the legislature alone has the ca-

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that goal."). In the immigration context, Immigration and Customs Enforcement (ICE) manages the prosecution of noncitizens. *See* MEMORANDUM FROM JOHN MORTON, DIR. OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf. However, the fact that the ICE then relies on DOJ attorneys to litigate immigration cases may raise concerns, as the attorneys arguing cases do not have the opportunity to exercise discretion.

258. *See* Roberts, *supra* note 160, at 32 ("The courts have adhered to the myth that the deportation of an alien, even when based on his conduct in this country following a lawful admission for permanent residence, is not punishment in the constitutional sense. Consequently, the plenary power of Congress to legislate on immigration matters is not limited by the Constitution's ex post facto, bill of attainder, and cruel and unusual punishment clauses.").

259. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 324 (2001) (explaining that the Court "reject[s] the argument that deportation is punishment for past behavior"); Fong Yue Ting v. United States, 149 U.S. 698, 709 (1893) (defining "deportation" as "the removal of an alien out of the country simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent or under those of the country to which he is taken").

260. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948); *see also* Bonetti v. Rogers, 356 U.S. 691, 699 (1958) ("When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct. It may fairly be said to be a presupposition of our law to resolve doubts against the imposition of a harsher punishment.") (quoting Bell v. United States, 349 U.S. 81, 83 (1955)).

261. *See* William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1206 (2000) (characterizing lenity as reflecting nondelegation doctrine); *see also* Sunstein, *supra* note 246 (same); Kahan, *supra* note 249, at 347 ("[T]he rule of lenity . . . is best understood as a 'nondelegation doctrine' in criminal law.").

pacity to make those moral judgments" required by assigning punishment.[262]

Lenity conflicts directly with *Chevron*, as each doctrine counsels courts to resolve a high level of ambiguity in a different way based on different presumptions about congressional intent.[263] Indeed, the Supreme Court has suggested that *Chevron* does not apply to Department of Justice interpretations of criminal statutes[264] because the agency does not administer the criminal codes[265] and because to grant deference to prosecutors who had incentive to construe statutes broadly would "replac[e] the doctrine of lenity with a doctrine of severity."[266] Cass Sunstein has supplied a more theoretical rationale, arguing that lenity should be treated as a clear statement rule that prevents an agency from assuming delegated power in the absence of a plain statement from Congress delegating that authority.[267]

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262. Eskridge, *supra* note 261. Lenity might also be seen as a doctrine designed to protect minority interests from unfavorable political decisions. *See* Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 GEO. IMMIGR. L.J. 515, 522 ("[T]he Court created the rule of lenity to protect values, or 'underenforced constitutional norms,' [that] the Court would not directly protect by constitutional review."). Hiroshi Motomura has chronicled the efforts of the Court to apply "phantom constitutional norms" in the immigration context to "undermine the plenary power doctrine through statutory interpretation." Motomura, *supra* note 231, at 549. *See also* Slocum, *The Immigration Rule of Lenity and* Chevron, 17 GEO IMMIGR. L.J. at 522 ("The Court's use of lenity may also stem from its recognition that noncitizens typically have no political voice or access to political power and its desire to counteract possible prejudice against them and ensure that the political process treats them fairly.").

263. For further discussion, see Kristin E. Hickman, *Of Lenity,* Chevron*, and KPMG*, 2 VA. TAX. REV. 905, 912–18 (2007) (discussing the applicability of *Chevron* versus lenity in the tax context).

264. *See* Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) ("[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.").

265. *See id.* ("The law in question, a criminal statute, is not administered by any agency but by the courts.")

266. *Id.* at 178. This rationale has implications in the immigration context as well, because although proceedings against immigrants are brought by the Department of Homeland Security, the Department of Justice, the agency which also houses the BIA, prosecutes immigration cases.

267. *See* Sunstein, *supra* note 246, at 317 ("The nondelegation canons represent a salutary kind of democracy-forcing minimalism, designed to ensure that certain choices are made by an institution with a superior democratic pedigree."). However, a nondelegation canon based on the immigration rule of lenity would most likely reflect a fictional, presumed congressional intent rather than true congressional intent, considering the history of legislation directed at noncitizens. Brian G. Slocum, *Canons, the Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363, 369 (2006) ("An immigration rule of severity . . . might more accu-

Apart from the shared application of lenity principles in criminal and immigration law, the Court has acknowledged other similarities between these contexts. In one example, the Court has usefully analogized between the criminal and immigration contexts when explicating the law of executive detention.[268] This may provide an additional reason not to defer to BIA interpretations of the INA.

3. Political Process Theory

In the words of former BIA Chairman Maurice Roberts, the work of the BIA is "unique" among administrative tribunals because "our immigration laws directly and exclusively affect human beings."[269] Noncitizens face significant collective action problems, as they cannot vote, frequently have lower incomes, may lack proficient language skills, and are not guaranteed state-sponsored representation before immigration courts.[270]

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rately reflect congressional intent than the immigration rule of lenity."). This nondelegation function of lenity conflicts with criminal law in practice and with immigration law, because in both contexts Congress delegates interpretive authority, to courts and agencies respectively, and in both contexts the recipient of delegated authority typically exercises that authority rather than forcing Congress to address an issue with greater specificity. *See* Kahan, *supra* note 249, at 347 (arguing that "[t]he historic underenforcement of lenity . . . reflects the existence of another largely unacknowledged, but nonetheless well established, rule of federal criminal law: that Congress may *delegate* criminal lawmaking power to courts"). In response to time pressure and challenges in seeking political consensus, Congress has in many instances enacted "open-textured or highly general legislation that is nonetheless directly enforceable in court," empowering the judiciary to resolve the meaning of the statute. *Id.* at 353. Kahan cites antitrust, civil rights law, and labor law as examples of broadly drafted statutes that courts have exercised broad power in interpreting. *Id.* In the immigration context, Congress has expressly delegated general interpretive authority of the broadly drafted INA to the Attorney General. *See* 8 U.S.C. § 1103 (2009) (giving the Attorney General the power to "establish such regulations . . . necessary for carrying out this section" of the INA and the power to "delegate such authority").

268. *See* Zadvydas v. Davis, 533 U.S. 678, 701 (2001) (adopting a presumption limiting detention to a reasonable amount of time because the Court "ha[d] adopted similar presumptions in other contexts," then citing presumptions based on the meaning of "petty offense" and delays in probable cause hearings).

269. Roberts, *supra* note 160, at 30; *see also* Matter of Cerna, 20 I. & N. Dec. 399, 408 (BIA 1991) ("The laws that we administer and the cases we adjudicate often affect individuals in the most fundamental ways.").

270. *See* Roberts, *supra* note 160, at 32–33 ("[A]liens in general are a disadvantaged minority in our society. Many have come to escape the poverty and hopeless lack of opportunity in their native lands. Many arrive under emergency conditions as refugees from political or religious persecution. Most lack proficiency in our language and knowledge of our institutions. Economically, aliens

One school of constitutional interpretation has argued that rather than identifying and vindicating particular substantive values, courts should instead "recognize[ ] the connection between . . . political activity and the proper functioning of the democratic process" and seek to police that democratic process.[271] In other words, rather than imposing substantive values on society, courts should seek to ensure that the political process is properly functioning. In many cases, this means ensuring that minority groups[272] have access to fair and equal treatment.[273] John Hart Ely looks to the theory of constitutional interpretation outlined in footnote four of *Carolene Products*[274] for the principle that "it is an appropriate function of the Court to keep the machinery of majoritarian democracy running as it should, to make sure the channels of political participation and communication are kept open."[275]

Political accountability is particularly problematic as a basis for *Chevron* deference in the immigration context because noncitizens cannot vote and are therefore not represented in the political process. From a formal doctrinal perspective, this simply may not mat-

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frequently have lower incomes and are unable to afford the rapidly mounting charges for adequate professional representation. As nonvoters, they lack political clout. In times of economic or political stress they present a ready and defenseless target not only for the demagogues but also for concerned citizens seeking simplistic answers to complex social and economic problems."); *see also* Katzmann, *supra* note 4, at 586 ("Immigrants often come to this country in fear, fleeing from persecution, escaping from poverty, not knowing the language, not knowing to whom to turn for competent legal advice, all the while working to make a better life. In all too many cases, the dearth of adequate counsel for immigrants all but dooms the immigrant's chances to realize the American dream.").

271. John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 452–53 (1978).

272. *See id.* at 458 ("What the system, at least as described thus far, does *not* ensure is the effective protection of minorities whose interests differ from the interests of most of the rest of us. For if it is not the 'many' who are being treated unreasonably but rather only some minority, that obviously will not be so comfortably amenable to political correction. Quite the contrary, there may be political pressures to *encourage* our representatives to pass laws that treat the majority coalition on whose continued support they depend in one way, and one or more minorities they feel they do not need in a less favorable way . . . .").

273. *See id.* ("Our Constitution by and large has remained a constitution properly so called, concerned with constitutive questions—primarily with the mechanics of decision, but also in important measure with whether all the people are in fact being represented or rather some are being unjustifiably excluded from either the process or the benefits with which the effective majority has seen fit to favor itself.")

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

275. Ely, *supra* note 271, at 455.

ter.[276] But the Supreme Court has remarked on the political tenuousness of the noncitizens living within the borders of the United States, observing that since "noncitizens cannot vote, they are particularly vulnerable to adverse legislation."[277] Further aggravating this problem, noncitizens do not have the right to a court-appointed attorney and are often unrepresented before immigration judges.[278]

The political process in immigration adjudication raises concerns because the critical decision-making apparatus for determining removal and asylum, which directly affects personal liberties, is effectively handed off to immigration courts and the BIA through open-ended provisions in the INA. If courts take seriously the notion that the political accountability of executive agencies justifies *Chevron* deference, then the fact that noncitizens lack access to the political process counsels in favor of denying *Chevron* deference and providing for de novo judicial review.

4. Conclusions

The unique qualities of the immigration context establish a normative backdrop against which courts make decisions about deference to the BIA. Whereas traditional legal norms counsel in favor of deference to the BIA when foreign policy is implicated, lenity and political process theory counsel against deference in domestic

276. As a longstanding matter of law, the plenary power doctrine grants Congress and the Executive broad authority in the immigration context. *See, e.g.*, Spiro, *supra* note 236, at 339 (describing the plenary power doctrine as the doctrine under which "the courts have persistently abjured any significant role in policing political branch conduct in the [immigration context]").

277. INS v. St. Cyr, 533 U.S. 289, 315 (2001). One commentator has characterized the application of the immigration rule of lenity in *St. Cyr* as a "rule of clarity [that] should and does draw support from the representation-reinforcement theory of constitutional interpretation long associated with Professor John Hart Ely." *See* Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281, 1292 (2002).

278. *See* Roberts, *supra* note 160, at 41 ("While it may be true that other federal administrative tribunals, such as the Federal Trade Commission and the Securities and Exchange Commission, have difficult cases which receive original review by their professional staffs, it is erroneous to equate the Board's cases with those of the other agencies. Because of the financial interests involved, the parties to the proceedings before those agencies are invariably represented by counsel. Large agency staffs are available to brief and argue cases before the agency. In the cases that come before the Board, many of the aliens are unrepresented or were unrepresented at the hearing before the immigration judge. Even when the alien before the Board has counsel, the quality of representation may still be inadequate. Not all attorneys or other representatives who appear in immigration cases have the necessary expertise.").

contexts. Though these norms are rarely decisive on their own,[279] they inform courts' presumptions concerning congressional intent. These norms counsel in favor of limiting the application of *Chevron* to the INA based on the relative expertise of courts and agencies.

III.
GRANTING DEFERENCE BASED ON THE RELATIVE EXPERTISE OF COURTS AND THE BIA

As discussed in Part I, when interpreting the INA courts often mechanically apply *Chevron*'s rule requiring deference to an entrusted agency's reasonable interpretation of ambiguous statutory provisions. However, if courts read *Chevron* to adopt ambiguity as the sole touchstone of deference and systematically defer to all BIA interpretations of ambiguous INA provisions, they will fail to realize *Chevron*'s goal. The *Chevron* framework should allocate interpretive questions between courts and the BIA based on relative institutional competence.[280] Part III of this Note argues that courts reviewing BIA interpretations should consider, as part of the *Chevron* step zero[281] threshold inquiry, whether the BIA exercised its expertise in interpreting the statute.[282] Unless the ambiguous statutory provision in question implicates BIA expertise[283] and the BIA has applied its expertise to interpret that statutory provision, courts have no reason to believe that Congress intended to implicitly delegate interpretive authority to the BIA. By deferring only to expert BIA interpretations of the INA and reviewing all other questions of law de novo, courts effectuate the purposes of *Chevron* and respect legis-

279. *See e.g.*, Kawashima v. Holder, 132 S. Ct. 1166, 1176 (2012) (noting that although "we have, in the past, construed ambiguities in deportation statutes in the alien's favor," "the application of the present statute clear enough that resort to the rule of lenity is not warranted"); Kahan, *supra* note 249, at 346 ("Judicial enforcement of [the criminal rule of] lenity is notoriously sporadic and unpredictable.").

280. *See Negusie*, 555 U.S. at 530 (Stevens, J., concurring) ("[*Chevron*] accounts for the different institutional competencies of agencies and courts: Courts are expert at statutory construction, while agencies are expert at statutory implementation.").

281. *See supra* Part I.A (explaining that the *Chevron* step zero inquiry asks whether the *Chevron* framework applies at all).

282. *See, e.g.*, Higgins v. Holder, 677 F.3d 97, 109 (2d Cir. 2012) (Katzmann, J., concurring) (arguing that even if the INA is "silent" on the provision in question, courts should only defer to the BIA's interpretation "to the extent that it is within the domain of the agency's special expertise in immigration law, as long as it is reasonable").

283. *See supra* Part II.B (characterizing the BIA's expertise in immigration-specific subject matter and the INA).

lative intent. Generally, the BIA has comparative expertise when interpretation must be guided by political accountability or where interpretation depends on immigration-specific factors, and courts have comparative expertise in interpreting plain text, legal terms of art, and provisions that mirror those contained in the criminal code.

The Supreme Court has not clearly drawn this distinction between the relative institutional competence of courts and the BIA, which Justice Stevens characterized in his concurrence in *Negusie v. Holder* as "subtle" yet nevertheless "importan[t]."[284] This distinction recurs throughout the Supreme Court's administrative deference jurisprudence[285] and has resolved many of the courts of appeals' immigration cases.[286] Nonetheless, some circuits apply *Chevron* mechanically to defer to all BIA interpretations of ambiguous provisions rather than considering whether the BIA has applied its expertise.[287] Courts faced with the issue can resolve circuit splits on whether to defer to various BIA interpretations of ambiguous INA provisions by considering the agency's expertise as a prerequisite to deference.

Part III.A proposes a test for analyzing the BIA's expertise at *Chevron* step zero. First, when courts have previously interpreted the provision[288] and the provision does not involve foreign policy,[289] the provision does not implicate BIA expertise. Second, when the BIA's reasoning mirrors judicial reasoning or is otherwise devoid of immigration-specific expertise, that BIA interpretation lacks expertise. Part III.B discusses Supreme Court precedent that supports the proposed test. Part III.C argues that a step zero-based approach is preferable to a blanket deference rule because it cabins judicial discretion and produces greater uniformity. Additionally, a step zero-based approach is preferable to a step two-based approach because it better allocates interpretive authority between courts and the BIA. Part III.D discusses the circuits' current treatment of BIA expertise in *Chevron* analysis and identifies types of INA provisions

284. *See Negusie*, 555 U.S. at 530 (Stevens, J., concurring).

285. *See supra* Part II.A.

286. *See infra* Part III.C.

287. *See supra* note 18.

288. *See, e.g.*, Prudencio v. Holder, 669 F.3d 472, 482 (4th Cir. 2012) (denying deference to BIA interpretation of "moral turpitude" because "courts . . . have been able to interpret this phrase for over a century, and a robust body of law has developed").

289. *See, e.g.*, Denis v. Att'y Gen., 633 F.3d 201, 209 n.11 (3d Cir. 2011) (denying deference in part because the interpretation of Section 1101(a)(43)(S) bore "none of the same [foreign policy] implications" present in *Aguirre-Aguirre*).

that a court or the BIA is relatively more competent to interpret. Section III.E applies the proposed approach to conclude that courts should not defer to the BIA's interpretation of 8 U.S.C. § 1101(a)(43)(S).[290]

A. Stating a Clear Test to Determine Whether Chevron *Applies*

Rather than accepting an overbroad rule that always grants the BIA deference, courts should adopt a more nuanced reading of Supreme Court precedent that acknowledges that *Chevron* is triggered not only by the presence of an entrusted agency as interpreter but by the specific text at issue. Accordingly, the inquiry at *Chevron* step zero should be whether Congress intended that the BIA be the primary interpreter of the specific text at issue. This approach suggests that Congress did not entrust the interpretation of every ambiguous phrase in the INA to the BIA.

In effectuating this reasoning, courts should take into account not merely the fact that the BIA administers the INA, but additionally whether the BIA is more competent than a court to interpret the statute and whether the BIA actually applied its expertise in rendering its interpretation. Judge Katzmann's concurrence in *Higgins v. Holder*[291] recommends such an approach, acknowledging that even when an INA provision is ambiguous, courts should only defer to the BIA's interpretation "to the extent that it is within the *domain of the agency's special expertise in immigration law*, as long as it is reasonable."[292] This approach acknowledges statutory ambiguity, but recognizes that the BIA should not receive deference for interpretations that depend on the agency's importation of definitions from other statutes.

To determine whether the interpretation of a particular statutory provision requires agency expertise, courts should look to (1) the nature of the provision at issue, and (2) the form of the BIA's reasoning. The inquiry into the nature of the INA provision should focus on congressional intent, as *Chevron* is based on the assumption that ambiguity indicates congressional intent to delegate. The inquiry into the form of the BIA's reasoning should serve to determine whether the INA provision in question is susceptible to the

290. 8 U.S.C. § 1101(a)(43)(S) (2012) ("The term 'aggravated felony' means . . . an offense relating to obstruction of justice . . . for which the term of imprisonment is at least one year . . . .").

291. 677 F.3d 97 (2d Cir. 2012).

292. *Id.* at 108–09 (emphasis added). *See also* Patel v. Ashcroft, 294 F.3d 465, 467 (3d Cir. 2002) (explaining that "legal issues that turn on a pure question of law not implicating the agency's expertise" do not receive deference).

application of agency expertise. If the BIA's judgment does not invoke policy considerations or any insights based on the BIA's extensive experience in adjudicating immigration claims,[293] but instead draws inferences from prior judicial construction of similar provisions and bears a closer resemblance to the analysis undertaken by judges[294] than to the cross-disciplinary balancing contemplated in *Chevron*,[295] there is little reason to presume that the BIA has any particular advantage over courts in reaching its interpretation.[296]

B. Supreme Court Precedent Requires Chevron *Deference to Agencies' Expert Policymaking, Not Agencies' Textual Interpretation*

The Supreme Court has implicitly considered the comparative expertise of courts and agencies in cases applying *Chevron* to BIA interpretations. In *INS v. Cardoza-Fonseca*[297] the Court denied deference to the BIA's interpretation of "well-founded fear" despite finding that the phrase contained "some ambiguity."[298] The BIA had read the "well-founded fear of persecution" standard as identical to the "clear probability of persecution" standard.[299] The Court reasoned that *Chevron* deference was inappropriate because the BIA

293. The BIA has in other cases asserted that its interpretation implements executive policy. *See, e.g.*, Matter of Lok, 18 I. & N. Dec. 101, 105 (BIA 1981) ("[W]e conclude that the policies of the Act would best be served by deeming the lawful permanent resident status of an alien to end with the entry of a final administrative order of deportation.").

294. In *Denis* the Third Circuit expressly observed that "[a]lthough we do not defer to the BIA here, we will discuss its approach to resolving the instant matter, as it bears some similarities to our own." 633 F.3d at 210.

295. *See, e.g.*, *Immigration Law in the Supreme Court*, *supra* note 173 ("It is unclear . . . exactly what the Board did in *Aguirre*. Certainly, unlike the EPA, it did not fill in substance to the open texture of a statute . . . . [T]he Board simply decided a case. It lent no new interpretation to the Refugee Act and did not even mention the Convention."); *see also* Matter of Velazquez-Herrera, 24 I. & N. Dec. 503, 508–09 (BIA 2008) (characterizing BIA gap-filling as "seeking to identify . . . 'federal policies'").

296. For example, there is no reason to suppose that the BIA is better situated to discern congressional intent than a federal court, but the BIA's process of policymaking through interpretation nonetheless relies on BIA determinations of congressional intent. *Cf.* Bracamontes v. Holder, 675 F.3d 380, 386 (4th Cir. 2012) (denying deference to a congressional intent-based BIA interpretation of 8 U.S.C. § 1101(a)(13)(A) because "[r]egardless of the BIA's speculation concerning congressional intent, however, the statute plainly says what is says.").

297. 480 U.S. 421 (1987).

298. *Id.* at 448.

299. *Id.* at 448 n.31.

had not filled an implicit gap left by Congress.[300] Instead, the question of whether the two standards were identical was a "pure question of statutory construction for the courts to decide."[301] This was a sensible application of *Chevron* principles, as courts are more competent than the BIA to perform pure statutory interpretation and the BIA did not rely on its immigration-specific expertise when equating "well-founded fear" with "clear probability." Alternatively, in *INS v. Aguirre-Aguirre*[302] the Court deferred to the BIA's interpretation of "serious nonpolitical crime," concluding that the "judiciary [was] not well positioned to shoulder primary responsibility" for deeming certain crimes committed abroad political because such determinations might affect foreign relations.[303] In that case, the provision was susceptible to the application of the BIA's expertise because it implicated foreign affairs, and the BIA applied its expertise to fashion a test for identifying "serious nonpolitical crime[s]" that balanced the "political aspect of the offense" against its "common-law character."[304]

The precise contours of this functional distinction remain unclear. In *Negusie v. Holder*, Justice Stevens's concurrence waxes on the distinction between "pure questions of statutory interpretation and policymaking" and "central legal issues and interstitial questions."[305] To Justice Stevens, "[t]he label is immaterial. What matters is the principle. . . . Statutory language may . . . admit of both judicial construction and agency exposition."[306] Stevens distinguished between *Cardoza-Fonseca* and *Aguirre-Aguirre* by explaining that in *Cardoza-Fonseca* the Court determined that two statutory provisions were not identical—a pure question of statutory interpretation—whereas in *Aguirre-Aguirre* the Court addressed the BIA's application of a definition of "serious nonpolitical crime" to specific facts.[307] Justice Stevens also explained that "*Chevron* deference need not be an all-or-nothing venture," because a Court may determine

300. *See id.* at 448 (explaining that courts must defer to agency interpretations that fill a gap left by Congress, but that the question at hand was "much narrower").

301. *Id.* at 446.

302. 526 U.S. 415 (1999).

303. *Id.* at 424–25.

304. *Id.* at 422. *See also* Matter of McMullen, 19 I. & N. Dec. 90, 97–98 (BIA 1984).

305. Negusie v. Holder, 555 U.S. 511, 531 (2009) (Stevens, J., concurring).

306. *Id.*

307. *See id.* at 533.

the meaning of a statute while leaving the specific application of that statute to the agency.[308]

This recognition calls for a distinction between the different types of questions that the BIA answers.[309] *Chevron* deference is certainly appropriate for interpretations of provisions that establish substantive policies based on expert reasoning.[310] But it is less clear that deference yields any benefits or accords with the rationales underlying *Chevron* in the absence of the application of agency expertise.[311]

C. Chevron *Step Zero Provides the Best Solution*

One concern with the proposed approach is that it places greater discretion in courts' hands than does a broad application of *Chevron* to all ambiguous statutory provisions. However, this should not concern courts. *Chevron* was not intended to revolutionize administrative law—even if it has in practice[312]—and prior practice appropriately gave courts discretion to grant or deny deference based on agency expertise.[313] Additionally, the more nuanced approach favored by this Note comports with the Court's *Mead* jurisprudence, which undercuts Justice Scalia's position that *Chevron* ought to function as a bright-line rule.[314] Finally, the test proposed by this Note should not be viewed as novel, as it stems from the approach that some courts of appeals have already taken when faced with BIA interpretations that do not entail expertise.[315] Rather than inventing a new test, this Note only seeks to clearly organize the principles that courts of appeals have adopted in tackling more than a dozen interpretive questions arising from the INA.[316]

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308. *Id.*

309. *See supra* Part III.A.

310. *See, e.g.*, Sandoval v. Reno, 166 F.3d 225, 239 (3d Cir. 1999) ("*Chevron* appears to speak to statutory interpretation in those instances where Congress delegated rule-making power to an agency and thereby sought to rely on agency expertise in the formulation of *substantive policy*.") (emphasis added).

311. *See supra* Part I.A (discussing problems that arise from inconsistent application of immigration law).

312. Sunstein, *supra* note 44, at 188 ("Justice Stevens . . . had no broad ambitions for [*Chevron*]; the Court did not mean to do anything dramatic.").

313. *See supra* Part II.A.

314. *See supra* notes 10–12 (explaining that the Court has rejected Scalia's proposal that *Chevron* functions as a bright-line rule).

315. *See supra* Part III.B.

316. *See infra* notes 336, 341, 361, 370.

A second concern with the approach favored by this Note is that by allowing courts greater discretion, the goal of uniformity will be undermined. However, clarifying the analysis that courts should undertake when deciding whether to apply *Chevron* should help align the circuits and bring about greater uniformity. Furthermore, as argued in Part I, a staggering lack of uniformity currently exists in immigration administration, such that even an incremental increase in uniformity would improve upon the current state of affairs. It may be the case that only statutory amendment would allow courts and the BIA to approach true uniformity in interpretation and application of the INA.

As an alternative to the proposed test, courts might resolve the interpretation of the INA at *Chevron* step two by taking a more robust approach to determining whether the BIA's interpretation is reasonable.[317] The advantage of such an approach is that it does not undercut the BIA's authority to interpret the INA, but instead results in remand.[318] However, resolving the interpretation of the INA at step two raises problems for the same reason. First, remanding unreasonable BIA interpretations will create further delay in the process of adjudicating immigration cases. The goal of judicial review of BIA interpretations should not be to force the BIA to repeatedly hazard a guess at legislative intent or to proffer its own application of the criminal code to the immigration context. Instead, if courts are better suited to make an interpretation, then it is more efficient for courts to resolve the issue rather than remanding to the BIA for a second guess. By the same token, courts should not grant *Chevron* deference to a correct BIA interpretation if it is the responsibility of the court to make that interpretation. Second, the step two approach may erroneously entrust the BIA with too much power. As this Note has argued, a principal question that arises for courts in interpreting many provisions in the INA is not whether the text is susceptible to a particular interpretation but whether courts or the BIA bear the responsibility for interpreting that text. This question is most directly addressed by an inquiry that asks whether *Chevron* is the appropriate judicial tool, not whether the BIA has reasonably interpreted the statute.

317. *See, e.g.*, Holder v. Martinez Gutierrez, 132 S. Ct. 2011, 2017 (2012) (explaining that the BIA's position "prevails if it is a reasonable construction of the statute, whether or not it is the only possible interpretation or even the one a court might think best").

318. *See supra* Part I.C.

D. INA Provisions at Stake

The BIA should receive deference for its interpretations of some types of INA provisions, but not all. The types of INA provisions that the BIA interprets may be broken into three rough categories. First, the BIA generally does and should receive *Chevron* deference for provisions that implicate foreign policy. Second, courts often do, but nevertheless should not, defer to BIA interpretations of procedural provisions in the INA, such as effective date provisions and statutes of limitations. Third, courts widely disagree on whether to defer to INA provisions that apply domestically and draw on non-immigration law. In many cases, courts should not defer to these provisions because the BIA does not bring any expertise to bear on the issues at stake.

1. Provisions Implicating Foreign Policy

The BIA does, in theory, possess one significant advantage over the courts: As a politically accountable executive agency, the BIA is better positioned to make decisions with potential repercussions for foreign relations.[319] It is also clear that the implications of international relations demand policymaking responses requiring expertise outside the province of the courts.[320] Yet, in many instances, the presumption of a politically accountable BIA may be strictly a legal fiction, as by regulation the BIA operates independently of the

319. *See* Negusie v. Holder, 555 U.S. 511, 517 (2009) ("Judicial deference in the immigration context is of special importance, for executive officials exercise especially sensitive political functions that implicate questions of foreign relations. The Attorney General's decision to bar an alien who has participated in persecution may affect our relations with [the alien's native] country or its neighbors. The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.") (internal citations and quotations omitted).

320. Bradley, *supra* note 243, at 666–67 ("It is not clear . . . that foreign affairs law can be neatly divorced from foreign affairs policy. Interpretation of foreign affairs law may require assessments of international conditions and relationships."). Judgments in the asylum context recognize international norms outside the province of courts. *See* INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) ("A decision by the Attorney General to deem certain violent offenses committed in another country as political in nature, and to allow the perpetrators to remain in the United States, may affect our relations with that country or its neighbors. The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions."); Matter of McMullen, 19 I. & N. Dec. 90, 90 (BIA 1984) ("The statutory exclusion from the definition of 'refugee' of those persons who have participated in the persecution of others represents the view of the Congress that such persons are unworthy and undeserving of international protection.").

Attorney General, its politically accountable superior.[321] But as a matter of administrative law, this principle that courts defer to the political branches on foreign policy matters is well settled.

Foreign policy expertise comes into play in three contexts. First, the BIA must apply the INA to predicate offenses committed outside the United States.[322] A politically accountable agency may be better suited to interpret foreign law than a court, since a court has no advantage in reading foreign law. Second, the BIA may be better positioned to interpret the terms of treaties relevant to United States immigration law.[323] Third, the BIA's familiarity with the facts of political situations outside the borders of the United States enables the BIA to make informed judgments about asylum claims.[324] In these situations, courts properly defer to BIA interpretations.

2. Procedural Provisions

One strand of opinions has denied *Chevron* deference to BIA interpretations of particular procedural provisions in the INA that do not implicate the BIA's expertise.[325] Courts have framed this ar-

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321. *See supra* Part II.C.3.

322. A noncitizen is not eligible for asylum if "[t]here are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States," 8 U.S.C. § 1158(b)(2)(A)(iii) (2012), or if the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1158(b)(2)(A)(i) (2010).

323. Bradley, *supra* note 243, at 701 ("The Supreme Court has stated in a number of decisions that it gives 'great weight' to the executive branch's interpretation of treaties."); *but see* Farbenblum, *supra* note 161, at 1088 ("Lower courts should be applying the same canons of statutory construction identified in *Cardoza-Fonseca* when interpreting statutes that incorporate international treaties.").

324. *See, e.g.*, *Matter of McMullen*, 19 I. & N. Dec. at 97–98 ("Whether crimes are of a political character is primarily a question of fact. In evaluating the political nature of a crime, we consider it important that the political aspect of the offense outweigh its common-law character. This would not be the case if the crime is grossly out of proportion to the political objective or if it involves acts of an atrocious nature.") (internal citations omitted).

325. *See, e.g.*, Sandoval v. Reno, 166 F.3d 225, 239–40 (3d Cir. 1999) (denying deference to BIA interpretation of the effective date of a statute); Bamidele v. INS, 99 F.3d 557, 561 (3d Cir. 1996) (denying deference to BIA interpretation of a statute of limitations). In *Bamidele*, the court spoke directly to the relative competence of the BIA and courts, explaining that "[a] statute of limitations is not a matter within the particular expertise of the INS," but instead "a clearly legal issue that courts are better equipped to handle." *Bamidele*, 99 F.3d at 561 (internal quotations omitted).

gument in terms of comparative expertise: Because courts possess greater competence to answer questions involving ambiguous procedural provisions, a reviewing court should interpret the statute de novo.[326] A better argument might be that the agency's lack of expertise to answer the question serves as evidence that Congress did not intend to delegate interpretive authority to the agency.[327]

Courts have drawn an important distinction between substantive and procedural interpretations that illustrate this principle. In *Bamidele v. INS*, the Third Circuit declined deference to the BIA's interpretation of the five-year statute of limitations contained in 8 U.S.C. § 1256.[328] The court cited other cases where the BIA had received deference,[329] pointing to the agency's relevant expertise. The Third Circuit distinguished *Bamidele* from these cases in which courts appropriately granted deference on two grounds. First, these other cases all dealt with issues "labyrinthine in their complexity," such that the BIA's familiarity with the INA could provide the court

326. *See* Berry, *supra* note 168, at 584 (arguing that agencies should not receive deference for interpretations of procedural provisions because "courts, rather than agencies, should be the primary interpreters of procedural provisions."). Also noteworthy, federal courts frequently interpret procedural provisions in other statutes. Richard A. Matasar, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1356 (1986) ("[P]rocedural common lawmaking envisions jurisdictional decisions as an evolutionary dialogue between the Court and Congress: the Court fills gaps in enacted law and frees a Congress, otherwise occupied by matters of substance, from constant jurisdictional fine tuning.").

327. *See, e.g.*, *Sandoval*, 166 F.3d at 239–40 ("An issue concerning a statute's effective date is not one that implicates agency expertise in a meaningful way, and does not, therefore, appear to require *Chevron* deference."). *Compare* Matasar, *supra* note 326 (explaining that "[a]rguments that the Court's procedural common law derogates from congressional intent are based on a simplistic notion of how jurisdictional decisions are made" and that in reality jurisdictional decisions are the product of a dialogue between Congress and the courts), *with* Berry, *supra* note 168, at 579 ("When formulating procedural laws, Congress recognizes [judicial] expertise and trusts the judgment of courts to interpret these laws and make necessary procedural decisions.").

328. 99 F.3d at 561–62.

329. The cases cited were *Yang v. Maugans*, 68 F.3d 1540 (3d Cir. 1995) (granting deference to BIA interpretation of the burden of proving entry), *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993) (interpreting "clear probability of persecution"), and *Katsis v. INS*, 997 F.2d 1067, 1068 (3d Cir. 1993) (interpreting "lawfully admitted for permanent residence"). The Fifth Circuit split with the Third Circuit over the issue in *Katsis*. *See* Butros v. INS, 990 F.2d 1142, 1144 (9th Cir. 1993) (finding the interpretation of "lawful permanent resident" a "purely legal question" not entitled to *Chevron* deference).

valuable guidance.[330] Second, two of the three cases involved the interpretation of substantive provisions of the INA that bore some "unique" relation to immigration.[331] In contrast, the statute of limitations at issue in *Bamidele* "evoke[d] none of th[ose] considerations," as it was "a general legal concept with which the judiciary can deal at least as competently as can an executive agency."[332] The *Bamidele* court took a strong position against deference, finding that even though "Congress has given us little guidance" on the meaning of the statute,[333] rendering it ambiguous, the courts were nonetheless the appropriate interpreter. Not all circuits have agreed with the *Bamidele* court's reasoning.[334]

Courts have also denied deference to the BIA's interpretations of other procedural provisions of the INA. Courts have been clear that *Chevron* does not apply to effective date provisions in the INA.[335] In addition to relying on courts' comparative expertise in procedure[336] and expressing skepticism that Congress would dele-

330. *Bamidele*, 99 F.3d at 562 ("Each of these cases concerned matters labyrinthine in their complexity in which our analysis would be bolstered by our reliance on the expertise of the INS.").

331. *Id.* at 562 ("Moreover, the latter two cases addressed terminology which took on unique import and meaning informed by the INS's interpretation of its governing statute.").

332. *Id.*

333. *Id.* at 561.

334. *Compare id.* at 557 (denying deference to BIA interpretation of § 1256), *and* Garcia v. Att'y Gen., 553 F.3d 724, 727 (3d Cir. 2009) (denying deference to BIA interpretation of § 1256 after 1996 amendment to INA), *with* Asika v. Ashcroft, 362 F.3d 264, 265 (4th Cir. 2004) (granting deference to BIA interpretation of § 1256). *See also* Alhuay v. Atty. Gen., 661 F.3d 534, 545 (11th Cir. 2011) (finding § 1256 unambiguous and dismissing the appeal); *Kim v. Holder*, 560 F.3d 833, 837 (8th Cir.2009) (finding § 1256 relatively unambiguous and deferring to the Attorney General's interpretation of provision).

335. *See, e.g.*, Bejjani v. INS, 271 F.3d 670, 679 (6th Cir. 2001), *abrogated by* Fernandez-Vargas v. Gonzales, 548 U.S. 30, 126 (2006) (finding *Chevron* deference to BIA interpretations of effective date provisions inappropriate); Sandoval v. Reno, 166 F.3d 225, 239 (3d Cir. 1999) (finding *Chevron* inappropriate for review of statutes of limitations); Jurado-Gutierrez v. Greene, 190 F.3d 1135, 1148 (10th Cir. 1999) ("Determining the statute's temporal reach does not involve any special agency expertise. Rather, we consider the question of whether AEDPA § 440(d) applies retroactively to be a 'pure question of statutory construction for the courts to decide.'"); Mayers v. INS, 175 F.3d 1289, 1302 (11th Cir. 1999) ("The question of a statute's effective date is generally considered to be a pure question of law for courts to decide."); Goncalves v. Reno, 144 F.3d 110, 127 (1st Cir. 1998) (finding *Chevron* inappropriate for review of statutes of limitations).

336. *Sandoval*, 166 F.3d at 239 ("An issue concerning a statute's effective date is not one that implicates agency expertise in a meaningful way, and does not, therefore, appear to require *Chevron* deference.")

gate interpretive authority over procedural provisions implicitly,[337] courts have pointed to the anti-retroactivity canon.[338]

In the 1990s, circuits split over whether to defer to the BIA's interpretation of the phrase "status not having changed"[339] in the INA's definition of "lawfully admitted for permanent residence."[340] In those cases, the time when a noncitizen's status changed determined whether that noncitizen could move to reopen a petition for discretionary withholding of removal. The BIA concluded that "the lawful permanent resident status of an alien [came] to end with the entry of a final administrative order of deportation."[341] While procedural in the sense that it effectively set a final date when a noncitizen could move to reopen, the BIA's rule also implicated policy considerations, namely balancing interests in finality against equita-

337. *Goncalves*, 144 F.3d at 127 ("We think it is a significant question whether the determination of the application of the effective date of a governing statute is the sort of policy matter which Congress intended the agency to decide and thus whether the doctrinal underpinnings of *Chevron* are present here. When Congress wants an agency to determine whether to apply new rules, it usually delegates that discretion expressly.").

338. *Bejjani*, 271 F.3d at 679 (finding *Chevron* deference to BIA interpretations of effective date provisions inappropriate after *INS v. St. Cyr*, 533 U.S. 289 (2001), in which the Court applied the anti-retroactivity canon and the immigration rule of lenity to resolve an ambiguous INA provision).

339. *Compare* Nwolise v. INS, 4 F.3d 306, 311 (4th Cir. 1993) (granting deference to the BIA interpretation of "status not having changed"), *and* Katsis v. INS, 997 F.2d 1067, 1069–70 (3d Cir. 1993) (finding an implicit delegation and deferring to BIA interpretation), *with* Henry v. INS, 8 F.3d 426, 439 (7th Cir. 1993) (finding the BIA's rule unreasonable at step two), Butros v. INS, 990 F.2d 1142, 1144 (9th Cir. 1993) (en banc) (finding the issue a "purely legal question" and rejecting the BIA interpretation without mentioning *Chevron*), Vargas v. INS, 938 F.2d 358, 363 (2d Cir. 1991) (denying *Chevron* deference because "[t]he BIA did not present its decision as an interpretation of statutory provisions"), *and* Acosta-Montero v. INS, 62 F.3d 1347, 1351 (11th Cir. 1995) (denying *Chevron* deference).

340. 8 U.S.C. § 1101(a)(20) (2012) ("The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed."). In *Matter of Lok*, 18 I. & N. Dec. 101, 101 (BIA 1981), the BIA held that "[t]he lawful permanent resident status of an alien terminates . . . with the entry of a final administrative order of deportation, i.e., when the Board renders its decision in the case upon appeal or certification or, where no appeal to the Board is taken, when appeal is waived or the time allotted for appeal has expired." The courts of appeals examined the question of when a noncitizen's "lawfully admitted for permanent residence" status terminated in order to determine whether that noncitizen remained eligible for 212(c) relief.

341. *Matter of Lok*, 18 I. & N. Dec. at 105.

ble principles.[342] Accepting the BIA's interpretation as reasonable under *Chevron*, the Third Circuit concluded that an "unambiguous cut-off date discourages unnecessary and prolonged litigation by its very clarity, promotes finality, and avoids adjudication of stale claims."[343] The circuits that denied *Chevron* deference, however, argued that the BIA's interpretation was inconsistent with a procedural regulation promulgated by the Attorney General[344] and that the BIA unreasonably viewed motions to reopen as akin to completely new actions.[345] And in another case, *Chevron* was viewed as entirely irrelevant because the issue was a pure question of statutory interpretation.[346]

Courts should view deference's purpose in such cases as the delegation of authority to agencies to make general substantive policy in statutory gaps left by Congress.[347] Interpretations of procedural provisions do not tend to involve policymaking.[348] As the Third Circuit observed in *Sandoval v. Reno*, "*Chevron* appears to speak to statutory interpretation in those instances where Congress delegated rule-making power to an agency and thereby sought to rely on agency expertise in the formulation of *substantive policy*."[349] Yet,

342. The difficulty of drawing this distinction highlights the difficulty of drawing a distinction between substance and procedure. This is one downside to an approach that applies *Chevron* to interpretations of substantive provisions but not to interpretations of procedural provisions.

343. *Katsis*, 997 F.2d at 1073. The BIA also sought to avoid what it viewed as an internal inconsistency in the INA that would rise if noncitizens who had received a final order of deportation nonetheless remained lawful permanent residents. *Matter of Lok*, 18 I. & N. Dec. at 106 ("We find the proposition that an alien under a final order of deportation may remain a lawful permanent resident inherently incongruous.").

344. *See Acosta-Montero*, 62 F.3d at 1351 (asserting that "[w]e must hold the Board to the regulations the INS has adopted" and denying deference).

345. *Henry*, 8 F.3d at 438 ("Simply because a motion to reopen contemplates the consideration of additional evidence does not make it 'a different application' that must be 'adjudicated on a different factual record.'").

346. *See* Butros v. INS, 990 F.2d 1142, 1144 (9th Cir. 1993) (en banc) ("Interpretation of the language 'such status not having changed', found in the definition of lawful permanent residence . . . is a purely legal question.").

347. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 836, 866 (1984) ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.").

348. Berry, *supra* note 168, at 587 ("The interpretation of procedural provisions should not be considered policymaking because it generally does not involve reconciling conflicting policies.").

349. Sandoval v. Reno, 166 F.3d 225, 239 (3d Cir. 1999) (emphasis added).

the interpretation of "status not having changed" highlights the difficulty that may arise when distinguishing between procedural provisions and substantive provisions requiring the application of agency policy. An intermediate solution in these cases, as the opinions of the courts of appeals implicitly suggest, is *Skidmore*: The courts that deferred to the BIA were all persuaded that the BIA had made an effective policy decision in limiting noncitizens' ability to reopen petitions for withholding of removal.

3. Domestic Policy: Gap-Filling

Although the appropriateness of *Chevron* deference for questions with foreign policy implications is well established, many provisions in the INA do not implicate foreign policy.[350] In the case of many ambiguous provisions, such as "crime involving moral turpitude"[351] and "single scheme of criminal misconduct,"[352] courts seem more competent "to say what the law is" than the BIA.[353] These provisions closely resemble legal language existing in criminal statutes that are entrusted to courts to interpret. In these cases, *Chevron* functions to insulate the BIA and the Attorney General from judicial review. A better reading of the Court's jurisprudence on deference would require courts to defer to the BIA only in cases where the BIA exercised its particular expertise to interpret the INA.

In one clear-cut case, the BIA interpreted the term "forgery"[354] in 8 U.S.C. § 1101(a)(43)(R) to include conviction for forgery

350. *See, e.g.*, Patel v. Ashcroft, 294 F.3d 465, 468 (3d Cir. 2002) ("Those [foreign policy] considerations [cited in *Aguirre-Aguirre*] were not present in *Drakes*, and they are absent here."). In *Patel* and *Drakes* predicate offenses, for "burglary" and "forgery" respectively, were at stake.

351. 8 U.S.C. § 1227(a)(2)(A)(i)(I) (2012). In *Mei v. Ashcroft*, Judge Posner observes that the term "moral turpitude" bears the same meaning in immigration law as in the criminal law, but that nonetheless the parties limited their briefing to the immigration context. 393 F.3d 737, 740 (7th Cir. 2004). Although Posner concludes that the court need not decide whether the BIA's determination that "aggravated fleeing" is a crime of moral turpitude, he does go on to describe "the natural way" to perform the interpretation by reasoning through analogy. *Id.* In *Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012), the court held that "the moral turpitude provisions of the INA are not ambiguous and do not contain any gap requiring agency clarification" and denied *Chevron* deference. *Id.* at 476.

352. 8 U.S.C. § 1227(a)(2)(A)(ii) (2012).

353. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

354. 8 U.S.C. § 1101(a)(43)(R) (2012) (stating that "an offense relating to . . . forgery . . . for which the term of imprisonment is at least one year" qualifies as an "aggravated felony").

under Delaware state law.[355] The Third Circuit recognized that the meaning of "forgery" for the purposes of § 1101(a)(43)(R) was not that of Delaware, but of Congress, because "[t]he language of a federal statute must be construed to have the meaning intended by Congress, not the Delaware legislature."[356] The court proceeded to analyze the meaning of "forgery" across the federal corpus juris, finding the term ambiguous but interpreting the federal criminal law to give the term meaning.[357] As an afterthought, the court rejected *Chevron* on the grounds that the BIA had no expertise in interpreting federal criminal law whereas courts frequently interpreted federal criminal law.[358]

In another example, courts have split on granting deference to the BIA's interpretation of the phrase "crime involving moral turpitude."[359] Courts have also split on granting deference to the BIA's

355. Drakes v. Zimski, 240 F.3d 246, 250 (3d Cir. 2001) ("The BIA did not, at least explicitly, engage in the exercise in which we have engaged to determine the meaning of forgery for purposes of § 1101(a)(43)(R). Rather, the BIA simply found that (1) the section covers offenses "relating to" forgery, (2) Drakes was convicted of forgery under § 861 of the Delaware Criminal Code, (3) *a fortiori*, his offense was an offense relating to forgery under the Act.").

356. *Id.* at 248.

357. *Id.* at 249. ("Where federal criminal statutes use words of established meaning without further elaboration, courts typically give those terms their common law definition. If research into the common law yields several competing definitions, however, courts should look to the reading that best accords with the overall purposes of the statute even if it is the minority view. Where the traditional definition is out of step with the modern meaning of a term, more generic, contemporary definitions—such as those found in state statutes—may apply. Furthermore, Congress' general purpose in enacting a law may prevail over this rule of statutory construction altogether."). The Supreme Court has set out the so-called "categorical approach" for interpreting predicate offenses that are considered in the INA. *See* Taylor v. United States, 495 U.S. 575, 588 (1990).

358. *See, e.g.*, *Drakes*, 240 F.3d at 250–51 ("[N]ot only did the BIA not, at least explicitly, call upon any particular expertise in reaching that determination, but defining under federal law a term such as 'forgery' is what federal courts do all the time.").

359. *Compare* Mei v. Ashcroft, 393 F.3d 737, 739 (7th Cir. 2004) ("The courts that have addressed the question . . . agree that the Board's interpretation of the meaning of 'crime involving moral turpitude' is entitled to *Chevron* deference."), *with* Marmolejo-Campos v. Holder, 558 F.3d 903, 910 (9th Cir. 2009) (en banc) (concluding that the BIA has "fail[ed] to particularize" the meaning of "moral turpitude" and applying their own generalized definition, but noting that their own understanding "does not differ materially from the Board's"), *and* Prudencio v. Holder, 669 F.3d 472, 476 (4th Cir. 2012) ("Because we conclude that the moral turpitude provisions of the INA are not ambiguous and do not contain any gap requiring agency clarification, we hold that the procedural framework established in *Silva–Trevino* was not an authorized exercise of the Attorney General's authority under *Chevron*."), *and* Fajardo v. U.S. Att'y Gen., 659 F.3d 1303, 1310 (11th Cir.

decision to classify a particular crime as "involving" moral turpitude.[360] Courts' unwillingness to defer stems in part from the fact that the phrase "moral turpitude," while on its face open-ended, has a judicially established meaning developed over the course of a century.[361] The existence of this longstanding judicial interpretation both provides evidence that Congress views courts as competent to interpret "moral turpitude" and that Congress intended that courts interpret "moral turpitude."

The BIA often interprets statutory gaps by reference to federal law or common law.[362] Some entries on the INA's list of predicate offenses expressly include parentheticals cross-referencing definitions contained elsewhere in federal statutes,[363] whereas others do

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2011) ("Congress unambiguously intended adjudicators to use the categorical and modified categorical approach to determine whether a person was convicted of a crime involving moral turpitude.").

360. *Mei*, 393 F.3d at 739 (explaining that "the courts are divided over whether the Board's decision to classify a particular crime as one involving moral turpitude is entitled to such deference"). *Compare* Smalley v. Ashcroft, 354 F.3d 332, 335–36 (5th Cir. 2003) ("First, we accord 'substantial deference to the BIA's interpretation of the INA and its definition of the phrase 'moral turpitude.' Second, we review *de novo* whether the elements of a state or federal crime fit the BIA's definition of a CIMT.") (internal citations omitted), *with* Knapik v. Ashcroft, 384 F.3d 84, 88 (3d Cir. 2004) ("We adopt the majority position and conclude that the BIA's determination that reckless endangerment crimes may involve moral turpitude is entitled to *Chevron* deference."). *See also* Yousefi v. INS, 260 F.3d 318, 326 (4th Cir. 2001) ("The *Chevron* framework provides the appropriate method for analyzing the Board's determination of what type of conduct involves moral turpitude for purposes of the INA."); Franklin v. INS, 72 F.3d 571, 578 (8th Cir. 1995) (Bennett, J., dissenting) (recognizing a split of authority).

361. *See* Prudencio v. Holder, 669 F.3d 472, 482 (4th Cir. 2012) ("[C]ourts nevertheless have been able to interpret [the] phrase ["crime involving moral turpitude"] for over a century, and a robust body of law has developed in this regard."); Jean-Louis v. Att'y Gen., 582 F.3d 462, 473 (3d Cir. 2009) ("The ambiguity that the Attorney General perceives in the INA is an ambiguity of his own making, not grounded in the text of the statute, and certainly not grounded in the BIA's own rulings or the jurisprudence of courts of appeals going back for over a century.").

362. *See, e.g.*, Matter of G- G-, 7 I. & N. Dec. 161, 164 (BIA 1956) ("The term 'fraud' is not defined by the Immigration and Nationality Act. We believe it should be used in the commonly accepted legal sense, that is, as consisting of false representations of a material fact made with knowledge of its falsity and with intent to deceive the other party. The representation must be believed and acted upon by the party deceived to his disadvantage.").

363. *See, e.g.*, 8 U.S.C. § 1101(a)(43)(B) (2012) (defining aggravated felonies to include "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)").

not.[364] The Third Circuit has observed that "[w]hen contrasted with the structure of the statute as a whole, [the] . . . omission [of a parenthetical] is instructive, for it is typically understood that the legislature proceeds purposefully when it inserts specific language in one statutory section but omits it in another."[365] However, this ambiguity could indicate either congressional intent that courts apply a common law definition of the predicate offense[366] or else intent that the BIA construe the statute independently and receive *Chevron* deference.[367] In this situation, courts have split on whether to grant deference to BIA interpretations importing definitions from other federal statutes.[368]

It is telling that when deferring to BIA interpretations of provisions defined elsewhere in the federal corpus juris, courts find these interpretations reasonable by way of comparison to what is essentially their own de novo judicial review of the issue.[369] In cases where the BIA draws directly on a particular federal statute or an amalgamation of federal and state provisions to produce a definition for a term, it does not perform a task outside the competence of the courts. Furthermore, the BIA frequently does not draw on any of its expertise in the INA. In fact, in many cases the BIA primarily analyzes a broad array of other federal statutes.[370] Presumably, federal courts are best positioned to interpret the relationship between multiple statutes in the federal system, whereas the BIA is

364. *See, e.g.*, 8 U.S.C. § 1101(a)(43)(A) (2012) (defining aggregated felonies to include "murder, rape, or sexual abuse of a minor").

365. Restrepo v. Att'y Gen., 617 F.3d 787, 793 (3d Cir. 2010).

366. In *Restrepo* the provision at issue was "sexual abuse of a minor." *Id.*

367. *Id.* at 793.

368. *Compare* Estrada-Espinoza v. Mukasey, 546 F.3d 1147, 1157 (9th Cir. 2008) ("According *Chevron* deference to *Rodriguez-Rodriguez* would be inappropriate because the BIA did not construe the statute and provide a uniform definition in the decision.") *with Restrepo*, 617 F.3d at 796 ("We conclude that the BIA's definition of sexual abuse of a minor is a reasonable one and that it is appropriate to exercise *Chevron* deference. Accordingly, we will define sexual abuse of a minor by reference to § 3509(a)."). The *Restrepo* court went on to explain, "We believe it is far more likely that Congress eschewed cross references for crimes identified only by common parlance, such as murder, rape, sexual abuse of a minor, and theft because these terms are not clearly defined and cannot be clearly defined by a simple cross-reference." *Restrepo*, 617 F.3d at 798.

369. *See, e.g.*, Valansi v. Ashcroft, 278 F.3d 203, 209 (3d Cir. 2002) (stating the BIA's definition of "fraud" and then going on to recite its own judicial definition of "fraud" based on precedent, the Restatement (Second) of Torts, and Black's Law Dictionary). In *Valansi* the court cited *Chevron* as the standard of review but neither directly applied it to the BIA's definition of fraud nor rejected the BIA's definition. *See id.* at 208.

370. *See supra* Part III.D.2.

better positioned to interpret the INA itself. Finally, the BIA's reasoning in these cases does not demonstrate accountability to permissible policy objectives of the Executive. In fact, the BIA relies extensively on congressional intent, suggesting that whatever political restraint is operating on the BIA is precisely the same restraint operating on courts. Even if courts independently agree with the BIA's interpretation, they should step up and perform a judicial interpretation that provides judicial reasoning, rather than resolving an issue within the core competencies of the judiciary solely by deferring to an agency interpretation.

E. Applying the Test: Because Courts Possess Greater Competence than the BIA to Interpret "Relating to Obstruction of Justice," Courts Should Interpret that Phrase De Novo

Circuit courts are divided on the question of whether the BIA should receive deference for its interpretation of the phrase "relating to obstruction of justice" in 8 U.S.C. § 1101(a)(43)(S).[371] Because this statutory provision implicates neither foreign policy nor procedure, courts must look beyond the face of the statute to determine whether to defer to the BIA's interpretation. To decide whether the *Chevron* framework is appropriate, courts should consider whether the provision is susceptible to the application of BIA expertise and whether the BIA relied on its immigration-specific expertise to reach its interpretation.

The BIA promulgated its interpretation of § 1101(a)(43)(S) in *In re Espinoza-Gonzales*.[372] In that case, the BIA first found § 1101(a)(43)(S) ambiguous at *Chevron* step one because Congress had not explicitly defined it in the statute.[373] To resolve this perceived ambiguity, the BIA looked to 18 U.S.C. §§ 1501–18, which enumerate federal criminal "obstruction of justice" offenses.[374] The BIA reasoned that Congress' use of the term of art "obstruction of justice" in Section 1101(a)(43)(S) indicated an intent to import this list of criminal offenses into the INA.[375] The essential common elements in the enumerated federal offenses are "interference with

371. *Compare* Alwan v. Ashcroft, 388 F.3d 507, 514 (5th Cir. 2004) (granting *Chevron* deference to *Espinoza-Gonzales*) *with* Denis v. Att'y Gen, 633 F.3d 201 (3d Cir. 2011) (denying *Chevron* deference to *Espinoza-Gonzales*).

372. 22 I. & N. Dec. 889 (BIA 1999).

373. *Id.* at 891 ("The United States Code does not define the term 'obstruction of justice' or 'obstructing justice.'").

374. *See id.* at 892.

375. *See id.* at 893 ("Congress did not adopt a generic phrase such as 'obstructing justice' or 'obstruct justice,' but chose instead a term of art utilized in the United States Code to designate a specific list of crimes.").

the proceeding of a tribunal" and "intent to harm or retaliate against others who cooperate in the process of justice or might otherwise so cooperate."[376] From these common elements, the BIA derived the rule that for an offense to "relat[e] to obstruction of justice" the crime of conviction must contain "an affirmative and intentional attempt . . . to interfere with the process of justice" that was "motivated by a specific intent."[377] The BIA then construed the phrase "relating to" narrowly, relying on *United States v. Aguilar*[378] for the proposition that courts should interpret broadly stated "obstruction of justice" offenses narrowly.[379]

It remains unclear whether future reviewing courts should grant deference, deny deference, or avoid the *Chevron* question entirely because reviewing courts have split on the application of *Chevron* to the BIA's interpretation of "relating to obstruction of justice."[380] In response to this split, the BIA has reasserted that the *Espinoza-Gonzales* rule should receive deference and apply "uniformly nationwide."[381]

First, the Fifth and Ninth Circuits, in *Alwan v. Ashcroft*[382] and *Rentiera-Morales v. Mukasey*[383] respectively, granted *Chevron* deference to the BIA's *Espinoza-Gonzales* decision.[384] In *Alwan* the court found § 1101(a)(43)(S) ambiguous and deferred to the BIA, summarily concluding based solely on the fact of ambiguity that the interpretation had "not been designated by Congress as a matter to be ultimately resolved by the courts."[385] In *Rentiera-Morales*, the court appeared to skip over finding ambiguity to conclude that merely because § 1101(a)(43)(S) was "part of" the INA, which the BIA administers, the court must defer if the BIA acted reasona-

376. *Id.* at 892.

377. *Id.* at 894. The BIA later characterized the test plainly as whether the offense in question "lacked the essential elements that were included in the federal obstruction of justice crimes enumerated in 18 U.S.C. §§ 1501–1518." Matter of Martinez-Recinos, 23 I. & N. Dec. 175, 176–177 (BIA 2001).

378. 515 U.S. 593 (1995).

379. *See In re* Espinoza-Gonzales, 22 I. & N. Dec. 889, 894 (BIA 1999). The BIA held that misprision of a felony was not an offense relating to the obstruction of justice because it does not require as active interference with the proceedings of a tribunal or an active attempt with specific intent to interfere with the process of justice. *See id.* at 893.

380. *See supra* note 35.

381. Matter of Valenzuela Gallardo, 25 I. & N. Dec. 838, 844 (BIA 2012).

382. 388 F.3d 507 (5th Cir. 2004).

383. 551 F.3d 1076 (9th Cir. 2008).

384. *See* Higgins v. Holder, 677 F.3d 97, 103 (2d Cir. 2012) (observing that the Fifth and Ninth Circuits have accorded *Espinoza-Gonzales Chevron* deference).

385. 388 F.3d at 510, 514.

bly.[386] The court then found that deriving the definition of "obstruction of justice" from the federal criminal statute was reasonable and deferred.[387] These decisions typify the mechanical, lockstep approach to deference favored by Justice Scalia. The Fifth and Ninth Circuits focused on ambiguity and the BIA's status as the agency entrusted to administer the statute generally, rather than considering whether Congress intended that the BIA interpret the particular statutory provision at issue.

Other courts have taken approaches that focus on the particular provision at issue. In *Denis v. Attorney General*,[388] the Third Circuit found § 1101(a)(43)(S) unambiguous because "relating to obstruction of justice" was capable of judicial definition because courts had separately construed "relating to" and "obstruction of justice."[389] In *Higgins v. Holder*,[390] the Second Circuit confronted the Third Circuit's split from the Ninth and Fifth Circuits and specifically asked whether deference was appropriate when the BIA's interpretation was "itself based on the agency's construction of federal criminal statutes."[391] However, because the conviction for witness tampering at issue qualified as a crime relating to obstruction of justice under both the narrower BIA test and the broader Third Circuit test, the court was not required to reach that question.[392] For the purposes of resolving that case, the Second Circuit applied the BIA's narrower test to uphold the BIA decision.[393]

Neither the approach taken by the Fifth and Ninth Circuits nor the approach taken by the Third Circuit is wholly satisfying. To determine whether *Chevron* provides the appropriate tool to review the BIA's interpretation of an ambiguous provision, courts should take into account not merely the fact that the BIA administers the INA, but additionally whether the BIA is more competent than a

386. *See* Renteria-Morales v. Mukasey, 551 F.3d 1076, 1081 (9th Cir. 2008).

387. *See id.* at 1086 ("[T]he BIA acted reasonably in deriving the definition of 'obstruction of justice' for purposes of § 1101(a)(43)(S) from the body of federal statutes imposing criminal penalties in obstruction-of-justice offenses.").

388. 633 F.3d 201 (3d Cir. 2011).

389. *See id.* at 209 ("the phrase 'relating to obstruction of justice' . . . includes two discrete phrases—'relating to' and 'obstruction of justice'—both of which are capable of definition").

390. 677 F.3d 97 (2d Cir. 2012).

391. *Id.* at 104.

392. *See id.*

393. *See id.* at 104, 107 (adopting the BIA's interpretation of Section 1101(a)(43)(S) without deciding the *Chevron* question); *see also* Armenta-Lagunas v. Holder, 724 F.3d. 1019, 1022 (8th Cir. 2013) (finding it unnecessary to reach the *Chevron* question when interpreting Section 1101(a)(43)(S) because the state statute falls under the narrower BIA definition).

court to interpret the statute and whether the BIA actually applied its expertise in rendering its interpretation. Judge Katzmann's concurrence in *Higgins v. Holder*[394] recommends such an approach, acknowledging that, even though § 1101(a)(43)(S) is ambiguous, courts should only defer to the BIA's interpretation "to the extent that it is within the *domain of the agency's special expertise in immigration law*, as long as it is reasonable."[395] This approach acknowledges statutory ambiguity, but recognizes that the BIA should not receive deference for interpretations based on the agency's own reading of federal criminal statutes. To determine whether the interpretation of a particular statutory provision requires agency expertise, courts should look to the nature of the provision at issue and to the form of the BIA's reasoning.

The inquiry into the nature of the INA provision should focus on congressional intent, as *Chevron* is based on the assumption that ambiguity indicates congressional intent to delegate. In *Denis* the Third Circuit observed that § 1101(a)(43)(S) was on its face susceptible to interpretation by reference to other statutes and prior judicial opinions.[396] First, "obstruction of justice" was definable by reference to Title 18, an authority that was not immigration-specific and was "outside the BIA's special competence and congressional delegation, while . . . very much a part of th[e] Court's competence."[397] Additionally, courts had previously independently construed "relating to," which has no immigration-specific implications.[398] Second, the *Denis* court observed that the phrase "relating to obstruction of justice" differed dramatically from "serious nonpolitical crime," the ambiguous phrase at issue in *Aguirre-Aguirre*, because it shared none of the same "especially sensitive political implications" entailed by the foreign affairs context.[399] Thus,

394. 677 F.3d 97 (Katzmann, J., concurring).

395. *Id.* at 108–09 (emphasis added). *See also* Patel v. Ashcroft, 294 F.3d 465, 467 (3d Cir. 2002) (explaining that "legal issues that turn on a pure question of law not implicating the agency's expertise" do not receive deference).

396. *See* Denis v. Att'y Gen., 633 F.3d 201, 209 ("the phrase 'relating to obstruction of justice' . . . includes two discrete phrases—'relating to' and 'obstruction of justice'—both of which are capable of definition").

397. *Id.* (quoting *Francis v. Reno*, 269 F.3d 162, 168 (3d Cir. 2001)). *See also* Mugalli v. Ashcroft, 258 F.3d 52, 56 (2d Cir. 2001) (holding that the BIA's "analysis of a federal criminal statute" is not entitled to deference because such subject matter is "beyond the BIA's administrative responsibility and expertise").

398. *See Denis*, 633 F.3d at 210 (analyzing cases where courts had construed "relating to").

399. *Id.* at 209 n.11 (explaining that the interpretation of "offense relating to obstruction of justice" bore "none of the same [foreign policy] implications" present in *Aguirre-Aguirre,* which the Fifth and Ninth Circuits relied on).

rather than merely denying deference based on a determination that the statute was unambiguous, the court drew on the negative implication of the longstanding norm that the political branches are supreme in foreign policy. Apart from ambiguity, § 1101(a)(43)(S) bore no characteristics indicating that Congress intended the BIA to resolve its meaning. Whereas the courts in *Alwan* and *Rentiera-Morales* presumed congressional delegation based solely on ambiguity, the approach favored by this Note requires courts to identify some evidence that Congress intended courts to defer to a BIA interpretation when courts are otherwise fully competent to interpret the particular provision at issue.

The inquiry into the form of the BIA's reasoning should also serve to determine whether the INA provision in question is susceptible to the application of agency expertise. Judge Katzmann's concurrence in *Higgins* concludes that deference was inappropriate because the BIA's reasoning was based on its reading of the federal criminal code rather than the application of its immigration-specific expertise.[400] The BIA did not invoke policy considerations or any insights based on its extensive experience in adjudicating immigration claims,[401] but instead drew inferences from the "obstruction of justice" offenses in Title 18. The BIA's reasoning in *Espinoza-Gonzales* bears a closer resemblance to the analysis undertaken by judges[402] than to the cross-disciplinary balancing that the EPA performed to make policy in *Chevron*.[403] Thus there is little reason to presume that the BIA has any particular advantage over courts in

400. *See Higgins*, 677 F.3d at 108 (Katzmann, J., concurring) (indicating that the BIA's "analysis of a federal criminal statute" should not receive deference) (internal citation omitted).

401. The BIA has in other cases asserted that its interpretation implements executive policy. *See, e.g.*, Matter of Lok, 18 I. & N. Dec. 101, 105 (BIA 1981) ("[W]e conclude that the policies of the Act would best be served by deeming the lawful permanent resident status of an alien to end with the entry of a final administrative order of deportation.").

402. In *Denis* the Third Circuit expressly observed that "[a]lthough we do not defer to the BIA here, we will discuss its approach to resolving the instant matter, as it bears some similarities to our own." 633 F.3d at 210.

403. *See, e.g.*, *Immigration Law in the Supreme Court*, *supra* note 173 ("It is unclear . . . exactly what the Board did in *Aguirre*. Certainly, unlike the EPA, it did not fill in substance to the open texture of a statute . . . . [T]he Board simply decided a case. It lent no new interpretation to the Refugee Act and did not even mention the Convention."); *see also Matter of* Velazquez-Herrera, 24 I. & N. Dec. 503, 508–09 (BIA 2008) (characterizing BIA gap-filling as "seeking to identify . . . 'federal policies'").

reaching its interpretation.[404] Additionally, the BIA did not observe that *Chevron* was applicable to its interpretation, suggesting that the agency saw its role as construing the one true meaning of the statute[405] rather than as a gap-filling policymaker. Because courts, not agencies, make the ultimate determination of ambiguity,[406] the BIA's view of the one true meaning of the statute is not due deference.

Because the particular provision at issue, § 1101(a)(43)(S), is not susceptible to the application of the BIA's immigration-specific expertise and because the BIA did not apply immigration-specific expertise in *Espinoza-Gonzales*, the *Chevron* framework should not apply.

CONCLUSION

If the circuits expressly adopt the application of agency expertise as a threshold factor for the application of the *Chevron* doctrine in the immigration context,[407] it may not have a substantial impact on the substantive outcomes of immigration adjudications, as courts may independently arrive at the same interpretation as the BIA or may reach the same judgment as the BIA under different reasoning.[408] However, the proposed approach would provide pro-

404. For example, there is no reason to suppose that the BIA is better situated to discern congressional intent than a federal court, but the BIA's process of policymaking through interpretation nonetheless relies on BIA determinations of congressional intent. *Cf.* Bracamontes v. Holder, 675 F.3d 380, 386 (4th Cir. 2012) (denying deference to a congressional intent-based BIA interpretation of 8 U.S.C. § 1101(a)(13)(A) because "[r]egardless of the BIA's speculation concerning congressional intent, however, the statute plainly says what is says").

405. *See* Holder v. Martinez Gutierrez, 132 S. Ct. 2011, 2021 (2012) (explaining that the BIA does not receive deference if it "thought its hand tied, or that it might have reached a different result if assured it could do so"). The *Espinoza-Gonzales* dissent cited *Chevron* when arguing that the BIA's "unexplained interpretation of 'obstruction of justice' . . . does not constitute a permissible interpretation of the statute and is unreasonable." *In re* Espinoza-Gonzalez, 22 I. & N. Dec. 889, 900 (BIA 1999) (Rosenberg, Board Member, concurring and dissenting).

406. Courts have the ultimate authority over the determination of ambiguity. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (holding that a court's finding that a statute is unambiguous "trumps" the agency construction if the judicial construction "follows from the unambiguous terms of the statute").

407. This Note leaves open the question of whether agency expertise should be adopted as a threshold factor outside of the immigration context.

408. Though the courts have differed in their approaches to deference in the Section 1101(a)(43)(S) context, the end results for noncitizen petitioners have been the same. For example, in *Alwan v. Ashcroft* the Fifth Circuit appears to independently reach the same result as the BIA under the guise of step two reasonable-

cess-based benefits and appropriately reflect legislative intent on the division of power between the BIA and courts.

First, the proposed approach would be more faithful to congressional intent than current approaches. *Chevron*'s presumption that Congress intended to delegate interpretive authority to agencies extends from the premise that specialized agencies apply expertise to execute congressional will.[409] By limiting deference solely to contexts where agencies apply expertise, courts can better effectuate this presumed will of Congress. Second, the proposed approach would ensure better reasoned judicial opinions and BIA opinions. By interpreting INA provisions de novo, courts would generate independent analysis rather than mechanically and summarily adopting an agency interpretation, providing guidance for future litigants, legislators, and the BIA. Additionally, the BIA would have greater incentives to justify its decisions with immigration-specific rationales or statements of policy rather than addressing ambiguity as a court would. As a result, the proposed approach would ensure that agencies and courts perform the functions they are respectively more competent to perform.

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ness analysis. *See* 388 F.3d 507, 514–15 (5th Cir. 2004) (explaining that "we have—for all intents and purposes—reviewed the merits of Alwan's petition"). Similarly, in *Denis* the Third Circuit agreed with the BIA that petitioner's crime related to obstruction of justice, but arrived at this conclusion without deferring. Denis v. Att'y Gen., 633 F.3d 201, 213 (3d Cir. 2011) (agreeing that petitioner's crime of conviction relates to obstruction of justice).

409. *See, e.g.*, Martin v. OSHRC, 499 U.S. 144, 154 (1991) ("Because historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court, we presume here that Congress intended to invest interpretive power in the administrative actor in the best position to develop these attributes.") (internal citations omitted).