

IMMIGRATION LAW ALLIES AND ADMINISTRATIVE LAW ADVERSARIES

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I. INTRODUCTION

Immigration law allies long have worried about the fairness of immigration law enforcement. These concerns include whether the government provides adequate process in immigration law removal adjudication¹ and

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1. See, e.g., Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541 (2011); Stephen H. Legomsky, *Deportation*

whether immigration law rulemaking transparently advises foreign nationals about the rules that govern immigration law adjudication.² One example of a process concern is that the law does not provide for government-funded counsel for foreign nationals, leaving many individuals to try to maneuver through the complexities of immigration law on their own.³ Without counsel, individuals feel the full weight of government power with little to lean on. One example of a rulemaking concern is that immigration law relies heavily on guidance documents, which provide less stability and transparency than another type of agency rulemaking.⁴ It is doubtful that a foreign national would know to look for an agency guidance document, let alone understand its legal significance.⁵

Immigration law allies also have separation of powers concerns.⁶ The role of the judiciary is often weak in immigration law, and the enforcement of immigration law often involves inter-agency combination of functions and the use of agency adjudicators with very little decisional independence. For example, an employee of the Department of Justice adjudicates whether a foreign national will be removed from the United States. This employee, called an immigration judge, lacks the job protections provided to other federal agency adjudicators in other areas of administrative law.⁷ The lawyer pursuing removal on behalf of the government is an employee of the Department of Homeland Security. The foreign national, again, often has no lawyer. Congress has limited judicial review over immigration agency

and the War on Independence, 91 CORNELL L. REV. 369 (2006); Lenni Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997); Guillermo Cantor, *Detained Beyond the Limit: Prolonged Confinement by U.S. Customs and Border Protection Along The Southwest Border*, <https://americanimmigrationcouncil.org/research/prolonged-detention-us-customs-border-protection>; *ACLU Files Class Action Lawsuit Against DHS Challenging Months-Long Delays in Bringing Detained Immigrants, Asylum Seekers Before Judges*, ACLU, <https://www.aclu.org/news/aclu-files-class-action-lawsuit-against-dhs-challenging-months-long-delays-bringing-detained>; *Federal Court Again Blocks Deportation of Iraqi Nationals*, ACLU, <https://www.aclu.org/news/federal-court-again-blocks-deportation-iraqi-nationals>.

2. Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565 (2012).

3. 8 U.S.C. § 1362; Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV. 1, 9 (2015); see also Vera Institute of Justice, *Evaluation of the New York Immigrant Family Unity Project 7-10*, 21 (2017), <https://www.vera.org/publications/new-york-immigrant-family-unity-project-evaluation> (analyzing municipal funding of defense counsel in New York City and noting that “without an attorney, individuals are rarely able to effectively navigate the immigration legal system”). The Obama Administration agreed to provide representation to mentally disabled individuals in removal proceedings after a federal district court judge ordered the government to provide counsel to that population. Debbie Smith, *Appointed Counsel and Bond Hearings for the Mentally Disabled*, available at <https://cliniclegal.org/resources/articles-clinic/appointed-counsel-and-bond-hearings-mentally-disabled>.

4. Family, *supra* note 2.

5. *Id.*

6. Family, *supra* note 1; Benson, *Back to the Future*, *supra* note 1; Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009); Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1 (2014).

7. Jill E. Family, *Murky Immigration Law and the Challenges Facing Removal and Benefits Adjudication*, 31 J. ASSOC. ADMIN. L. JUDICIARY 45, 50-51 (2011).

adjudication.⁸ Additionally, the plenary power doctrine gives Congress very broad power to make immigration law policy subject to even less than rational basis review.⁹ In summary, an agency removal proceeding can seem stacked in favor of the political branches, with limited room for the judiciary to intervene.

Those who question the legitimacy of administrative law are also concerned about fairness, due process and separation of powers.¹⁰ The existence of administrative agencies has long provoked critiques. The Administrative Procedure Act¹¹ (“APA”) itself was enacted as a reaction to concerns about the potential power of administrative agencies.¹² The Supreme Court has decided many cases addressing the constitutionality of agency behavior.¹³ Despite that the mainstream consensus is that federal administrative law is legitimate,¹⁴ there are administrative law scholars and advocates who still call for its demise.¹⁵ To them, critiques and restrictions on the power of administrative agencies are steps toward the destruction of, or at least a substantial weakening of, the administrative state. Others question and seek to reform the power of administrative agencies without explicitly seeking the total demise of administrative law, but out of skepticism about federal power generally.¹⁶ The path is incremental; moving toward a weakened administrative state is preferred.¹⁷ This article refers to both groups as “administrative law adversaries.”¹⁸

8. 8 U.S.C. § 1252. See Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615 (2000); Jill E. Family, *Stripping Judicial Review During Immigration Reform: The Certificate of Reviewability*, 8 NEV. L.J. 499 (2008).

9. *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

10. President Trump’s White House Counsel, Donald F. McGahn, II, named the regulatory state “the greatest threat to the rule of law in our modern society” and he called the judiciary “the most effective bulwark against that threat.” Donald F. McGahn, II, Barbara K. Olsen Memorial Lecture, Federalist Society National Lawyers Convention, Nov. 17, 2017 at 27:50, available at <https://www.youtube.com/watch?v=aDmpaPYIqg>. He also characterized the administrative state as a “direct threat to individual liberty.” *Id.* at 31:00. See also Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 17-33 (2017); Philip Wallach, *The Administrative State’s Legitimacy Crisis*, BROOKINGS INST. (Apr. 2016), <https://www.brookings.edu/research/the-administrative-states-legitimacy-crisis/> (summarizing challenges to the administrative state).

11. 5 U.S.C. § 551 *et seq.*

12. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 37-41 (1950) (discussing the concerns that lead to the adoption of the Administrative Procedure Act).

13. See, e.g., *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986) (concluding that agency adjudication of a state law counterclaim did not violate the Article III judicial power); *Whitman v. American Trucking Assoc., Inc.*, 531 U.S. 457 (2001) (determining that “requisite to protect the public health” is an intelligible principle and therefore a constitutional delegation of congressional power).

14. Adrian Vermuele, *What Legitimacy Crises?*, CATO UNBOUND (May 9, 2016), <https://www.cato-unbound.org/2016/05/09/adrian-vermeule/what-legitimacy-crisis>.

15. See discussion *infra* Part II.

16. See discussion *infra* Part II.

17. See discussion *infra* Part II.

18. Gillian Metzger has described some recent criticisms of the administrative state as “contemporary anti-administrativism.” Metzger, *supra* note 10, at 4. Under that umbrella falls “conservative and libertarian challenges to administrative governance,” and “more moderate interventions.” *Id.* at 8, 32. These include political, judicial and academic challenges. See generally *id.* at 9-12. The more moderate interventions include academic arguments “pushing back at administrative governance more

At times, concerns that motivate immigration law allies converge with those held by administrative law adversaries.¹⁹ Before his confirmation as a Supreme Court justice, then Judge Neil Gorsuch wrote a concurrence in an immigration law appeal where he sided with an individual foreign national facing the strong power of federal administrative agencies.²⁰ In that case, the Board of Immigration Appeals, an administrative appellate body and a part of the Department of Justice, was able to change existing precedent of the U.S. Court of Appeals of the Tenth Circuit.²¹ Justice Gorsuch was concerned that the agency was able to change the rules in this way.²² At his confirmation hearing, Justice Gorsuch described his concern:

[The circumstances of the case] reminded me of when Charlie Brown is going in to kick the ball, and Lucy picks it up at the last second, and that struck me as raising serious due process concerns, fair notice, and separation of powers concerns.

...

Can a man like Mr. Gutierrez [the foreign national], the least among us, be able to rely on judicial precedent on the books, or can have the ball picked up as he is going in for the kick?²³

Many immigration law allies share Justice Gorsuch's concerns about a lack of fairness in immigration law adjudication. What this excerpt from his confirmation hearing does not reveal is that, as discussed in more detail below, Justice Gorsuch went further in his concurring opinion to raise questions about the underpinnings of administrative law generally.²⁴

Another example of the convergence is that immigration law allies and administrative law adversaries both probably would support a proposal to

incrementally." *Id.* at 32. These incremental arguments are often rooted in administrative law as opposed to questions of legitimacy of the administrative state, which are often rooted in constitutional law arguments. *Id.* Metzger recognizes that challenges to the administrative state are "diverse," but she identifies anti-administrativism's "core themes." *Id.* at 33. Those core themes are "rhetorical antipathy to administrative government," "an assertion of a greater role for the Article III courts," and a "heavy constitutional flavor" (including some reliance on the doctrine of Originalism). *Id.* at 35, 38, 42-43. At least one "anti-administrativist" challenges the breadth of Professor Metzger's categorization. Aaron L. Nielson, *Confessions of an "Anti-Administrativist,"* 131 HARV. L. REV. F. 1, at 2 (2017). For purposes of this article, the exact categorization is not as important as recognizing that there are some whose interests may converge with immigration law allies but whose interests may diverge when it comes to ideas about agency regulation in general.

19. Mila Sohoni, *A Bureaucracy—If You Can Keep It*, 13 HARV. L. REV. F. 13, 18 (2017) ("Some of the underlying themes of anti-administrativism, if not all of its precise recommendations, may find voice on the left as well as on the right").

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

21. *Id.* at 1144.

22. See generally *id.* at 1149-58.

23. *Gorsuch Confirmation Hearing Day 2 Part 1*, CSPAN.ORG, (March 21, 2017), <https://www.c-span.org/video/?425138-1/supreme-court-nominee-stresses-independence-calls-criticism-judges-disheartening&start=3896>.

24. Metzger, *supra* note 10, at 4 (describing Justice Gorsuch as "stak[ing] out a strongly anti-administrative position" in his concurring opinion).

create more job security for immigration judges as a way to increase fairness in the administrative process.²⁵ Adjudicators with more job security may be less likely to make decisions worried about what agency bosses may think. An administrative law adversary may see this proposal as ultimately unsatisfactory, but as at least a stepping-stone toward reducing agency power.²⁶ If it is harder for agency bosses to fire adjudicators, then agency power has decreased. Immigration law allies may support the proposal as a means to improve the fairness of immigration law enforcement, and may not share the end goals or beliefs of the adversaries.

This article explores this convergence phenomenon, including examining the extent of the convergence. Examining efforts to discredit the *Chevron*²⁷ doctrine and to reimagine the rulemaking process shows how immigration law allies share some of the concerns of administrative law adversaries. Also, there are immigration law implications if these reforms take hold. In addition to considering immigration law implications, the broader consequences are important. Immigration law allies should be aware that some who are arguing against *Chevron* deference and that some who are arguing to add obligations to the rulemaking process are doing so because ultimately they prefer to weaken, if not destroy, the administrative state. What may be good for immigration law in the short term may weaken administrative law principles in the long term.²⁸

II. EFFORTS TO WEAKEN THE ADMINISTRATIVE STATE

This Part explains the *Chevron* doctrine and describes critiques of the doctrine promoted by administrative law adversaries. It also examines efforts to reform the rulemaking process. By focusing on the implications of *Chevron* and rulemaking reform for immigration law, the convergence of immigration law allies and administrative law adversaries comes into view.

25. See, e.g., Dana Leigh Marks, *Let Immigration Judges Be Judges*, THE HILL, <http://thehill.com/blogs/congress-blog/judicial/298875-let-immigration-judges-be-judges> (arguing for the creation of an Article I immigration court). Kent H. Barnett, *Against Administrative Judges*, 49 U.C. DAVIS. L. REV. 1643, 1780 (2016) (encouraging the use of Administrative Law Judges over Administrative Judges like immigration judges).

26. Kent H. Barnett, *Why Bias Challenges to Administrative Adjudication Should Succeed*, 81 MO. L. REV. 1023, 1035 (2017) (“I argue that for those Justices who are concerned with administrative overreach, attending to [administrative judges’] partiality problems provides a pragmatic and realistic first step.”).

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

28. Metzger, *supra* note 10, at 46-51 (acknowledging “a movement against national administrative government” and arguing that “some anti-administrative moves could prove quite significant” including that “contemporary anti-administrativism may serve to undercut the legitimacy of national administrative governance”); Sohoni, *supra* note 19, at 16 (referring to Supreme Court justices who have questioned administrative law power “as the mirror image and foil of those *Lochner*-era dissenters, who toiled so long and so assiduously until their point was won by a later and more fatal majority”).

A. Questioning Chevron Deference

1. The Chevron Doctrine

Chevron deference refers to the type of respect a federal court should show to an agency's legal conclusions.²⁹ When Congress delegates tasks to an executive branch agency, the agency will need to interpret the statute Congress has charged it with implementing.³⁰ If a regulated party challenges an agency legal conclusion, federal courts do not review the agency's interpretation of the statute *de novo*.³¹ Instead, courts defer to reasonable agency interpretations of ambiguous statutes.³² If the statute is clear, then the court must give effect to the clear congressional meaning.³³

Statutes rarely contain definitions of every statutory term and agencies often resolve statutory ambiguities. In *Chevron*, the Supreme Court rejected an environmental group's challenge to President Reagan's Environmental Protection Agency's interpretation of a term of the Clean Air Act.³⁴ An agency, like the EPA did in *Chevron*, may clarify a statutory term through notice and comment rulemaking. Notice and comment rulemaking is a procedure under the APA that generally requires an agency to post notice of a proposed rule, to accept comments from the public on the proposed rule, and then to issue a final rule after considering the public feedback.³⁵ Notice and comment rulemaking is a time intensive and expensive agency process.³⁶ To interpret a statute through notice and comment rulemaking, an agency posts notice of how it intends to interpret the statute, accepts public reaction to that interpretation, and then announce its final interpretation. If after notice and comment rulemaking an agency adopts a clarification of an ambiguous statutory term that is reasonable, courts must defer to that reasonable interpretation, even if the court might prefer an alternative reasonable interpretation.³⁷ Whether an interpretation is reasonable is a fairly low bar to meet. Generally speaking, for an agency interpretation to be unreasonable it must be arbitrary and capricious.³⁸

29. *Chevron*, 467 U.S. 837 (1984).

30. *See, e.g., id.* (upholding the Environmental Protection Agency's interpretation of the statutory term "stationary source").

31. *Id.*

32. *Id.* *See also* Emily Hammond, Elizabeth Garrett & M. Elizabeth Magill, *Judicial Review of Statutory Issues Under the Chevron Doctrine*, A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 67 (2015).

33. *Id.*

34. *Id.* at 839-40.

35. 5 U.S.C. § 553(b)-(d); *see also* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 52 (2012).

36. Family, *supra* note 2, at 598-99.

37. HAMMOND ET AL., *supra* note 32, at 94.

38. *Judalang v. Holder*, 132 S. Ct. 476, 483 n.7 (2011); HAMMOND ET AL., *supra* note 32, at 94-98.

Under Supreme Court precedent, certain agency legal conclusions are not entitled to *Chevron* deference.³⁹ According to the Supreme Court, agency legal conclusions are entitled to *Chevron* deference when “Congress delegated authority to the agency generally to make rules carrying the force of law” and when the agency legal conclusion at issue was made under that authority.⁴⁰ Notice and comment rulemaking generally is considered to meet these requirements.⁴¹ More informal types of agency work-product, however, may not trigger *Chevron* deference.⁴² “Major questions” with “deep economic and political significance” also may be exempt.⁴³

In *Chevron*, the Supreme Court upheld a Republican administration’s narrow interpretation of the Clean Air Act. It upheld a reasonable interpretation that decreased the reach of the act. The desirability of an agency’s reasonable interpretation will vary depending on one’s political and policy perspective. Republicans may have been less thrilled with outcomes when the doctrine called for deference to agency legal conclusions during the Obama administration.⁴⁴

Since its introduction in 1984, *Chevron* deference has been the subject of much criticism and study.⁴⁵ Even with Supreme Court attempts to clarify some aspects of the doctrine,⁴⁶ the outcome of the *Chevron* analysis depends first on whether *Chevron* deference even applies,⁴⁷ and if it does, second on the unpredictable conclusion whether a court will find the statute to be ambiguous.⁴⁸ Courts will use canons of statutory interpretation to determine if a statute is clear.⁴⁹ If a court determines that a statute is ambiguous, then the agency conclusion of law is almost always reasonable.⁵⁰ If a court determines

39. United States v. Mead Corp., 533 U.S. 218 (2001). See also Steven Croley & Richard Murphy, *The Applicability of the Chevron Doctrine—“Chevron Step Zero,”* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES at 105-07 (2015).

40. *Mead Corp.*, 533 U.S. at 226-27.

41. CROLEY & MURPHY, *supra* note 39, at 105.

42. *Id.* at 105-07; 112-17. In *Mead*, the Supreme Court determined that a tariff classification issued via a ruling letter was not entitled to *Chevron* deference because the agency did not intend for the ruling letter to have the force of law. *Mead Corp.*, 533 U.S. at 232.

43. King v. Burwell, 135 S. Ct. 2480, 2488-89 (2015) (exempting an IRS regulation from *Chevron* deference because of the fundamental nature of the Affordable Care Act.)

44. See LIBERTY’S NEMESIS 368-69 (Dean Reuter & John Yoo eds., 2016). See also Metzger, *supra* note 10, at 15 (“Once Republican mainstays, *Chevron* deference and presidential administrative control quickly became the *bêtes noires* of conservatives”); Christopher J. Walker, *(Incrementally) Toward a More Libertarian Bureaucracy*, LIBERTY L. BLOG (Feb. 8, 2016), <http://www.libertylawsite.org/liberty-forum/incrementally-toward-a-more-libertarian-bureaucracy/> (“It is a bit ironic that right-of-center scholars and judges are attacking the *Chevron* deference doctrine that crystalized during the Reagan administration to allow for sweeping deregulatory executive actions.”).

45. HAMMOND ET AL., *supra* note 32, at 69-70. See Christopher J. Walker, *Attacking Auer and Chevron: A Literature Review*, 15 GEO. J.L. & PUB. POLICY (forthcoming 2018).

46. See, e.g., United States v. Mead Corp., 533 U.S. 218 (2001).

47. CROLEY & MURPHY, *supra* note 39 at 102.

48. HAMMOND ET AL., *supra* note 32 at 74-93.

49. *Id.* at 80-93.

50. *Id.* at 93-98. But see Kristin E. Hickman & Nicholas R. Bednar, *Chevron’s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1411 (2017) (“The Supreme Court has shown substantially greater willingness to invalidate agency interpretations at *Chevron* step two”).

that the statute is clear, then the court implements what it determined Congress wanted.⁵¹

One further complicating factor is the Supreme Court's decision in *Brand X*.⁵² In *Brand X*, the Supreme Court held that if an agency legal conclusion deserves *Chevron* deference, the agency's reasonable interpretation of an ambiguous statute may trump an existing federal court conclusion on the same question of law.⁵³ If a federal court interprets an ambiguous statute one reasonable way, but then an agency later interprets the ambiguous statute another reasonable way, that same federal court must now abandon its own precedent and accede to the agency's reasonable interpretation.⁵⁴

2. *Chevron Criticism and Administrative Law Adversaries*

Questioning the *Chevron* doctrine does not necessarily mean that one seeks the destruction of, or even substantial weakening of, the administrative state. Some recent criticisms of *Chevron*, however, are tied to broader efforts to weaken or destroy the power of administrative agencies.⁵⁵ Some who criticize *Chevron* are doing so because they see serious problems with the legal justifications for regulation by administrative agencies in general.⁵⁶

Justice Neil Gorsuch provided an example of this type of criticism of *Chevron*, as mentioned above. In the immigration law case discussed in his confirmation hearing, *Brand X* caused the Tenth Circuit to consider exactly when a Board of Immigration Appeals' statutory interpretation eliminated Tenth Circuit precedent on the same question of law.⁵⁷ The Tenth Circuit had resolved tension between two immigration statutes in 2005.⁵⁸ In 2007, the Board of Immigration Appeals looked at the same statutory tension and resolved it in a different way.⁵⁹ Subsequently, the Tenth Circuit recognized that under the Supreme Court's decision in *Brand X*, the Tenth Circuit was required to defer to the Board of Immigration Appeals' reasonable resolution of the statutory tension, even though the Tenth Circuit first had resolved the tension differently.⁶⁰

The Tenth Circuit faced the question whether the Board of Immigration Appeals' interpretation would apply to someone who applied for a benefit after the Board announced its contrary interpretation but before the Tenth

51. HAMMOND ET AL., *supra* note 32, at 75.

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

53. *Id.*; See also CROLEY & MURPHY, *supra* note 39, at 122-24.

54. *Id.*

55. Hickman & Bednar, *supra* note 50, at 1398 (“*Chevron* has become a convenient scapegoat or bogeyman for those who are unhappy with the administrative state or judicial review of agency action”).

56. Metzger, *supra* note 10, at 12, 26-28, 32-33.

57. Guitierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016).

58. Padilla-Caldera v. Gonzales (Padilla-Caldera I), 426 F.3d 1294, 1299-1301 (10th Cir. 2005), *amended and superseded on reh'g*, 453 F.3d 1237, 1242-44 (10th Cir. 2006).

59. *In re Briones*, 24 I. & N. Dec. 355, 371 (BIA 2007).

60. See Padilla-Caldera v. Holder (Padilla-Caldera II), 637 F.3d 1140, 1148-52 (10th Cir. 2011).

Circuit recognized the effect of the agency interpretation under *Brand X*.⁶¹ A three judge panel, including Justice Gorsuch, held that the Board's statutory interpretation did not take effect in the Tenth Circuit until the Tenth Circuit acknowledged it under *Brand X*.⁶² If someone applied for an immigration benefit in the period after the Board announced its legal conclusion, but before the Tenth Circuit acknowledged its knock-out effect under *Brand X*, the application must be adjudicated under the Tenth Circuit's legal conclusion.⁶³

Justice Gorsuch filed a concurring opinion in the case that explained his objections to *Chevron* deference and his desire to implement *de novo* review of agency legal conclusions. While the Tenth Circuit decided the case under *Chevron* and its progeny, Justice Gorsuch's concerns about *Chevron* motivated him to write a concurring opinion. Perceiving "an elephant in the room,"⁶⁴ Justice Gorsuch argued that "the fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."⁶⁵

Citing separation of powers principles as "a vital guard against governmental encroachment on the people's liberties," Justice Gorsuch criticized *Brand X* as removing too much power from the neutral judiciary.⁶⁶ Because *Brand X* requires courts to "overrule their own declarations about the meaning of existing law in favor of interpretations dictated by executive agencies," Justice Gorsuch concluded that *Brand X* shifted the balance of power too far toward the executive and away from the judiciary.⁶⁷ He objected to agency power to overrule court interpretations of law. To him, the proper recourse to overrule a court interpretation of law is to engage in the legislative process.⁶⁸ To the extent that *Chevron* helps to justify the rule in *Brand X*, Justice Gorsuch attacked the foundational principles of the *Chevron* doctrine.⁶⁹ Because *Chevron* allows agencies to resolve statutory ambiguity, Justice Gorsuch determined that "*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty."⁷⁰ He was not swayed by the argument that agencies permissibly fill legislative voids when interpreting ambiguous statutes. He wrote: "courts are not fulfilling their duty to interpret the law."⁷¹

61. *Gutierrez-Brizuela*, 834 F.3d at 1142.

62. *Id.* at 1148-49.

63. *Id.*

64. *Id.* at 1149.

65. *Id.*

66. *See id.* at 1149-50.

67. *See id.* at 1150.

68. *Id.* at 1150-51.

69. *Id.* at 1151-52.

70. *Id.* at 1152.

71. *Id.* at 1152-53.

Justice Gorsuch is not the only Supreme Court Justice to question deference to agencies.⁷² Justice Thomas has expressed his doubts about the constitutionality of courts deferring to agency interpretations of statutes.⁷³ Also, in a dissent in a *Chevron* deference case, Justice Roberts wrote that “[i]t would be a bit much to describe [the administrative state] as ‘the very definition of tyranny,’” but he also stated that “the danger posed by the growing power of the administrative state cannot be dismissed.”⁷⁴ In that dissent, Justice Roberts envisioned a greater role for the courts. Additionally, Justices Scalia, Thomas and Alito have questioned court deference to agency interpretations of the agency’s own regulations.⁷⁵

Legislative reforms to judicial deference are being advanced as well, including proposals to eliminate *Chevron* deference.⁷⁶ Clearly, there is a trend amongst some to curtail judicial deference to administrative agencies.⁷⁷ The idea of questioning the appropriate level of judicial deference to agency conclusions is not new. Such inquiry has been occurring since the enactment of the APA, if not before.⁷⁸ What is most relevant for this article is that some efforts to challenge judicial deference to agencies are tied to efforts to question the legitimacy of administrative law or to shrink federal power by decreasing the power of agencies.

Justice Gorsuch’s concurring opinion includes signs that he is skeptical of administrative law generally. In discussing whether congressional delegation is a justification for *Chevron* deference, he raised doubts about Congress’ ability to delegate its authority to the executive branch in the first place.⁷⁹ Justice Gorsuch recognized that the Supreme Court has settled that Congress can delegate to administrative agencies as long as it provides an “intelligible principle.”⁸⁰ He added, however: “Some thoughtful judges and scholars have questioned whether standards like these serve as much as a protection against the delegation of legislative authority as a license for it, undermining the separation between the legislative and executive powers that the founders

72. See Metzger, *supra* note 10, at 17-31 (discussing the judicial attack against the administrative state).

73. See *Michigan v. EPA*, 135 S. Ct. 2699, 2712-14 (2015) (Thomas, J. concurring).

74. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1879, 1886 (2013) (Roberts, C.J., dissenting) (arguing that courts, and not agencies, should decide whether Congress has given an agency interpretive authority over a subject).

75. See *Perez v. Mortg. Bankers Ass’n*, 135 S.Ct. 1199, 1210-25 (2015) (Alito, J. concurring; Scalia, J. concurring; Thomas, J. concurring); *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Scalia, J. dissenting).

76. See Metzger, *supra* note 10, at 4-13.

77. See Jonathan H. Adler, *Restoring Chevron’s Domain*, 81 MO. L. REV. 983, 983-84 (2016) (describing *Chevron* as “under siege” and describing the siege); *Is Deference Dying? Our Panel Holds a Vigil Over the Chevron Precedent*, *The Environmental Forum* (2017), <http://www.thecre.com/forum8/wp-content/uploads/2017/09/debate.pdf>; see also Walker, *supra* note 45.

78. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1247-48 (1994) (discussing whether Article III requires de novo review of agency decisions); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 37-41 (1950) (discussing the concerns that lead to the adoption of the Administrative Procedure Act).

79. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153-54 (10th Cir. 2016).

80. *Id.* at 1154 (quoting *Mistretta vs. United States*, 488 U.S. 361 (1989)).

thought essential.”⁸¹ The intelligible principle concept is a major foundational tenet of the administrative state. At the least, this is a nod to those who question it.

Also, Justice Gorsuch cited Philip Hamburger’s book *Is Administrative Law Unlawful?* to support his argument against judicial deference.⁸² He cited to the book to support his argument that concentrated executive power historically has led to abuse of power.⁸³ Justice Gorsuch did not state that he agrees with or adopts all of the views presented in Professor Hamburger’s book. Given the controversy surrounding the book⁸⁴ and the dramatic claims against administrative law made in it, however, the citation is notable.

Professor Hamburger argued in his book that administrative law is unlawful.⁸⁵ As other scholars have observed, there is some confusion about what “law” Professor Hamburger thinks administrative law violates,⁸⁶ but what is clear from the book is that Professor Hamburger does not believe that administrative law is compatible with desirable legal norms. According to Professor Hamburger, administrative law is the antithesis of liberty and promotes tyranny. He states, “at stake is nothing less than liberty under law”⁸⁷ and he classifies administrative law as a type of “absolute power.”⁸⁸ He supports his depiction through a legal history analysis.⁸⁹ Professor Hamburger traces modern administrative law to the English kings’ absolute prerogative. Hamburger argues that heritage is not a proud one and that it taints administrative law as “outside and above the law.”⁹⁰ Additionally, he writes that modern administrative law “has imposed on America the very power that constitutional law had defeated in England—a power contrary to the nature of Anglo-American societies and their constitutional law.”⁹¹

81. *Id.*

82. *Id.* at 1152.

83. *Id.* (Justice Gorsuch cited to Professor Hamburger’s discussion of King James I’s efforts to allow himself to interpret statutes); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 287-91 (2014).

84. Adrian Vermeule, *No* (Review of Philip Hamburger, *Is Administrative Law Unlawful?*), 93 TEXAS L. REV. 1547, 1552 (2014) (describing the book as “premised on a desperately shaky understanding of administrative law”); *but see* Gary Lawson, *The Return of the King: The Unsavory Origins of Administrative Law*, 93 TEXAS L. REV. 1521, 1526 (2015) (describing the book as “one of the most important books to emerge in my lifetime”).

85. HAMBURGER, *supra* note 83 at 7-8, 12-13; *see also* Lawson, *supra* note 78, at 1231 (arguing that “the post-New Deal administrative state is unconstitutional”).

86. Vermeule, *supra* note 84, at 1548 (“Hamburger is impenetrably obscure about what he means by “lawful” and “unlawful”); Lawson, *supra* note 84, at 1532 (“In other words, what underlying conception of lawfulness drives his analysis? I honestly do not know, and for me that is the most nagging difficulty with this amazing book.”); *but see* Philip Hamburger, *Vermeule Unbound*, 94 TEX. L. REV. 204, 213-14 (2016) (“In fact, my book argues that administrative power is unconstitutional because it violates the U.S. Constitution.”).

87. HAMBURGER, *supra* note 83, at 496.

88. *Id.* at 509.

89. For a contrasting interpretation of the legal history, see Paul Craig, *The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight* (June 30, 2016), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2802784.

90. HAMBURGER, *supra* note 83, at 493.

91. *Id.* at 494.

If administrative law is unlawful, then the status quo of administrative law is in doubt. In addressing arguments in favor of the lawful existence of administrative law, Professor Hamburger writes: “Whereas administrative law is deeply unlawful, the obstacles to accepting this conclusion are disturbingly thin. . . . When raised in defense of this dangerous power, the supposed obstacles look like lame excuses for not facing up to the ugly reality.”⁹²

Part of Professor Hamburger’s critique involves deference. He classifies judicial deference to agency interpretation as “an abandonment of judicial office.”⁹³ For Professor Hamburger, judicial deference to agency legal conclusions is “particularly striking” because “judges have a distinctive authority to expound the law.”⁹⁴ He concludes that because the constitution establishes judges as interpreters of the law, it is “puzzling” that a judge would defer to an agency, “unless the administrators enjoy a power above the law.”⁹⁵

Professor Hamburger’s ultimate conclusion that the administrative state violates foundational principles is similar to the conclusion reached by Professor Gary Lawson in 1994. Professor Lawson argued that “[t]he post-New Deal administrative state is unconstitutional.”⁹⁶ Professor Lawson determined that “the modern administrative state openly flouts almost every important structural precept of the American constitutional order.”⁹⁷ In support of his argument, Professor Lawson emphasized how agencies exercise a combination of legislative, executive and judicial functions. As an example, he described how the Federal Trade Commission promulgates rules, investigates potential violations of those rules, decides whether to begin an enforcement action, and then itself adjudicates whether there has been a violation of those rules.⁹⁸

Professor Lawson called Professor Hamburger’s book “one of the most important books to emerge in my lifetime.”⁹⁹ In exploring Professor Hamburger’s analysis, Professor Lawson addressed Professor Hamburger’s discussion about judicial deference to agency determinations. While Professor Lawson stopped short of agreeing that no deference is ever justifiable, he did

92. *Id.* at 492.

93. *Id.* at 316.

94. *Id.* at 316.

95. *Id.* at 317. *See also* Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016) (examining ways that *Chevron* contradicts judicial duties under the constitution). Professor Hamburger is the president of a new organization called the New Civil Liberties Alliance. It describes its work as “against the administrative mechanisms (such as *Chevron* and *Auer* deference) that repeatedly threaten constitutionally protected freedoms.” *See* <https://www.nclalegal.org/about-us>.

96. Lawson, *supra* note 78, at 1231; *see also* Ronald Pestritto, *The Birth of the Administrative State: Where it Came From and What it Means for Limited Government*, HERITAGE FOUND. (Nov. 20, 2007), <http://www.heritage.org/political-process/report/the-birth-the-administrative-state-where-it-came-and-what-it-means-limited> (“the ideas that gave rise to what is today called “the administrative state” are fundamentally at odds with those that gave rise to our Constitution”).

97. Lawson, *supra* note 78, at 1233.

98. Lawson, *supra* note 78, at 1248; *see also* LIBERTY’S NEMESIS, *supra* note 44, at 244 (describing agency combination of functions).

99. Lawson, *supra* note 84, at 1526.

state that he is “no big fan of judicial deference.”¹⁰⁰ He also stated, “To be sure, Professor Hamburger is surely on safe ground criticizing the current regime of deference.”¹⁰¹

Professor John Yoo also has attacked the legitimacy of administrative law. Professor Yoo has called administrative agencies “liberty’s nemesis.”¹⁰² He asserts that his perceived failures of the Obama administration can be traced to the evils of administrative law.¹⁰³ He has recommended a course of action to “disable and hobble” the administrative state.¹⁰⁴ As a part of that effort, he recommends increasing the role of courts in reviewing agency decisions. He would abandon *Chevron* deference.¹⁰⁵

Criticism of *Chevron* is not by definition an attack against the legitimacy of administrative law.¹⁰⁶ For some, however, *Chevron* reform is a piece of a larger project to delegitimize. Professors Hamburger, Lawson and Yoo are examples of this type of effort.

There are other administrative law adversaries who seek major reforms, which may or may not include reform to *Chevron*, but who have not explicitly questioned the legitimacy of administrative law. These adversaries seem to be motivated by a desire to decrease the overall power of the federal government.¹⁰⁷ Arguably these scholars fall on the continuum towards those who outright question the legitimacy of the administrative state.¹⁰⁸ For example, Professor Kent Barnett has described bias challenges against administrative judges (as compared to Administrative Law Judges) as a promising “first step” in attacking administrative law more generally.¹⁰⁹ Professor Chris

100. *Id.* at 1544.

101. *Id.* at 1545.

102. LIBERTY’S NEMESIS, *supra* note 44, at 370 (“Now constitutional doctrine must aim at liberty’s nemesis—administrative agencies.”). In the same collection of essays, Dean Reuter described his observation that as federal power increases, individual liberty decreases. *Id.* at 4. *See also* D.A. Candeub, *Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49, 93 (2017) (describing defenders of the administrative state as “argu[ing] for an elected dictator” and arguing that that because the administrative state conflicts with the Constitutional understanding of separation of powers, the framers would see it as “tyrannical and illegitimate”).

103. LIBERTY’S NEMESIS, *supra* note 44, at 367.

104. *Id.* at 369 (“Rather than make the administrative state more efficient and effective, perhaps the better answer is to disable and hobble it.”).

105. *Id.*

106. At Justice Gorsuch’s confirmation hearing, Senator Orrin Hatch said, “I’m troubled by the suggestion that skepticism of *Chevron*, the *Chevron* case, somehow means that one is somehow reflexively opposed to regulation. In my mind, such a charge is completely unfounded.” *Gorsuch Confirmation Hearing, Day 2, Part 1*, C-SPAN (Mar. 21, 2017), <https://www.c-span.org/video/?425138-1/supreme-court-nominee-stresses-independence-calls-criticism-judges-disheartening&start=3896>.

107. *See Metzger, supra* note 10, at 33 (describing the academic attack against the administrative state as “part of a wider and decades-old effort to reset constitutional law in a conservative and libertarian direction, reflected in the work of conservative legal groups like the Federalist Society and the Institute for Justice”); Brian Beutler, *The Rehabilitationists*, NEW REPUBLIC (Aug. 30, 2015) (describing libertarian efforts to rehabilitate *Lochner v. New York*, 198 U.S. 45 (1905), and decrease our acceptance of the overall boundaries of the power of the federal government).

108. Metzger distinguishes between those who seek incremental reform through challenges based in administrative law and those who seek to delegitimize the administrative state through constitutional law arguments. Both groups, however, fall under her “anti-administrativist” label. *See supra* note 18.

109. Barnett, *supra* note 26, at 1035.

Walker has advocated for reforms that move toward a more libertarian administrative state.¹¹⁰

Others find fault with *Chevron* but do not question the legitimacy of the administrative state or question federal power.¹¹¹ For example, Professor Jack Beerman has argued that *Chevron* violates the APA and that it raises separation of powers problems.¹¹² His suggestions for reform are motivated by a desire to remain true to the foundation of the administrative state, the APA.¹¹³ His argument does not question the legitimacy of administrative law.

The debate over judicial deference to agency legal conclusions has repercussions for immigration law, as discussed below. Immigration law allies have concerns about *Chevron* deference as well.¹¹⁴ Immigration law allies should think about *Chevron* using a wider lens beyond just its implications for immigration law. *Chevron* is not sacrosanct, and reforms to *Chevron* are not necessarily the death knell of administrative law. Immigration law allies, however, should keep in mind that some arguing against *Chevron* do so as a part of a larger project to weaken administrative law.

B. *Burdening the Regulatory Process*

The APA dictates how agencies may make rules.¹¹⁵ The most intensive method, formal rulemaking, is rarely used. It involves public hearings.¹¹⁶ The next most intensive is notice and comment rulemaking.¹¹⁷ The least intensive is the use of guidance documents.¹¹⁸ Efforts to reform the APA's

110. Walker, *supra* note 44 (responding to calls to drastically weaken the administrative state by suggesting "a number of incremental and . . . more realistic reforms that would move us toward a more libertarian administrative state").

111. See Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should be Overruled*, 42 CONN. L. REV. 779, 795-809 (2010) (describing criticisms of *Chevron's* theoretical justification since the 1980s). See also Shruti Rana, *Chevron Without the Courts? The Supreme Court's Recent Chevron Jurisprudence through an Immigration Lens*, 26 GEO. IMMIGR. L.J. 313 (2012) (critiquing judicial deference to immigration agency decisionmaking); Jonathan H. Adler, *Restoring Chevron's Domain*, 81 MO. L. REV. 983, 1001 (2016) (predicting that *Chevron* will remain a part of administrative law and supporting its use in certain circumstances); Hickman & Bednar, *supra* note 50, at 150 ("Many critics of *Chevron* do not reject deference per se but rather advocate for certain variations thereof"); Richard W. Murphy, *Abandon Chevron and Modernize Stare Decisis for the Administrative State*, 69 ALA. L. REV. 1, 5 (forthcoming 2017) ("A less breathless but far stronger argument condemns *Chevron* not for being so strong as to destroy America's moral underpinnings and constitutional order, but instead for being so weak that it cannot be worth all the legal trouble it creates").

112. Beerman, *supra* note 111, at 782-84.

113. Beerman, *supra* note 111, at 788-94. See Metzger, *supra* note 10, at 33-34 (discussing criticisms made by "scholars committed to the administrative project").

114. See *infra* Part II(C).

115. 5 U.S.C. § 553.

116. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING, *supra* note 35, at 5.

117. *Id.* at 6 n.10.

118. *Id.* at 5-6.

rulemaking provisions come from across the ideological spectrum.¹¹⁹ Some proposed reforms would make it harder for agencies to create rules. For example, some reforms would require greater use of public hearings.¹²⁰ Such reform fits with a perspective that administrative agency power needs to be curtailed. If it takes more time and energy to regulate and the pot of agency resources does not grow, the result is a weakened administrative state.

Agencies use the notice and comment process more than formal rulemaking to promulgate rules.¹²¹ As described above, under notice and comment rulemaking, agencies issue a notice of proposed rulemaking and then accept public comment on the proposed rule for a period of time. After considering the public comment, the agency then releases a final rule. The APA itself contains some limited direction as to how agencies should undertake this process.¹²²

The APA contains exemptions to notice and comment rulemaking.¹²³ Under these exemptions, an agency can avoid the requirements for notice before it acts and for public comment before it acts.¹²⁴ An agency rule that is the product of shortened procedures, however, may not have the force of law and may not be entitled to *Chevron* deference. If an agency rule does not have the force of law, then a regulated party is free to argue during any enforcement proceeding that a different rule should apply.¹²⁵

Guidance documents are an exemption from notice and comment rulemaking.¹²⁶ Through a guidance document, agencies transmit information to the public about how they plan to enforce statutory law and its own regulations. An agency simply issues a guidance document, which is often in the form of a memorandum from a high-ranking agency official.¹²⁷ It instructs lower-level agency officials of the agency's priorities and plans when it comes to certain enforcement issues. Agency guidance documents are not legally binding, however.¹²⁸ Regulated parties must be free to argue for a different approach than that contained in the guidance document.

Reform proposals aim to add procedural burdens to the notice and comment rulemaking process and to the use of guidance documents. The general theme is that it would be harder for agencies to make rules. These proposals stem from a belief that agencies need to be restricted.

119. See Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629 at 638-47 (2017) (describing areas of APA reform supported by a broad consensus).

120. See *infra* note 132.

121. LUBBERS, *supra* note 35, at 5.

122. *Id.* at 6.

123. 5 U.S.C. § 553(a), (b), (d) (2012); See also Lubbers, *supra* note 35, at 52-110.

124. *Id.*

125. Family, *supra* note 2, at 571, 578-85.

126. LUBBERS, *supra* note 35, at 63.

127. Family, *supra* note 2, at 593-98.

128. *Id.* at 569-71.

For example, the U.S. House of Representatives passed the Regulatory Accountability Act in January 2017.¹²⁹ The bill would, among other things, create new rulemaking hurdles for certain categories of rules.¹³⁰ Under the House bill, an agency would have to: (1) give notice that it will initiate notice and comment rulemaking (pre-notice of the notice required under the current APA) for a “major rule,” a “high-impact rule,” a “negative-impact on jobs and wages rule,” or a “rule that involves a novel legal or policy issue arising out of statutory mandates”¹³¹ and (2) provide an actual hearing before adoption of high impact rules.¹³²

This bill would import the formal rulemaking requirement of a live public hearing for “high impact rules.” The bill imagines a public hearing featuring cross-examination and inquiry into the agency’s factual conclusions.¹³³ This includes considering whether there is a lower cost alternative that the agency should adopt.¹³⁴ These proposals would slow down the rulemaking process, assuming that agencies are not appropriated substantial additional sums to carry out agency operations.¹³⁵

The House Regulatory Accountability Act also would impose additional requirements on guidance documents.¹³⁶ For example, the act would import some notice and comment rulemaking requirements to guidance documents, such as requiring cost-benefit analysis for major guidance.¹³⁷ Major guidance is guidance that “is likely to lead to:” (1) “an annual cost on the economy of \$100,000,000 or more;” (2) “a major increase in costs or prices;” (3) “significant adverse effects on competition, employment, investment, productivity,

129. H.R. 5, 115th Cong. § 103 (2017). There are other legislative proposals that would affect rulemaking. See Metzger, *supra* note at 10, at 11-13.

130. The House version of the Regulatory Accountability Act is a part of H.R. 5, a compendium of administrative law reform bills. For discussion of the other aspects of House Bill, H.R. 5, see House Congressional Record, <https://congress.gov/bill/115th-congress/house-bill/5> (last visited Dec. 1, 2017).

131. H.R. 5 § 103(c) (2017). Under the bill, “major rules” include rules with “an annual cost on the economy of \$100,000,000 or more,” rules that will cause “a major increase in costs or prices,” rules that will cause “significant adverse effects on competition, employment, investment, productivity, innovation,” and rules with “significant impacts on multiple sectors of the economy.” See *id.* § 102. A “high impact rule” is one that is “likely to impose an annual cost on the economy of \$1,000,000,000 or more.” *Id.* A “negative impact on jobs and wages rule” is one that, among other things, “reduce[s] employment [or wages] not related to new regulatory compliance by 1 percent or more annually during the 1-year, 5-year, or 10-year period after implementation.” *Id.* For these three types of rules (and for rules falling under the novel legal or policy issue category), agencies would need to provide at least 90 days’ notice that the agency will publish the notice of proposed rulemaking. *Id.* § 103(c). The advanced notice must include a description of the problem, information about data and evidence the agency expects to rely on, and an explanation of the agency’s thinking on the issue. *Id.* The agency must solicit data, views and arguments and provide at least 60 days of public comment. After the advance notice process is complete, then the agency would still need to publish the regular notice of proposed rulemaking and continue the APA process. *Id.*

132. See H.R. 5 § 103(e).

133. *Id.*

134. *Id.*

135. See Metzger, *supra* note 10, at 12.

136. See H.R. 5 § 104. White House Counsel Donald F. McGahn, II expressed the Trump Administration’s view that agency use of guidance documents is “inconsistent with the rule of law.” See *supra* note 10 at 38:00.

137. *Id.*

innovation;” or (4) “significant impacts on multiple sectors of the economy.”¹³⁸ This bill has a place in a consistent line of efforts to impose new procedural burdens on agencies.¹³⁹

Both the U.S. Chamber of Commerce and the Center for Progressive Reform agree that bills like the Regulatory Accountability Act aim to make it more difficult to regulate. For example, the Center for Progressive Reform has described the proposed requirement for formal hearings for high impact rules as “extremely troubling.”¹⁴⁰ The center explains:

These types of hearings were all but dispensed with several decades ago because they were impracticable, wasteful, burdensome, and resulted in lengthy delays of pending rules. Ordinary Americans and small business will lack the resources to participate meaningfully in these “public hearings.” Instead, they will be dominated by well-resourced corporate special interests. . . . The expense of conducting these “public hearings” will limit agencies’ ability to carry out their statutory missions, especially at a time when agencies face severe resource shortfalls.¹⁴¹

The organization has similar objections to other parts of the bill. A critical theme is that the bill would add unnecessary obligations to the rulemaking process without providing additional resources such that the whole process could grind to a halt, resulting in a diminished capacity to regulate private business.¹⁴²

The U.S. Chamber of Commerce has described its support of the Regulatory Accountability Act in terms of making it harder to regulate.¹⁴³ In a document called “Taming the Administrative State,” the U.S. Chamber of Commerce acknowledges a desire to “rein in the regulatory beast,” and that “frustrations with the administrative state are well justified.”¹⁴⁴ The report proposes that “all regulations are not equal.”¹⁴⁵ Some are acceptable, as they “keep society functioning” and some “protect health and safety.”¹⁴⁶ Others, however, must be “more critically reviewed.”¹⁴⁷

138. *Id.* at 102.

139. See Memorandum from ACUS Interns to Reeve Bell (Jan. 30, 2017), <https://www.acus.gov/sites/default/files/documents/Regulatory%20Reform%20Legislation%20Memo%202-13-2017.pdf>.

140. Center for Progressive Reform, *Section by Section Analysis, S. 951, The Regulatory Accountability Act of 2017*, at 5, http://progressivereform.org/articles/RAA-S951_2017_Analysis_Full.pdf.

141. *Id.* at 5-6.

142. *Id.*

143. WILLIAM L. KOVACS ET AL., TAMING THE ADMINISTRATIVE STATE: IDENTIFYING REGULATIONS THAT IMPACT JOBS AND THE ECONOMY (2017), https://www.uschamber.com/sites/default/files/taming_the_administrative_state_report_march_2017.pdf.

144. *Id.* at 1.

145. *Id.*

146. *Id.*

147. *Id.* at 2.

Efforts to reform the rulemaking process are sometimes tied to efforts to restrict agency power in general. Administrative law adversaries may support bills like the Regulatory Accountability Act because of its promise to put additional hurdles in front of agency action. For purposes of this article, it does not matter whether the appeal of such reforms satisfies a desire for less federal power or a belief that administrative agencies should not exist at all. What does matter is that debates about rulemaking reform in immigration law are implicated in this larger debate about agency power. As with efforts to eliminate *Chevron* deference, immigration law allies should consider how rulemaking reforms in immigration law are mixed up with debates over agency power in general. Administrative law adversaries should consider how proposed reforms will effect immigration law.

C. *Immigration Law Implications*

The debates about *Chevron* deference and agency rulemaking manifest in immigration law. This section describes how and examines potential repercussions of deference and rulemaking reform in immigration law.

1. *Eliminating Chevron Deference*

Chevron deference is operative in immigration law. The question of when *Chevron* deference applies has even more layers of complexity than in other areas of administrative law. At times *Chevron* applies just as we expect, given that immigration law is a type of administrative law.¹⁴⁸ When *Chevron* operates unexceptionally in immigration law, a court will defer to a reasonable interpretation of an ambiguous immigration statute. A federal court may determine the Immigration and Nationality Act (“INA”) to be ambiguous and defer to the Board of Immigration Appeals’ reasonable interpretation of that statute.¹⁴⁹ Or a federal court may find that the INA is clear and that the Board’s interpretation runs afoul of that unambiguous interpretation.¹⁵⁰ If that happens, then the court would enforce Congress’ clear intent as expressed in the statute. Sometimes, however, immigration cases seem to be treated differently.¹⁵¹ For example, a special immigration law deference can get in

148. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1989 (2015) (explaining that a legal conclusion of the Board of Immigration Appeals that made “scant sense” did not deserve *Chevron* deference); *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014) (applying *Chevron* deference and upholding a permissible agency interpretation of the Immigration and Nationality Act); *Judalang v. Holder*, 565 U.S. 42 (2011) (holding that the Board of Immigration Appeals exercised its authority in an arbitrary and capricious way); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (reversing the Ninth Circuit because it did not apply *Chevron* deference to an agency interpretation of the Immigration and Nationality Act’s withholding of removal provisions); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (concluding that a part of the Immigration and Nationality Act was not ambiguous using traditional tools of statutory interpretation).

149. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999).

150. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987).

151. Michael Kagan, *Loud and Soft Anti-Chevron Decisions*, 53 WAKE FOREST L. REV. ____ (forthcoming 2018) (discussing immigration cases where *Chevron* did not apply); Paul Chaffin, Note, *Expertise and Immigration Administration: When Does Chevron Apply to BIA Interpretations of the INA?*, 69 N.Y. U. ANN. SURV. AM. L. 503, 509-525 (2013) (describing inconsistent uses of *Chevron* on immigration

Chevron's way. The Rule of Lenity states that in immigration law, any statutory ambiguity should be resolved in favor of the foreign national.¹⁵² The Rule of Lenity seems to undercut *Chevron* deference because it could override a reasonable agency interpretation that resolves statutory ambiguity against a foreign national. As discussed below, it is not clear when the Rule of Lenity applies instead of *Chevron* deference.

Because various federal agencies implement immigration law and interpret the INA, various agencies could be due *Chevron* deference. The Board of Immigration Appeals interprets the INA through informal adjudication conducted by attorney-employees of the Department of Justice.¹⁵³ It is an administrative appellate body that hears appeals from decisions of immigration judges.¹⁵⁴ The Board is mostly, but not exclusively, concerned with the removal aspects of the INA.¹⁵⁵ United States Citizenship and Immigration Services (“USCIS”) interprets the INA as a part of its mission to administer immigration benefits.¹⁵⁶ USCIS, for example, issues guidance documents or engages in notice and comment rulemaking to communicate its interpretations of the parts of the INA that implicate affirmative applications for legal status.¹⁵⁷ USCIS is a part of the Department of Homeland Security. It uses a combination of rulemaking and paper-based informal adjudication to carry out its functions. Customs and Border Protection and Immigration and Customs Enforcement are two additional units within the Department of Homeland Security with immigration law responsibilities. The Department of Labor and the Department of State also play roles in the implementation of immigration law.¹⁵⁸

If *Chevron* deference were abandoned and courts review all of these agencies’ legal conclusions *de novo*, that would not lead to any guaranteed results either pro-immigrant or anti-immigrant. In some circumstances, a

law); Estella F. Chen, Note, *Judicial Deference After United States v. Mead: How Streamlining Measures at the Board of Immigration Appeals May Transform Traditional Notions of Deference in Immigration Law*, 20 GEO. IMMIGR. L.J. 657, 665-677 (2006) (analyzing federal circuit court applications of *United States v. Mead* in immigration cases). See also Michael Kagan, *Does Chevron Have an Immigration Exception?* YALE J. ON REG.: NOTICE AND COMMENT BLOG (May 19, 2016), <http://yalejreg.com/nc/does-chevron-have-an-immigration-exception-by-michael-kagan/>; Michael Kagan, *Chevron's Immigration Exception, Revisited*, YALE J. ON REG.: NOTICE AND COMMENT BLOG (June 10, 2016), <http://yalejreg.com/nc/chevron-s-immigration-exception-revisited-by-michael-kagan/>.

152. Rebecca Sharpless, *Zone of Nondeference: Chevron and Deportation for a Crime*, 9 DREXEL L. REV. 323, 334-41 (2017); Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 539-43 (2003) (describing the interactions between the immigration-specific rule of lenity and more general administrative law principles); David S. Rubenstein, *Putting the Immigration Rule of Lenity in Its Proper Place: A Tool of Last Resort After Chevron*, 59 ADMIN. L. REV. 479, 501-04 (2007) (same).

153. Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L. J. 595, 599 (2009); Family, *supra* note 1, at 543.

154. *Id.*

155. *Id.*

156. Family, *supra* note 2, at 585-86.

157. *Id.*

158. Jill E. Family, *The Executive Power of Process in Immigration Law*, 91 CHICAGO-KENT L. REV. 59, 77, 81 (2016).

restrictionist agency legal conclusion may be discarded upon judicial review. In other circumstances, the opposite might happen; the reviewing court may narrow an accommodating agency legal conclusion. The tenor of statutory interpretation challenges would change, however, as parties would be free to argue outside the confines of the *Chevron* presumption that reasonable agency legal conclusions must be upheld. What is less clear is how courts would actually use their *de novo* review. Would there be some kind of deference practiced, even if courts claim to not show deference? Of course, all of this is premised on the idea that what kind of deference the court says it is using actually matters to outcomes. At the Supreme Court level, there is evidence it does not.¹⁵⁹ At the courts of appeals, there is evidence that it does.¹⁶⁰

If *Chevron* deference were abandoned and the Rule of Lenity were not, that would solidify that deference is due in immigration cases to interpretations that favor foreign nationals. In 2017, the Supreme Court avoided deciding whether *Chevron* would receive priority over the Rule of Lenity.¹⁶¹ The Court explained that it did not need to resolve that question because “the statute, read in context, unambiguously forecloses the [immigration agency’s] interpretation.”¹⁶² Presumably, because the immigration agency’s interpretation would have failed *Chevron* because it went against congressional intent, the Court did not need to decide whether *Chevron* should apply at all. If *Chevron* deference no longer exists, it would be clear that the Rule of Lenity prevails.

Further complicating predictions about post-*Chevron* immigration law is the plenary power doctrine. The plenary power doctrine still looms large in immigration law.¹⁶³ This 19th century Supreme Court doctrine proclaims that courts should show special restraint in reviewing congressional policy choices in immigration law.¹⁶⁴ For example, Congress has wide authority to decide who may legally enter the country, subject only to a “facially legitimate and bona fide” standard of review.¹⁶⁵ While returning lawful permanent residents (those with a green card) may have constitutional rights, the plenary power doctrine gives little protection to first time applicants outside of the United States who are asking for permission to enter.¹⁶⁶ In a post-*Chevron* world, the existence of the plenary power doctrine might be a reason

159. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008); Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Action Mean?*, 63 ADMIN. L. REV. 77 (2011).

160. Kent H. Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 115 MICH. L. REV. 1, 4-9 (2017). See also Christopher J. Walker, *Chevron Inside the Regulatory State: An Empirical Assessment*, 82 FORDHAM L. REV. 703 (2014) (assessing *Chevron*'s effect on agency behavior).

161. *Esquivel-Quintana v. Sessions*, 2017 WL 2322840 (2017).

162. *Id.* at *10.

163. See, e.g., Matthew Lindsay, *Disaggregating Immigration Law*, 68 FLA. L. REV. 179, 184-85 (2016).

164. *Chinese Exclusion Case*, 130 U.S. 581 (1889).

165. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972).

166. *Id.*; see also Lindsay, *supra* note 163, at 187-91.

to continue to apply the Rule of Lenity. If the government has so much power, then statutory ambiguities might rightly be decided in favor of the foreign national. However, courts might also develop a different kind of post-*Chevron* immigration law deference influenced by the plenary power doctrine. Without *Chevron*, courts might determine that the best way to give affect to the plenary power doctrine is to show deference to agency legal conclusions in immigration law, even if courts are no longer deferring to agency legal conclusions in other contexts.

Predictions about a post-*Chevron* immigration law also must take into consideration that Congress has enacted restrictions on judicial review of agency action in immigration law.¹⁶⁷ Rather than strictly following the judicial review provisions of the APA,¹⁶⁸ Congress has carved out special rules for immigration law. There is no judicial review of most agency discretionary actions and of conclusions of fact.¹⁶⁹ Judicial review of agency conclusions of law still exists. At first glance these restrictions on judicial review might not seem to affect any discussion about *Chevron* because judicial review of conclusions of law remain. However, judicial review of agency conclusions of law still exists mostly as a concession to the difficult constitutional questions that would result if Congress eliminated all review of questions of law (including habeas review).¹⁷⁰ If a post-*Chevron* world results in statutory interpretations that are consistently pro-immigrant, Congress could decide to force the constitutional issue and attempt to eliminate judicial review of questions of law.

There is no guarantee that courts would review agency immigration legal conclusions *de novo* in a post-*Chevron* world. Even if they did, it is hard to predict exactly what that might mean for immigration law. Courts may create a type of plenary power deference in immigration cases. Or they may apply the Rule of Lenity. Or the plenary power doctrine may be overturned,¹⁷¹ or perhaps immigration law exceptionalism is overstated,¹⁷² and courts will treat

167. 8 U.S.C. § 1252.

168. 5 U.S.C. §§ 701-706.

169. *Id.*

170. *Id.* See also *INS v. St. Cyr*, 533 U.S. 289, 289 (2001).

171. In June of 2017, the Supreme Court temporarily limited the application of President Trump's travel ban to those without any bona fide relationship to the United States. *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2080 (2017). Others with a bona fide relationship, even if applying for initial entry, could not be denied entry under the travel ban. While this case was ultimately dismissed as moot, the bona fide relationship standard could foreshadow a departure from the plenary power doctrine. <http://www.scotusblog.com/wp-content/uploads/2017/10/16-1436-order-2017.10.10.pdf>.

172. In a study of the use of *Chevron* deference in the federal courts of appeals, Professor Kent Barnett and Christopher Walker found that courts used *Chevron* deference 72.7% of the time when reviewing immigration agency decisions. Barnett and Walker, *Chevron in the Circuit Courts*, *supra* note 160, at tbl.3. That percentage ranked the immigration agencies eighteenth out of the 28 agencies studied in terms of the percentage of cases in which the courts used *Chevron* deference (as supposed to some other level of deference or no deference). That means that courts used *Chevron* deference less frequently for the decisions of 10 other agencies, but relied on *Chevron* deference more frequently for 17 other agencies. Immigration is tied to less frequent use of *Chevron* deference, but is not completely out of the mainstream.

immigration questions of law just like any other agency legal conclusion. The post-*Chevron* state of review of agency immigration legal conclusions is unclear.

2. *Regulatory Reform*

The effect of increased regulatory burdens on immigration law is clearer. Increased regulatory burdens would be detrimental to immigration law, especially to USCIS. Because the Board of Immigration Appeals functions mostly through individual adjudication, increased notice and comment rulemaking requirements would not have as substantial an effect as at USCIS.¹⁷³ Notice and comment rulemaking at USCIS is already a time- and labor-intensive activity.¹⁷⁴ There are already substantial procedural obligations that USCIS undertakes before it issues a notice of proposed rulemaking. Also, immigration rulemaking can require the coordination of USCIS, Immigration and Customs Enforcement, Customs and Border Patrol, the Department of State, the Department of Labor, and the Department of Justice. It can be difficult to obtain consensus.¹⁷⁵ Adding additional procedural requirements would make the process even more cumbersome. USCIS already does not produce enough notice and comment regulations. Adding on an additional requirement to issue an Advanced Notice of Proposed Rulemaking and perhaps a requirement to hold an evidentiary hearing would hinder the process even more.

The burdens and delays of notice and comment rulemaking can lead an agency to rely more on guidance documents because they are less procedurally burdensome. Guidance documents are problematic already,¹⁷⁶ but legal reform efforts like the Regulatory Accountability Act carry a dramatic one-two punch. The first punch is that notice and comment rulemaking becomes even more difficult.¹⁷⁷ An agency may turn to rely on guidance documents even more as the only available method to communicate effectively with regulated parties. The second punch is the restrictions on the use of guidance

173. The Board of Immigration Appeals relies on “precedent decisions” to set rules. United States Department of Justice, Attorney General and BIA Precedent Decisions, <https://www.justice.gov/eoir/ag-bia-decisions> (last visited on Dec. 2, 2017).

174. Family, *Administrative Law through the Lens of Immigration Law*, *supra* note 2, at 598-99. The pre-publication steps are:

(1) USCIS leadership meets regularly to prioritize rules and decide on whether to initiate new rulemakings; (2) Subject matter experts at USCIS draft rules, engaging all interested offices within the agency; (3) Rulemaking teams (including economists, privacy specialists, etc.) develop and draft associated rulemaking documents, such as economic evaluations, privacy documents, and Paperwork Reduction Act materials; (4) USCIS often holds public stakeholder meetings to obtain views from the public, consistent with Executive Order 13563; (4) During the development process for a rulemaking, USCIS may engage with other components within DHS or with other federal agencies; (5) There is a clearance process at USCIS and DHS for leadership to approve rulemakings; (6) For regulatory actions that are “significant” under Executive Order 12866, the Office of Management and Budget (OMB) has up to 90 days to review the regulatory action.

Id.

175. *Id.*

176. Family, *supra* note 2, at 578-85.

177. *Id.* at 598-99; Jill E. Family, *Easing the Guidance Document Dilemma Agency by Agency: Immigration Law and Not Really Binding Rules*, 47 U. MICH. J.L. REFORM 1, 20 (2013).

documents. Agencies will be forced to be creative and come up with even more informal methods of communicating with regulated parties, or might simply communicate less. Lack of communication is entirely possible, especially if agencies are not given additional funds to comply with increased procedural burdens.¹⁷⁸ Agencies certainly will have to focus rulemaking priorities even more sharply.

If notice and comment rulemaking becomes even more difficult, it will be harder to solve immigration law's overreliance on agency guidance documents. Many fundamental immigration law policies are contained in guidance documents, and not in legally binding rules.¹⁷⁹ Harder to achieve notice and comment rulemaking, especially combined with more stringent requirements on the issuance of new guidance documents, will likely freeze in place those guidance documents that already exist. While that could result in some lingering pro-immigrant policies, it would not solve the problem that those policies are not legally binding rules. Immigration lawyers perceive and treat guidance documents as legally binding the agency, but they do not.¹⁸⁰ USCIS will continue to adjudicate applications for benefits, but the process will be less transparent and less consistent with fewer notice and comment rules and fewer guidance documents.

The introduction of new requirements for "major rules" and "high impact" rules would raise questions about how to measure the effect of immigration regulation. If "high impact rules" are rules that are "likely to impose an annual cost on the economy of \$1,000,000,000 or more,"¹⁸¹ then the impact of any immigration rule will need to be calculated. Calculating the cost of a particular immigration rule will be difficult and controversial. It is possible that many immigration rules will not impose that kind of cost. If that happens, then immigration rulemaking would not be subject to the proposed formal hearing requirement. The definition created for "major rules" leaves more room for including immigration rules. "Major rules" includes rules with "an annual cost on the economy of \$100,000,000 or more," rules that will cause "a major increase in costs or prices," rules that will cause "significant adverse effects on competition, employment, investment, productivity, innovation," and rules with "significant impacts on multiple sectors of the economy."¹⁸² If immigration rules are classified as major rules, then the immigration agencies will face the added procedural requirement of issuing an advanced notice of proposed rulemaking.

Reforms to the rulemaking process could place additional hurdles in the path of USCIS. This would lead to fewer notice and comment rules and perhaps less communication from the agency to stakeholders. That new status

178. Family, *supra* note 2, at 598-99.

179. *Id.* at 593-99; Family, *supra* note 177, at 16-18.

180. Family, *supra* note 177, at 9.

181. See *infra* note 132.

182. See *infra* note 132.

quo would mean more frustration for immigration law allies who are looking for transparent and legally binding explanations of immigration law. If administrative law adversaries seek the same, they may be disappointed by regulatory reform.

III. A LIMITED CONVERGENCE

Concerns about government power in immigration law do converge with the concerns of administrative law adversaries. The convergence exists, but the meeting point may be narrow. Not all immigration law allies question the legitimacy of the administrative state or are skeptical of federal power. Perhaps some do and are both immigration law allies and administrative law adversaries. Do administrative law adversaries extend their concerns about government power to immigration law? This section explores the extent of the convergence.

Immigration law allies have raised concerns about *Chevron*. For example, Professor Alina Das determined that *Chevron* deference should not apply when courts are presiding over habeas challenges to immigration detention.¹⁸³ Professor Rebecca Sharpless argued that *Chevron* deference should not operate when agencies have interpreted removal statutes “triggered by a conviction for a crime.”¹⁸⁴ Professor Bassina Farbenblum questioned the role of *Chevron* deference in asylum cases, where the legal standards are provided by international treaty obligations.¹⁸⁵ These concerns are in addition to the argument that the Rule of Lenity should apply instead of *Chevron*.

In raising concerns about *Chevron*, the interests of immigration law allies may converge with efforts to eliminate *Chevron*. Allies should continue to make these arguments. They should also consider, however, how these arguments may affect the larger conversation about administrative agency power. Additionally, they should consider whether broader questions about agency power influence their own conception of power in immigration law. Should regulatory power be the same across administrative agencies?¹⁸⁶ Or is there something exceptional about immigration law that requires special safeguards?¹⁸⁷

183. Alina Das, *Unshackling Habeas Review: Chevron Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143 (2015); see also Shruti Rana, *supra* note 111, at 359-60 (exploring the implications of *United States v. Mead* on immigration decisions reached through poor quality decisionmaking procedures).

184. Sharpless, *supra* note 152, at 352.

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

186. A more contextualized approach to administrative law may be appropriate. Jill E. Family, *Easing the Guidance Document Dilemma Agency by Agency: Immigration Law and Not Really Binding Rules*, 47 U. MICH. J.L. REFORM 1 (2013).

187. See Michael Kagan, *Does Chevron Have an Immigration Exception?*, <http://yalejreg.com/nc/does-chevron-have-an-immigration-exception-by-michael-kagan/> (arguing that “[a]dministrative law canons are poorly suited to address the core liberty concerns involved in immigration enforcement”).

As far as rulemaking reform, in a previous article I argued that USCIS should use more notice and comment rulemaking, instead of guidance documents, and that it should establish its own Good Guidance Practices to set more transparent and stable rules about how it will use guidance documents.¹⁸⁸ These arguments do not assert that USCIS does not have the power to use guidance documents, nor do they assert any challenge to Congress' ability to delegate authority to USCIS. Instead, these are arguments about improving the administration of immigration law. Administrative law adversaries might support these arguments, but may be willing to go much further in curtailing agency power in this context.

In terms of adjudication, a variety of serious concerns exist surrounding the Department of Justice's adjudication of removal cases. The immigration courts face an absurd backlog of over 600,000 cases.¹⁸⁹ The quality of decision-making leaves much to be desired at times.¹⁹⁰ The adjudicators lack decisional independence.¹⁹¹ Because foreign nationals in removal proceedings generally have no right to a government-funded attorney, about 40 percent proceed without an attorney.¹⁹² That number rises to over 80 percent without an attorney for those detained during their proceedings.¹⁹³ The substantive law of removal is harsh, complex and lacking in proportionality.¹⁹⁴ It is not unusual to see references to the system as dysfunctional and imploding under its own weight.¹⁹⁵ Immigration law allies have argued for a variety of reforms.¹⁹⁶ These arguments, however, are not necessarily a fundamental attack on the very notion of administrative adjudication. Instead, they represent efforts to hold the government accountable; they aim to make sure the government is providing top quality administrative adjudication, or at least adjudication that meets the minimum requirements of procedural fairness.

Immigration law allies appreciate concerns about agency combination of functions voiced by administrative law adversaries. USCIS, for example, promulgates rules about immigration benefits, and then adjudicates those rules by granting and denying applications for legal status. In the removal

188. Family, *supra* note 2, at 615-16; Family, *supra* note 177, at 51.

189. Immigration Court Backlog Tool, TRAC IMMIGRATION, http://trac.syr.edu/phptools/immigration/court_backlog/.

190. See, e.g., Family, *supra* note 1, at 544-45, 569-72.

191. *Id.*; see also Legomsky, *Deportation and the War on Independence*, *supra* note 1.

192. 8 U.S.C. § 1362; EOIR Statistical Yearbook at F1 (2016), <https://www.justice.gov/eoir/page/file/fysb16/download>.

193. Ingrid Eagly and Steven Shafer, *Access to Counsel in Immigration Court*, AMERICAN IMMIGRATION COUNCIL, <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

194. Family, *supra* note 1, at 551-63.

195. See Stephen Stock and David Paredes, *Immigration Court Director Calls for Overhaul of Broken System* (May 27, 2015), NBC BAY AREA, <http://www.nbcbayarea.com/investigations/Immigration-Court-Director-Calls-for-Overhaul-of-Broken-System-305053461.html>.

196. See, e.g., ACUS, *Immigration Removal Adjudication*, at 3 <https://www.acus.gov/sites/default/files/documents/2012-3.pdf>; American Bar Association, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* (2010), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.authcheckdam.pdf.

context, there is inter-agency combination of functions and limited judicial review. As with other criticisms of immigration adjudication, allies do not usually use these concerns to question the legitimacy of the administrative state. Instead, advocates have sought greater independence for immigration judges,¹⁹⁷ more funding for the immigration court system,¹⁹⁸ and government-funded counsel for foreign nationals.¹⁹⁹ In fact, the National Association of Immigration Judges itself has argued for some of these reforms.²⁰⁰ The organization is not also arguing that their work is illegitimate.

Recent efforts and controversies surrounding the immigration agencies' use of prosecutorial discretion also do not necessarily implicate a challenge to the legitimacy of the administrative state. Professor Shoba Sivaprasad Wadhia called for greater transparency and predictability in the use of prosecutorial discretion in immigration law.²⁰¹ Prosecutorial discretion in immigration law concerns efforts to prioritize enforcement resources, including deciding what characteristics make someone a high priority for removal.²⁰² President Obama attempted to inject greater transparency into prosecutorial discretion through two programs, Deferred Action for Childhood Arrivals (DACA) and Deferred Action for the Parents of Americans (DAPA).²⁰³ While DACA was implemented,²⁰⁴ DAPA was enjoined by court order and was never implemented.²⁰⁵ Through these policies, the Department of Homeland Security announced enforcement priorities, and those priorities did not include undocumented individuals who were brought to the United

197. Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, <http://nieman.harvard.edu/wp-content/uploads/pod-assets/Image/microsites/immigration2013/resources/Urgent%20Priority%20FINAL%201-1-08.pdf>.

198. ACUS, Immigration Removal Adjudication, *supra* note 196, at 3; *Empty Benches*, AMERICAN IMMIGRATION COUNCIL, <https://www.americanimmigrationcouncil.org/research/empty-benches-underfunding-immigration-courts-undermines-justice>.

199. CAPITAL AREA IMMIGRANTS' COALITION, *Access to Justice, Government Funded Counsel Promotes Justice, Saves Money*, <https://www.caircoalition.org/2014/11/24/access-to-justice-government-funded-counsel-promotes-justice-saves-money>.

200. *Publications*, National Association of Immigration Judges, <https://www.naij-usa.org/publications> (last visited Nov. 29, 2017).

201. Shoba Wadhia, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* 146-56 (2015).

202. *Id.*

203. DEP'T OF HOMELAND SEC., *EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN* (2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>; *EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN AND WITH RESPECT TO CERTAIN INDIVIDUALS WHO ARE THE PARENTS OF U.S. CITIZENS OF PERMANENT RESIDENTS*, https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

204. President Trump announced his intent to rescind DACA in March 2018. DEP'T OF HOMELAND SEC., *EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN AND WITH RESPECT TO CERTAIN INDIVIDUALS WHO ARE THE PARENTS OF U.S. CITIZENS OR PERMANENT RESIDENTS* (2014), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

205. *Rescission of Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA")*, DEP'T OF HOMELAND SEC. (June 15, 2017), <https://www.dhs.gov/news/2017/06/15/rescission-memorandum-providing-deferred-action-parents-americans-and-lawful>.

States as children (under DACA) or undocumented parents of US citizen children (under DAPA).²⁰⁶

Support of efforts like DACA and DAPA and calls for more transparent use of prosecutorial discretion do not equate with a challenge to the right to regulate, and do not determine whether any individual favors or opposes any particular administrative law reform. In fact, these efforts promote a method of regulation that makes reasoned priorities and transparently describes those priorities. Also, DACA and DAPA were announced via guidance documents. Support of that procedural choice requires acceptance of the idea that agencies may legitimately use guidance documents to announce agency priorities.²⁰⁷

Those involved in the convergence of immigration law allies and administrative law adversaries have much to consider. Immigration law allies need to acknowledge and understand that arguments about agency power in immigration law implicate a much larger discussion about the power of the federal government to regulate. At times, the convergence may result in improvement in immigration law. Administrative law adversaries, however, may use or see the convergence as a step toward achieving a much larger goal of minimizing federal power generally.

Similarly, administrative law adversaries need to fully digest that their arguments and end goals have implications for immigration law.²⁰⁸ Will they also argue for diminished federal authority over immigration law, or will they treat immigration law as exceptional?²⁰⁹ It is unclear how far adversaries are willing to include noncitizens in their concerns about liberty and separation of powers.²¹⁰ Would opponents of *Chevron* treat immigration law exceptionally if *Chevron* deference were abandoned? Should other areas of agency action get increased judicial scrutiny, but not immigration law? Would adversaries devolve immigration power to the states if the administrative state

206. Napolitano, *supra* note 203; Johnson, *supra* note 203.

207. *See generally*, Family, *supra* note 2; Letter from Shoba Sivaprasad Wadhia, Professor of Law, Penn State Law, to President Donald Trump (Aug. 14, 2017), <https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/LawProfLetterDACAfinal8.13.pdf> (supporting the legality of Deferred Action for Childhood Arrivals, including its pedigree as a guidance document).

208. White House Counsel Donald F. McGahn, II stated: “The Trump vision of regulatory reform can be summed up in three simple principles: due process; fair notice; and individual liberty.” *See supra* note 10 at 33:40.

209. Professor Hamburger states, for example, that his book “does not question all executive acts.” HAMBURGER, *supra* note 83, at 2. Would immigration law be an acceptable exercise of executive power? Or, does immigration executive action fall under his “binding acts” focus for purposes of identifying administrative law?. *Id.* at 4-5. *See Metzger, supra* note 10, at 37 (stating that “anti-administrative Justices also appear more sanguine about executive power in the national security arena”).

210. *See Ilya Somin, Immigration, Freedom and the Constitution*, 40 HARV. J.L. & PUB. POL’Y 1, 8 (2017) (describing a restrictionist approach to immigration as “in conflict” with free market principles and a desire to limit federal government power). *See also* Results from the 2017 Libertarianism vs. Conservatism Post-Debate Attendee Survey, Cato Institute, <https://www.cato.org/blog/results-2017-post-libertarianism-vs-conservatism-debate-survey-0> (Aug. 25, 2017) (revealing a disconnect between millennial libertarians and conservatives on immigration issues).

were dismantled?²¹¹ Or would the power to regulate immigration stay with the federal government?

Immigration law allies occupy a unique vantage point to approach the latest efforts of administrative law adversaries to weaken or reform the administrative state. The convergence allows immigration law allies insight into the concerns that motivate administrative law adversaries. Likewise, the convergence allows administrative law adversaries to understand allies' concerns about the treatment of foreign nationals. The convergence appears to be limited, but its breadth ultimately will be determined by the allies and adversaries themselves. Immigration law allies should consider whether they are also administrative law adversaries, and administrative law adversaries need to clarify how immigration law fits into their efforts to safeguard against federal power.

IV. CONCLUSION

The legitimacy of administrative law and the proper scope of agency power are old topics. Efforts to challenge the administrative state or to implement major reform seem to have gained new urgency. There are intersections between efforts to weaken the administrative state and efforts to improve fairness in immigration law. Many of the arguments to improve immigration law point out that the balance of power is heavily tilted toward administrative agencies in immigration law. Those who seek to diminish federal power or to delegitimize administrative law may welcome arguments in immigration law that decrease government power.

Efforts to increase fairness in immigration law, however, do not automatically equate to efforts to challenge the legitimacy of federal power, or to enact major administrative law reform. Thus while the efforts of immigration law allies and administrative law adversaries may converge, they may not all share end goals. As debates over the future of administrative law continue, it is important to consider how potential reforms might improve the administration of immigration law. Reforms to immigration law, however, must also be viewed in the context of the future of administrative law.

211. See, e.g., Ilya Somin, *Yes, Obama's Executive Action Deferring Deportation for Millions of Immigrants Is Constitutional*, <http://reason.com/archives/2016/04/19/yes-obamas-executive-action-deferring-de> (Apr. 19, 2016) (arguing that the Constitution does not give the federal government power to regulate immigration).