

THE MEANING OF THE END OF *CHEVRON* FOR IMMIGRATION REMOVAL ADJUDICATIONS

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ABSTRACT

In Loper Bright Enterprises v. Raimondo, the Supreme Court in 2024 overruled the foundational administrative law decision of Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. Since 1984, Chevron had required courts to defer to reasonable agency interpretations of ambiguous provisions of statutes that they administered. Courts again have the final say on the meaning of the law.

Liberal commentators lament the end of Chevron deference and complain that the Court is imposing conservative control over the administrative state. However, whatever the overall political impacts, Chevron was no friend to noncitizens. Deference generally meant that courts upheld the U.S. administrative agencies' interpretation of the immigration statute and agency orders of removal of noncitizens from the United States.

Of course, removal adjudications, which determine whether noncitizens may live in the United States, were not at issue in Chevron, a technical environmental law case involving a pollution emissions rule. The review of removal adjudications differs from the exercise of a cost/benefit analysis to fashion rules and regulations designed to protect the environment. Through an immigration bureaucracy with the power to remove noncitizens from the United States or grant them relief from removal, such as asylum, attorneys for the U.S. government pursue the removal of noncitizens and attempt to restrict relief from removal provided by the immigration statute passed by Congress. Agencies in the Executive Branch decide those matters. In that bureaucratic landscape, Chevron deference for years had adverse consequences on noncitizens, the majority of whom are people of color from the developing world.

This Essay evaluates how the Supreme Court's overruling of Chevron will affect judicial review of agency immigration adjudications and may benefit

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noncitizens by allowing the courts to have the final word on the meaning of the law. It concludes that, even if the Court's elimination of Chevron deference does not ultimately improve matters for noncitizens, independent interpretations of the immigration statute by the courts cannot possibly have more negative impacts than the era of deference.

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INTRODUCTION

President Donald Trump and his administration's dedicated pursuit of removals of noncitizens from the United States have placed immigration front and center in the national consciousness. It may seem anomalous to discuss deference to the Executive Branch in the interpretation of the immigration statute when the Trump administration does not appear to be especially wedded to the rule of law

in its efforts to remove noncitizens from the United States.¹ Nonetheless, this Essay addresses issues central to adherence to the rule of law by agencies adjudicating the removal of noncitizens from the United States. It focuses on how the demise of a foundational Supreme Court administrative law decision will affect millions of immigration removal adjudications by agencies in the Executive Branch.

Created by a 1984 Supreme Court decision,² *Chevron* deference refers to the administrative law principle that courts should defer to agencies' reasonable interpretations of ambiguous statutes that they administer. Deference deviated from the tradition that courts are the final arbiters of the law. Dominating administrative law scholarship for four decades, the *Chevron* decision was considered by many commentators to represent the enlightened modern judicial approach to the management of administrative agencies.³

Over time, there was a growing concern with the lawmaking authority that *Chevron* bestowed on agencies. Conservatives advocated the elimination of *Chevron* deference in an effort to rein in the regulatory state.⁴ Over time, it became readily apparent that a Supreme Court led by Chief Justice John Roberts would overrule *Chevron*. In 2024, the Court finally did just that in *Loper Bright Enterprises v. Raimondo*,⁵ which involved the judicial review of an agency's interpretation of a statutory provision allocating the assessment of costs under a fishery management statute. In response to the decision, liberals charged the Court with exerting conservative judicial control over the administrative state.⁶

The end of *Chevron* deference will no doubt have ripple effects throughout administrative law and the regulation of administrative agencies. However,

1. See, e.g., *A.A.R.P. v. Trump*, 605 U.S. 91 (2025) (per curiam) (barring Trump administration from removing migrants from the United States without, as required by Due Process, a removal hearing affording migrants notice and a reasonable opportunity to be heard); *Trump v. J.G.G.*, 604 U.S. 670 (2025) (per curiam) (rejecting the administration's arguments and holding that noncitizens subject to removal under the Alien Enemies Act of 1798 are entitled to due process); *Noem v. Abrego Garcia*, 145 S. Ct. 1017 (2025) (ordering the Trump administration to facilitate the return of a noncitizen that it wrongfully deported to El Salvador).

2. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865–66 (1984), overruled, *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2025).

3. See, e.g., Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law is*, 115 *YALE L.J.* 2580, 2583 (2006) ("Recognition of the executive's interpretive power fits well with the institutional judgments that are embodied in the post-New Deal willingness to embrace presidential authority, including the varied forms of administrative power that are exercised under the President."); Cass R. Sunstein, *Chevron Step Zero*, 92 *VA. L. REV.* 187, 205 (2006) (stating that *Chevron* is "understood as a natural outgrowth of the twentieth-century shift from judicial to agency lawmaking"); see also Michael Herz, *Chevron is Dead; Long Live Chevron*, 115 *COLUM. L. REV.* 1867, 1867 (2015) ("At this point, it takeschutzpah to write about *Chevron*. Everyone is sick to death of *Chevron*, and four gazillion other people have written about it, creating a huge pile of scholarship and precious little left to say.")

4. See generally Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 *B.U. L. REV.* 619 (2021) (analyzing conservative advocacy for overruling *Chevron*).

5. 603 U.S. 369 (2024).

6. See, e.g., Matt Ford, *The Supreme Court Upends the Separation of Powers*, *NEW REPUBLIC REP.* (June 28, 2024), <https://newrepublic.com/article/183297/supreme-court-chevron-decision-continues-regulatory-war> [https://perma.cc/UL6B-SMQG].

scholars have made very different predictions about what those impacts will be.⁷ As the analysis in this Essay suggests, I tend to agree with Professor Peter Shane's read on the post-*Chevron* future of administrative law:

The Roberts Court's ideologically predictable 6-3 decision garnered headlines as a victory for legal conservatives hoping to curb federal regulation. However, the difference *Loper Bright* will make in the win-loss rate of agencies challenged in court remains uncertain. Other Supreme Court decisions, usually far less celebrated, are likely to destabilize the administrative state more than *Loper Bright*.⁸

Consistent with that assessment, the year after *Chevron* has not seen a dramatic change in the judicial outcomes of cases reviewing removal adjudications.⁹

In the post-*Chevron* era, agencies will continue to administer the laws passed by Congress. No longer deferring to agency interpretations of ambiguous statutes, courts have returned to full-fledged judicial review of the meaning of the law. Some decisions, no doubt, will favor the agency while others will not. Beyond that, it is difficult to predict with any degree of certainty what the end of *Chevron* will bring.

This Essay addresses the potential positive impacts of *Chevron*'s overruling on a vulnerable group of persons in a subset of administrative agency adjudications. *Chevron*'s demise specifically may benefit noncitizens, long adversely affected by judicial deference to the interpretation of the immigration statute in agency adjudications determining whether they should be removed from the United States.

The U.S. government seeks the removal of noncitizens from the United States; in turn, noncitizens often seek relief from removal so that they can remain in the United States.¹⁰ Part of the Department of Justice, the U.S. government's chief law enforcement agency, the immigration courts in adversary proceedings take evidence and apply the law in deciding whether to order the removal of noncitizens. Also in the Justice Department, the Board of Immigration Appeals (BIA) reviews appeals of immigration court removal

7. See Thomas W. Merrill, *The Demise of Deference and the Rise of Delegation to Interpret?*, 138 HARV. L. REV. 227 (2024) (evaluating the future of administrative law after *Chevron*); Mila Sohoni, *Chevron's Legacy*, 138 HARV. L. REV. F. 66, 66–67 (2025) (summarizing predictions about of administrative law after *Chevron*); Daniel E. Walters, *Four Futures of Chevron Deference*, 31 GEO. MASON L. REV. 635 (2024) (anticipating the overruling of *Chevron* and offering possibilities of how parts of the decision's form of deference might remain continue).

8. Peter M. Shane, *The Roberts Court's Chevron Ruling and Darkening Clouds Over the Administrative State*, WASH. MONTHLY (July 16, 2024), <https://washingtonmonthly.com/2024/07/16/the-roberts-courts-chevron-ruling-and-darkening-clouds-over-the-administrative-state/> [<https://perma.cc/ER4K-JR5Y>].

9. See *infra* text accompanying notes 56–58 (citing post-*Chevron* court of appeals decisions reviewing agency removal adjudications).

10. See Michael Kagan, *Mass Surrender in Immigration Court*, 14 UC IRVINE L. REV. 163, 173–176 (2024) (providing data showing that attorneys ordinarily in removal cases concede the grounds of removal of noncitizens).

orders. During *Chevron's* reign, the Board routinely interpreted ambiguities in the immigration statute against immigrants and in favor of removal.¹¹ Democratic and Republican administrations invoked *Chevron* to the detriment of noncitizens facing removal.¹²

Immigration removal adjudications are differently situated than actions by agencies in other substantive areas. The return of the courts to the traditional role as the final arbiters of the meaning of the immigration statute thus represents an improvement for noncitizens. Any benefits, however, are likely to be limited in light of the fact that the ideological composition of the federal bench changed with Republican President Trump's appointments in his first term, with the courts likely becoming even more conservative in his second term. With or without *Chevron*, an increasingly conservative judiciary will more likely agree with the immigration bureaucracy than with the noncitizen in construing the immigration statute, especially because the statute, in many instances, is rather unforgiving to noncitizens.¹³

In any event, the elimination of four decades of deference to the BIA – and final judicial interpretation of the immigration statute – simply cannot be any more damaging to noncitizens than courts applying *Chevron* deference to the Board's interpretations. Immigration exceptionalism refers to the exceptional immunity of the immigration laws from constitutional review.¹⁴ Immigration law may also be exceptional in the way that generally applicable administrative law principles operate in removal adjudications. The life and liberty of noncitizens at stake—life in the United States—in those matters differ in salient ways from those at issue in many other substantive areas, such as through the promulgation of generally applicable rules and regulations to protect the environment, as was at issue in *Chevron*.

This Essay considers the impact of the end of *Chevron* on agency immigration removal adjudications. Although limiting the inquiry to those adjudications, there is no apparent reason why the rejection of *Chevron* will have any different impacts on other agency immigration decisions. The immigration bureaucracy often pursues popular political ends—namely, stricter immigration enforcement—to the detriment of life and liberty interests of noncitizens.

Part I of this Essay reviews the basics of *Chevron* deference as conventionally understood. The Supreme Court viewed deference to the technical expertise of professional administrators and to the political process as justifications

11. See *infra* Part II.A.2 (offering examples).

12. See *id.*

13. See *infra* text accompanying notes 106–13.

14. Immigration exceptionalism generally refers to the judicially created plenary power doctrine that immunizes the immigration laws from constitutional review. See *infra* text accompanying notes 117–20. For analysis of immigration exceptionalism, see David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U.L. REV. 583 (2017); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1392–94 (1999); Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1981–89 (2013). But see Adam B. Cox, *The Invention of Immigration Exceptionalism*, 134 YALE L.J. 329 (2024) (questioning whether immigration law is in any way exceptional).

for relying on expert administrators accountable to the elected President, rather than unelected judges who lack technical expertise, in interpreting ambiguous statutory language.

Part II considers how *Chevron* played out in removal adjudications over forty-plus years. The decision contributed to a string of losses in the courts for noncitizens and victories for the U.S. government advocating for the interpretation of the immigration statute in ways that facilitated the removal of noncitizens from the United States. Exacerbated by the lack of representation by counsel for a majority of noncitizens, deference to the BIA meant that noncitizens regularly lost in appeals of removal orders to the court of appeals.

Part III offers preliminary thoughts on how judicial review of removal orders might develop after *Chevron*. It posits that, without deference to the agency's interpretation of ambiguous statutes in removal adjudications, the chances of noncitizens prevailing in the courts of appeals may marginally improve. At worst, there will be little change in the judicial review and outcomes of removal adjudications.

I. THE CONVENTIONAL WISDOM OF *CHEVRON* DEFERENCE

Since the Supreme Court's landmark 1803 decision in *Marbury v. Madison*,¹⁵ the interpretation of the law has been a bedrock function of the federal courts. *Chevron* deference to the agency's interpretation of an ambiguous law was thus a novel experiment. Despite *Chevron*'s deviation from a fundamental judicial function, scholars generally considered the decisions in *Chevron* and its progeny to be victories for the administrative state and judgments by expert professional administrators rather than judges. Unlike judges, agencies in the Executive Branch are politically accountable through the election of the President. Analyzed thoroughly and often, the decision arguably became a bedrock principle of administrative law.

At first glance, the agency's interpretation of the statute at issue in *Chevron* might appear ideally suited for judicial deference. The complex question of statutory interpretation before the Supreme Court was whether a regulation of the Environmental Protection Agency "allow[ing] States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble'" was consistent with the phrase "stationary source" in the Clean Air Act.¹⁶ Expert administrators arguably might be better equipped than judges at interpreting this and similarly opaque, technical provisions of an environmental protection law.

The Court famously explained the rationale for deference to the agency's reasonable interpretations of ambiguous statutory language as follows:

15. 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

16. *Chevron*, 467 U.S. at 840.

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices — resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.¹⁷

Chevron thus stood for judicial deference to the expertise and political processes represented by administrative agencies under the direction of the President.

Over the years, “the overwhelming number of [the Supreme Court] cases applying *Chevron* deference . . . reviewed the fruits of notice-and-comment rulemaking or formal adjudication.”¹⁸ The courts regularly deferred to the agencies' interpretations of ambiguous statutory provisions in both settings.

However, not all agency actions are the same. Interpreting a statute to implement it through a generally applicable rule or regulation differs from the interpretation of statutory language when applying the law in an individual agency adjudication. Professors Kristin Hickman and Aaron Nielson questioned the propriety of *Chevron* deference to legal interpretations by agencies in adjudications:

[T]he Court should revisit the notion of deferring to statutory interpretations announced by agencies in adjudications. [*O*]ur preference would be for courts never to defer to agency interpretations announced in adjudications. Recognizing, however, that the Court may not be willing to go so far, then at a minimum, the Court should categorically eliminate *Chevron* deference for interpretations announced in adjudications that lack congressionally imposed formal adjudication procedures . . .¹⁹

Professors Hickman and Nielson summarize their arguments for a rule against deference to agency adjudications as follows: “[f]irst, deferring to agency interpretations announced in adjudications does not align with the rationales often relied upon in defending *Chevron* deference — namely, delegation, expertise, and accountability. Second, such deference poses due

17. *Id.* at 865-66.

18. *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001).

19. Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron's Domain*, 70 DUKE L.J. 931, 964 (2021) (emphasis added).

process concerns. Finally, applications of [the Supreme Court's test] in the adjudication context are, quite simply, a mess."²⁰

As we shall see in Part II, deference to the political process in the interpretation of the law meant something far different for environmental rules and regulations than it does in informal immigration adjudications unrestricted by the Administrative Procedure Act.²¹ In those matters, the immigration court weighs the evidence and applies the law in determining whether a particular noncitizen, under an individualized set of facts, should be removed from the United States. The courts applying *Chevron* did not treat removal adjudications any differently from other agency actions.²²

The Supreme Court in 2024 unceremoniously abandoned *Chevron* in its entirety. In *Loper Bright Enterprises v. Raimondo*,²³ Chief Justice Roberts for the Court did not mince words:

Chevron is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the [Administrative Procedure Act (APA)] requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.

The Supreme Court's decision to overrule *Chevron* did not come as a surprise. "As Chief Justice Roberts observed . . . , *Chevron* deference [had] played no role in Supreme Court decisions for quite some time. *Chevron* issues, however, continue[d] to dominate circuit court opinions and continue[d] to be briefed before the Court."²⁴

II. *CHEVRON* DEFERENCE: NO FRIEND OF IMMIGRANTS

As the Supreme Court observed, "[i]t is well settled that 'principles of *Chevron* deference are applicable to [the immigration statutory] scheme."²⁵

20. *Id.*

21. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 404 (1946) (as amended); see *Marcello v. Bonds*, 349 U.S. 302, 309-10 (1944).

22. See *infra* Part II.A.2.

23. 603 U.S. 369, 412-13 (2024). The Court reasoned that the deference required by *Chevron* had proven to be unworkable, with the Court repeatedly forced to clarify the doctrine but finding it difficult to establish consistency in the law. See *id.* at 403-06, 411. "[T]he only way to ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion, . . . is for us to leave *Chevron* behind." *Id.* at 411-12 (citation omitted). The Court left open the possibility for some deference to the Executive Branch in interpreting statutes, but with the courts having the final say on their meaning. See *id.* at 412-13.

24. Nancy Morawetz, *Immigration Law after Loper Bright: The Meaning of 8 U.S.C. § 1103(A)(1)*, 99 N.Y.U. L. REV. ONLINE 282, 285 (2024) (footnotes omitted).

25. *Negusie v. Holder*, 555 U.S. 511, 516 (2009) (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999)). The Court further observed that "[j]udicial deference in the immigration context is of special

The Court regularly applied *Chevron* to agency removal adjudications.²⁶ When *Chevron* was the law, immigrants endured the adverse consequences of the judicial deference to the U.S. government's interpretations of the immigration statute in such adjudications. This Part of the Article analyzes the impacts of *Chevron* deference on noncitizens and explains why it was not well-suited for application to the judicial review of removal adjudications.

In scores of appeals of removal orders from the Board of Immigration Appeals, the circuits invoked *Chevron* to defer to the BIA's interpretations of ambiguous provisions of the immigration statute, which is lengthy, complex, and frequently ambiguous.²⁷ The courts deferred to the BIA despite, as the Supreme Court has reiterated on several occasions, "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."²⁸ That principle mirrors "the rule of lenity [that] commands that genuine ambiguities affecting a criminal statute's scope be resolved in the defendant's favor."²⁹ The immigration canon directly conflicted with *Chevron*'s mandate that courts defer to reasonable agency interpretations of ambiguous statutory provisions.³⁰ That conflict suggests deeper tensions at the core of this Essay.

A body of scholarly commentary has critically analyzed *Chevron* deference in agency removal adjudications.³¹ Much of it questioned judicial deference to the legal interpretations of the Board of Immigration Appeals, in its review of removal orders of the immigration courts.³² The competence, independence,

importance, for executive officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" *Negusie*, 555 U.S. at 517 (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)).

26. See *infra* Part II.A.2.

27. See *id.*

28. *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)).

29. *United States v. Bowen*, 127 F.3d 9, 13 (1st Cir. 1997) (citations omitted). "The important purposes served by the rule of lenity include the following: 'to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts.'" *Id.* at 13 (citation omitted).

30. See Rebecca Sharpless, *Zone of Nondeference: Chevron and Deportation for a Crime*, 9 DREXEL L. REV. 323, 325-26 (2017) ("Under *Chevron*, reviewing courts generally defer to reasonable interpretations of the [Immigration and Nationality Act] made by the U.S. Attorney General and the Board of Immigration Appeals The *Chevron* doctrine thus collides with . . . the rule of lenity, which holds that ambiguities in criminal law should be construed in favor of the defendant.") (footnotes omitted); see also Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515 (2003) (analyzing the tension between the rule of lenity toward immigrants and *Chevron* deference).

31. For incisive criticism of the application of *Chevron* deference to the Board of Immigration Appeals' interpretation of the immigration statute in agency immigration adjudications, see Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197 (2021). They generally argue that the justifications for *Chevron* deference – agency expertise and political accountability – do not apply to such adjudications. Patrick J. Glen, *The Case for Chevron Deference in Immigration Adjudications*, 71 DUKE L.J. ONLINE 18 (2021) challenges the arguments of Professors Wadhia and Walker and, among other things, contends that the immigration statute's delegations of discretion to the Executive Branch justify *Chevron* deference to its interpretation of the immigration statute.

32. See, e.g., Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059 (2011) (analyzing *Chevron*'s application in asylum cases); Michael Kagan, *Chevron's Asylum: Judicial Deference in Refugee Cases*, 58 HOUS. L. REV. 1119 (2021) (questioning *Chevron*'s application in asylum and refugee cases); Michael Kagan, *Chevron's*

and fairness of the BIA's interpretation of the immigration statute, as well as the life and liberty interests at stake, led many scholars to argue against the application of *Chevron* deference to removal adjudications. The significance of the noncitizen interests at issue in such adjudications deeply complicated the question of the propriety of deference to the BIA's interpretation of the immigration laws that determined whether a noncitizen could remain in the United States.

A. *Deference in Removal Adjudications*

The ordinary immigration case involving *Chevron* deference was a removal proceeding in which the U.S. government sought to remove a noncitizen from the country. Adversarial in nature, the removal adjudication setting differs from situations in which an agency employs technical expertise to promulgate a generally applicable rule or regulation to implement a statutory mandate. Under the immigration statute, noncitizens ordinarily resist the U.S. government's efforts to remove them from the United States and often seek relief from removal, such as cancellation of removal and asylum. In applying the law, the immigration courts and the Board of Immigration Appeals routinely adopted the statutory interpretations advocated by the U.S. government and opposed by noncitizens. Consequently, in removal cases, *Chevron* deference generally meant deference to the interpretation of the statute in removal adjudications by the immigration court and BIA, parts of the same Executive Branch seeking removal of the noncitizen. As we shall see, the lack of representation by counsel as well as deference to the agency contributed to adverse outcomes for noncitizens.³³

The ordinary immigration agency removal adjudication is reviewed by the courts differs from the typical agency promulgation of a generally applicable rule or regulation like that at issue in *Chevron*.³⁴ Adjudications in the immigration courts by design are adversarial proceedings, a setting that would be expected to affect how the U.S. government argues for the application of the immigration statute. In an immigration case, the politics that influence the government's arguments are pro-enforcement forces pressing to remove noncitizens from the United States and limit their relief from removal. Interpreting the immigration statute to ensure fair treatment of noncitizens is a secondary concern, if that.

Liberty Exception, 104 IOWA L. REV. 491, 495, 532–33 (2019) (arguing for “a physical liberty exception to *Chevron*” in immigration cases); Shruti Rana, *Chevron Without the Courts?: The Supreme Court's Recent Chevron Jurisprudence Through an Immigration Lens*, 26 GEO. IMMIGR. L.J. 313 (2012) (reviewing Supreme Court decision applying *Chevron* to asylum cases); Maureen A. Sweeney, *Enforcing/Protection: The Danger of Chevron in Refugee Act Cases*, 71 ADMIN. L. REV. 127, 135, 189–92 (2019) (questioning the application of *Chevron* deference to agency asylum decisions); see also Emily R. Chertoff, *Violence in the Administrative State*, 112 CAL. L. REV. 1941 (2024) (analyzing deficiencies in administrative law in regulating agencies, including immigration agencies, with law enforcement functions).

33. See *infra* Part II.A.1.

34. For an empirical study of the application of *Chevron* in immigration cases that reveals many complexities in the application of the deference doctrine, see Juan P. Caballero, *An Inconsistent Chevron Standard: Refining Chevron Deference in Immigration Law*, 52 LOY. U. CHI. L.J. 179 (2020).

Moreover, the nature of the rights at stake, as well as the U.S. government's interests, militates against deference to the BIA's interpretation of the immigration statute in removal adjudications. When individual rights are implicated, courts may serve as a much-needed check on political excess. Politically accountable administrative agencies can be expected to respond to political pressures, not necessarily the interests of noncitizens, who cannot vote, as a disenfranchised minority hold limited political power, and are vulnerable in the political process.³⁵ This political weakness helps explain why the courts recognized the statutory canon that ambiguities in removal statutes should be interpreted in favor of noncitizens.³⁶ Deference to the political process and agency removal decisions adversely affected immigrants on appeal, as is predictable, since immigrants often fare poorly in the political process. Adding to their disfavor, most immigrants subject to removal are people of color from the developing world. The race of immigrants historically has infected the immigration system.³⁷ President Trump, for example, has repeatedly emphasized the centrality of race in his immigration enforcement philosophy and policies.³⁸

Of course, political accountability of the Executive Branch is one of the justifications offered by the Supreme Court for *Chevron* deference to the interpretation of statutes by agencies.³⁹ However, politics do not fit comfortably in immigration adjudications that affect the rights and interests of a vulnerable minority. Deference to other forms of agency action, such as the formulation of rules and regulations implementing technical provisions of

35. Noncitizens are a discrete and insular minority subject to attack in the political process. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 161–62 (1980); David Cole, *Enemy Aliens*, 54 *STAN. L. REV.* 953, 981 (2002); Kevin R. Johnson, *Minorities, Immigrant and Otherwise*, 118 *YALE L.J. ONLINE* 77, 79 (2008); Neal Katyal, *Equality in the War on Terror*, 59 *STAN. L. REV.* 1365, 1383 (2007). That is evident in the public support for increased immigration enforcement, which propelled President Trump to the Presidency in two elections but later dropped in the midst of his mass deportation campaign in his second term. See Anna Commander, *Trump Hits Record Low Approval Rating on Immigration for Second Term: Poll*, *NEWSWEEK* (July 21, 2025), <https://www.newsweek.com/trump-record-low-approval-rating-second-term-poll-2102005> [<https://perma.cc/JYR8-8VMJ>].

36. See *supra* text accompanying notes 28–31.

37. See generally Gabriel J. Chin, *A Nation of White Immigrants: State and Federal Racial Preferences for White Noncitizens*, 100 *B.U. L. REV.* 1271 (2020) (reviewing the history of preferences for white immigrants in law in the United States); Kevin R. Johnson, *Systemic Racism in the U.S. Immigration Laws*, 97 *IND. L.J.* 1455 (2022) (analyzing the systemic racism embedded in the U.S. immigration laws).

38. See, e.g., Amanda Terkel & Megan Lebowitz, *From “Rapists” to “Eating the Pets”: Trump has Long Used Degrading Language Toward Immigrants*, *NBC NEWS* (Sept. 19, 2024) (recounting Donald Trump's derogatory comments about immigrants), <https://www.nbcnews.com/politics/donald-trump/trump-degrading-language-immigrants-rcna171120> [<https://perma.cc/C4Y6-WSQ7>]; Josh Dawsey, *Trump Derides Protections for Immigrants from “Shithole” Countries*, *WASH. POST* (Jan. 11, 2018) (decrying relief from removal for Salvadorans and Haitians, who the President said were from “s---hole countries”), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html [<https://perma.cc/C3LL-7QVL>]. See generally Rose Cuison Villazor & Kevin R. Johnson, *The Trump Administration and the War on Immigration Diversity*, 54 *WAKE FOREST L. REV.* 575 (2019) (analyzing the adverse impacts on people of color of the first Trump administration's immigration policies).

39. See *supra* text accompanying note 17.

statutes, is more justifiable in terms of exercising political judgments in interpreting ambiguous statutory language. The issue in *Chevron* involving a rule on the appropriate measurement of pollution emissions is a prime example.⁴⁰

In addition, the expertise relied on by the BIA differs in immigration cases from that wielded by, for example, an environmental agency. Rather than science, the expertise of the immigration bureaucracy is with the understanding and interpretation of the immigration laws and, to a lesser extent, immigration enforcement. The skills of legal interpretation of the immigration agency do not necessarily exceed those of courts, which, besides being expert at that task, can be expected to be more neutral than agencies of the Executive Branch in interpreting statutes in adversarial adjudications (with the Executive Branch on one side seeking the removal of noncitizens). Unlike immigration judges and BIA members who are part of the Department of Justice, Article III judges with life tenure enjoy some degree of political independence. When it comes to immigration enforcement, there may be reason for a degree of judicial deference, but not necessarily deference to the agency's legal interpretations. Although there is some deference to the methods of officers of the government in law enforcement, such deference does not generally extend to the interpretation of the law applied to a criminal defendant.⁴¹ Nor should there be deference to the Executive Branch's interpretation of the law with respect to the removal of noncitizens.

1. *Lack of Representation by Counsel*

One critical aspect of removal proceedings deserves recognition. Because removal adjudications are classified as civil, not criminal, in nature, noncitizens in removal proceedings are not guaranteed representation by counsel.⁴² One would expect that a lack of representation would affect outcomes, as well as the interpretations of the statute, famous for its complexity,⁴³ by the immigration courts and BIA. Indeed, as many as 60 percent of noncitizens go unrepresented in removal hearings. Many noncitizens lack the resources to retain private counsel, nonprofit or pro bono representation is hard to come by. Immigrants in detention, the number of whom have increased in recent

40. See *supra* text accompanying note 16.

41. See generally Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995 (2017) (analyzing critically the judicial presumption of police expertise in law enforcement).

42. See Immigration and Nationality Act § 292, 8 U.S.C. § 1362 (“In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel . . . as he shall choose.”); see also Jayanth K. Krishnan, *Misery, Melancholy, and Misfortune: A Migrant Case Study*, 41 WIS. INT’L L.J. 367, 396 (2024) (“There is . . . no right to government-appointed counsel within US immigration courts, which results in many unrepresented noncitizens receiving removal orders at extremely high rates.”) (footnote omitted).

43. See *Castro-O’Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988) (“With only a small degree of hyperbole, the immigration laws have been termed ‘second only to the Internal Revenue Code in complexity.’”) (citation omitted); *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977) (observing that the U.S. immigration laws resemble “King Minos’s labyrinth in ancient Crete”).

years, face additional logistical and other challenges in securing counsel.⁴⁴ Not surprisingly, noncitizens with counsel are more likely to prevail than unrepresented ones, many unrepresented noncitizens are ordered removed from the United States. One empirical study found “that only 37% of immigrants had counsel . . . from 2007 to 2012” in removal proceedings and “that immigrants who are represented by counsel . . . fare better at every stage of the court process – that is, their cases are more likely to be terminated, they are more likely to seek relief, and they are more likely to obtain the relief they seek.”⁴⁵

In sum, the lack of representation in removal adjudications militates in favor of judicial review rather than deference to agency interpretations of the immigration statute.

2. *Chevron* in the Routine Removal Adjudication Case

*INS v. Aguirre-Aguirre*⁴⁶ is a typical immigration removal case in which the Supreme Court invoked *Chevron* deference. In addressing whether the immigration statute disqualified an applicant from asylum, the Court held that the court of appeals should have deferred to the BIA’s interpretation of the statutory language “serious nonpolitical crimes.”⁴⁷ Neither the BIA nor the Court expressed any concern with the noncitizen’s life and liberty interests implicated by his claim to asylum based on possible persecution on account of his political activities in Guatemala. Rather, the Court treated the matter as a run-of-the-mill administrative law case, applied the general administrative law doctrine calling for deference to the agency’s interpretation of the statute, and reversed the court of appeals’ ruling rejecting that interpretation.⁴⁸

44. See generally Emily Ryo & Ian Peacock, *A National Study of Immigration Detention in the United States*, 92 S. CAL. L. REV. 3 (2018) (providing empirical data on noncitizens held in immigrant detention); Ingrid Eagly et al., *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CAL. L. REV. 785, 790–91 (2018) (presenting empirical data showing that “detained families face significant barriers to seeking asylum in the court system” and “that families have been detained in remote locations, have faced language barriers in accessing the courts, and, despite valiant pro bono efforts to assist them, have routinely gone to court without legal representation.”). Increases in criminal removals have led to increases in the number of noncitizens placed in immigrant detention, which the immigration statute mandates in many instances. See generally CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS* (2019) (analyzing critically the increased use of immigrant detention of noncitizens with criminal problems); Alina Das, *The Law and Lawlessness of U.S. Immigration Detention*, 138 HARV. L. REV. 1186 (2025) (reviewing the lawfulness of immigrant detention).

45. Ingrid Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 2, 7, 9 (2015) (footnotes omitted); see Emily Ryo & Reed Humphrey, *Beyond Legal Deserts: Access to Counsel for Immigrants Facing Removal*, 101 N.C. L. REV. 787, 790, 797 (2023) (providing empirical data showing that a minority of noncitizens are represented by counsel in removal proceedings and that unrepresented noncitizens are less likely to prevail than represented ones); Emily Ryo, Ian Peacock, & Christopher Zevesque, *Racial Disparities in Crime-Based Removal Proceedings*, 109 MINN. L. REV. 1997, 2004, 2016, 2018 (2025) (presenting data showing racial disparities in crime-based removals).

46. 526 U.S. at 1441 (1999); see, e.g., *Holder v. Martinez Gutierrez*, 566 U.S. 583, 591 (2012). The application of *Chevron* deference in immigration cases has generated critical scholarly commentary. See *supra* text accompanying notes 32–33.

47. See *INS v. Aguirre-Aguirre*, 526 U.S. at 418 (applying 8 U.S.C. § 1253(h)(2)(C)).

48. See *id.* at 423–33.

Similarly, in *Scialabba v. De Osorio*,⁴⁹ Justice Kagan, for a plurality of the Court, wrote in language indicative of the norm of judicial deference to agency interpretations of the immigration statute:

This is the kind of case *Chevron* was built for. Whatever Congress might have meant in enacting [the statutory provision in question], it failed to speak clearly. Confronted with a self-contradictory, ambiguous provision in a complex statutory scheme, the Board [of Immigration Appeals] chose a textually reasonable construction consonant with its view of the purposes and policies underlying immigration law. Were we to overturn the Board in that circumstance, we would assume as our own the responsible and expert agency's role. We decline that path, and defer to the Board.

In these examples, the Court found that *Chevron* required deference to the agency's interpretation of ambiguous provisions of the immigration statute. It did not defer when the statute was clear on the question.⁵⁰ For example, the Court in 2018 in *Pereira v. Sessions*⁵¹ held that *Chevron* deference did not apply because the immigration statute was clear about the necessary ingredients of a notice to appear for a removal hearing. In so holding, the Court rejected the U.S. government's interpretation of the law and, based on a defective notice to appear, set aside the order of removal of an undocumented immigrant. In a concurring opinion, Justice Kennedy pointedly raised the question of the future of *Chevron*:

*The type of reflexive deference exhibited in some of these cases is troubling. And when deference is applied to other questions of statutory interpretation, such as an agency's interpretation of the statutory provisions that concern the scope of its own authority, it is more troubling still. . . . Given the concerns raised by some Members of this Court, . . . it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie Chevron and how courts have implemented that decision. The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary.*⁵²

Justice Kennedy's concurrence was a tell-tale sign that the Court was primed to revisit *Chevron*, which it did a few years later.

As these decisions taken together demonstrate, the application of *Chevron* deference before its overruling in 2024 regularly arose in the appeals of

49. 573 U.S. 41, 75 (2014).

50. See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) (refusing to apply *Chevron* because statutory language was clear); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987) (to the same general effect).

51. 585 U.S. 198, 208–09 (2018).

52. *Id.* at 219, 221 (Kennedy, J., concurring) (citations omitted) (emphasis added).

agency removal orders. The courts often, but not always, deferred to the BIA's interpretations of the immigration statute. The claim was made that the immigration courts and BIA, part of the Executive Office for Immigration Review in the Department of Justice, in their interpretations leaned toward immigration enforcement and the removal of noncitizens. Immigration attorneys generally consider review by a court of appeals to be the first chance in the overall removal process for more independent, less enforcement-oriented decision-making. Previously foreclosed by *Chevron*, *Loper Bright* opened the door to greater and more independent judicial review.

Knowing that the Supreme Court might well overrule *Chevron*, the Solicitor General in *Loper Bright* argued that deference to the U.S. government's interpretation of the immigration statute is required by 8 U.S.C. § 1103(A)(1), which states that the Attorney General's determinations of the law are "controlling."⁵³ Professor Nancy Morawetz rebuts that novel argument through review of the text, history, and practice surrounding the statutory provision in question and concludes that the evidence does not support the U.S. government's far-reaching interpretation of an obscure and long-ignored provision of the immigration statute. Importantly, contrary to the U.S. government's position, forty years of Supreme Court and court of appeals decisions dutifully applied *Chevron* to many removal adjudications.⁵⁴

The end of *Chevron* deference means that the courts are now the final arbiters of the meaning of the immigration statute. With no deference to the BIA's interpretation of ambiguous statutory language, courts once again are obligated to take the traditional judicial role in interpreting the immigration statute. To this point, there is no clear trend in the rulings on the Board's interpretation of the immigration statute.⁵⁵ However, there is some evidence of improvements for noncitizens in the Board's interpretations of the statute after *Chevron*'s overruling. In *Velasquez v. Bondi*,⁵⁶ for example, the Supreme Court addressed a question of interpretation of the immigration statute without relying on *Chevron* deference and found in favor of the noncitizen on a filing deadline issue. Similarly, in *Riley v. Bondi*,⁵⁷ the Court interpreted the immigration statute in favor of the noncitizen on the statutory requirements for an appeal.

53. See Morawetz, *supra* note 24, at 283. Scholars also wondered how *Chevron*'s overruling might affect the review of agency immigration adjudications. See, e.g., Jill E. Family, *Immigration Law Allies and Administrative Law Adversaries*, 32 GEO. IMMIGR. L.J. 99, 116–22 (2022) (considering the future of judicial review of agency removal adjudications after the overruling of *Chevron*).

54. See *supra* text accompanying notes 47–53.

55. See, e.g., *Moctezuma-Reyes v. Garland*, 124 F.4th 416, 420–24 (6th Cir. 2024) (affirming the BIA's denial of cancellation of removal to a noncitizen); *Quito-Guachichulca v. Garland*, 122 F.4th 732, 732, 735 (8th Cir. 2024) (granting petition of review in criminal removal case and rejecting U.S. government's interpretation of the statute); *Bernardo-De La Cruz v. Garland*, 114 F.4th 883, 890 (7th Cir. 2024) (accepting U.S. government's interpretation of the immigration statute).

56. 604 U.S. 712, 724–27 (2025).

57. 606 U.S. 259 (2025).

Persons concerned with the application of immigration law should not be troubled that *Chevron* deference has been relegated to the legal history books.⁵⁸ Noncitizens will no longer be required as a threshold matter to challenge the arguments of the U.S. government that *Chevron* requires judicial deference to the BIA's interpretation of the statutory provision in question. Performing the traditional judicial role, courts will now rely on the conventional tools of construction of the immigration statute. Put simply, immigrants will not start off in the appeal of removal orders with a formidable hurdle – *Chevron* deference – to a successful appeal. Rather than debating the propriety of deference, the focus in future appeals of BIA rulings instead will be on the proper interpretation of the statutory language in question.

3. Why *Chevron* Was a Bad Fit for Removal Adjudications

As previously discussed, the *Chevron* case involved the interpretation of a complex environmental statute administered by the Environmental Protection Agency.⁵⁹ Without serious consideration of whether it made sense to apply *Chevron* to removal adjudications of the Board of Immigration Appeals, courts deferred to the agency's interpretations of the immigration statute as if the interests at stake were no different than those at the core of many other agency decisions.⁶⁰ The weighty life and liberty interests of the noncitizen affected by the agency decision did not factor much, if at all, into the courts' review of the average removal case. Treating immigration matters no differently than any other administrative agency decision, the courts followed the proverbial one-size-fits-all approach to the actions of all agencies.

The truth of the matter is that, as has been presented in this Essay, *Chevron* deference fits uncomfortably into the judicial review of removal orders by the Board of Immigration Appeals. With the immigration court and BIA, housed in the Department of Justice, the cards could be said to be stacked against noncitizens seeking to challenge their removal from the United States. In addition, the individual life and liberty stakes of removal cases are very different than those of *Chevron* – a court deferring to environmental experts in the implementation, application, and administration of the environmental protection laws through generally applicable rules and regulations.

The deference to the technical expertise of the average agency differs dramatically from the deference to the BIA in removal adjudications. Deference frequently meant acceptance of the BIA's interpretation of the immigration

58. Years ago, I questioned the application of *Chevron* deference to BIA interpretations of the statute in immigration and asylum adjudications. See Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy Over Immigration*, 71 N.C. L. REV. 413, 417–420 (1993); Kevin R. Johnson, *A "Hard Look" at the Executive Branch's Asylum Decisions*, 1991 UTAH L. REV. 279, 311 (1991).

59. See *supra* text accompanying notes 16–17.

60. See *infra* text accompanying note 93 (discussing Justice Harry Blackmun's view of the nature of judicial review of removal adjudications).

statute and the removal of a noncitizen from the United States.⁶¹ As Professor Maureen Sweeney has written,

[t]he expertise required to interpret the [Immigration and Nationality Act] . . . does not require familiarity with technical or scientific information, nor with the workings of an industry, nor even, for the most part, with the mechanics of immigration enforcement. And though immigration decisions are sometimes said to implicate delicate matters of foreign relations, the truth of the matter is that it is the very unusual case that affects anyone or anything other than the parties themselves. *The vast majority of immigration cases require expertise, not in foreign affairs, but rather in the legal interpretation of a complex statutory and regulatory scheme. This demands expertise in legal analysis and the application of law to facts – precisely the sort of expertise that federal courts have.*⁶²

Consequently, even if deference might be warranted in interpreting the law in matters requiring technical expertise, which the Supreme Court has now rejected,⁶³ that did not fit well with the judicial review of immigration adjudications.

The divisive politics of immigration have meant that Democratic and Republican Presidents have very different approaches to immigration law and enforcement, with the differences affecting the Executive Branch's interpretation of the immigration laws. Consider the contrast between the administrations of Presidents Trump and Biden. President Biden's policies were measured and mainstream, while President Trump's, time and again, pushed to the legal limits,⁶⁴ with his effort to restrict birthright citizenship, guaranteed by the 14th Amendment, by executive order, a striking example.⁶⁵ Attorneys General in the Trump Administration intervened in removal adjudications before the BIA to more strictly interpret the immigration statute to the detriment

61. See *supra* Part II.A.2.

62. Sweeney, *supra* note 32, at 174–75 (emphasis added); see Wadhia & Walker, *supra* note 31, at 1217–18.

63. See *Loper Bright Enterprises v. Raimondo*, 603 U.S. at 412–13; see also *supra* text accompanying & note 23 (discussing *Loper Bright*).

64. See, e.g., *supra* note 1 (citing cases in which the Supreme Court rejected the Trump administration's efforts to remove noncitizens without due process).

65. See Exec. Order, Protecting the Meaning and Value of Citizenship (Jan. 20, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/protecting-the-meaning-and-value-of-american-citizenship/> [<https://perma.cc/ZP29-4ZRB>]. After lower courts enjoined President Trump's executive order seeking to deny birthright citizenship to the children of undocumented immigrants from going into effect, the Supreme Court limited the power of the federal courts to enter nationwide injunctions to remedy constitutional violations. See *Trump v. CASA, Inc.*, 606 U.S. 831 (2025). Consistent with the Court's holding, lower courts certified class actions and again enjoined the implementation of the executive order. *CASA, Inc. v. Trump*, 793 F. Supp.3d 703 (D. Md. 2025); *Barbara v. Trump*, 2025 U.S. Dist. LEXIS 130805 (D. N.H. July 10, 2025). The constitutionality of President Trump's effort to restrict birthright citizenship is currently before the Court. See *Trump v. Barbara*, 2025 U.S. LEXIS 4487 (U.S. Dec. 5, 2025).

of noncitizens.⁶⁶ The Biden Administration vacated or otherwise overruled many of those rulings.⁶⁷ The legal flip-flop suggests that partisan politics, not anything resembling law or technical expertise, fueled the Executive Branch's changing interpretations of the immigration statute. The changes in legal interpretations greatly diminish the perceived legitimacy of the law and its application. With the legitimacy of the immigration adjudication system already in question, as discussed in Part II.B., the clear politicization of its lawmaking function further undermined perceptions of legitimacy of removal decisions.

In an extraordinary enforcement measure introduced in President Trump's second term, immigration judges were instructed to dismiss removal cases and allow for the arrest by Immigration and Customs Enforcement officers of noncitizens who appear at their removal hearings; by doing so, the noncitizen who dutifully appeared at the hearing could be arrested, detained, and subject to expedited, or summary, removal.⁶⁸ The measure put the noncitizen in an impossible Catch-22: Comply with the law and risk removal, or violate the law and be ordered removed. Immigration courts, in that instance, unquestionably became tools of the immigration enforcement machinery of the Executive Branch, not impartial adjudicators deciding removal cases in a manner faithful to the law.

B. *The Need for Meaningful Judicial Review*

The immigration court system has long been harshly criticized for bias, incompetence, and a lack of independence, in addition to bearing an overwhelming and unmanageable caseload. As famed court of appeals judge Richard Posner summarized the state of affairs in one case, “[t]his case involves a typical botch by an immigration judge. No surprise: the Immigration Court, though lodged in the Justice Department, is the least competent federal agency, though in fairness it may well owe its dismal status to its severe underfunding by Congress, which has resulted in a shortage of immigration judges that has subjected them to crushing workloads.”⁶⁹ Although criticism of the contemporary immigration adjudication system is voluminous,⁷⁰ courts for years regularly

66. See *infra* note 82 (citing examples).

67. See *id.*

68. Julia Ainsley, *Trump Admin Tells Immigration Judges to Dismiss Cases in Tactic to Speed Up Arrests*, NBC NEWS (June 11, 2025), <https://www.nbcnews.com/politics/national-security/trump-admin-tells-immigration-judges-dismiss-cases-tactic-speed-arrest-rcna212138> [<https://perma.cc/JNZ3-6R73>].

69. Chavarria-Reyes v. Lynch, 845 F.3d 275, 280 (7th Cir. 2016) (Posner, J., dissenting) (citation omitted); see Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1679–87 (2007) (studying the frequent criticism of BIA rulings by Judge Posner).

70. See, e.g., AM. BAR ASS'N ON IMMIGR., *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, 35–43 (2019) (identifying areas for improvement in immigration court system), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf [<https://perma.cc/F6RV-C76G>]; Jennifer Lee Koh, *Barricading the Immigration Courts*, 69 DUKE L.J. 48, 48–49 (2024) (reviewing the widely-perceived crisis in immigration court system); Karen Musalo, et. al., *With Fear, Favor, and Flawed Analysis:*

applied *Chevron* deference to BIA interpretations of the immigration statute in removal adjudications.⁷¹

In the typical removal case, the immigration court, which is housed in the Executive Office for Immigration Review (EOIR) in the Department of Justice, initially decides the cases.⁷² The government is represented by trial attorneys who are also part of the Executive Branch.⁷³ Appeals from immigration court removal orders are heard by the Board of Immigration Appeals, also in the EOIR.⁷⁴ To this point in the process, all of the principal actors in the agency removal adjudication process, except the noncitizen, are part of the Executive Branch. Professor Jayanth Krishnan describes the adjudicatory structure as follows:

[F]ormally known today as a “removal” proceeding, . . . the [immigration] judge works within the Department of Justice (DOJ) *Given that the prosecution of the immigrant is also conducted by officials from another executive branch office – the Department of Homeland Security (DHS) – it is not difficult to see why many critics view the removal process as heavily tilted in favor of the government.*⁷⁵

As another observer summarized matters, “executive control over immigration adjudication subjects [immigration judges] to a variety of conditions

Decision-Making in U.S. Immigration Courts, 65 B.C. L. REV. 2743, 2745 (2024) (presenting empirical study of immigration courts and recommending reforms, including less judicial deference to the Board of Immigration Appeals); Aadhiithi Padmanabhan, *Abandoning Deportation Adjudication*, 77 STAN. L. REV. 1557, 1557 (2025) (reviewing need for judicial review in light of the deficiencies in modern immigration adjudication system); Ingrid Eagly & Steven Shafer, *Detained Immigration Courts*, 110 VA. L. REV. 691, 745 (2024) (reviewing critically immigration court detention decisions); Mimi Tsankov, *The Immigration Court: Zigzagging on the Road to Judicial Independence*, 93 U. COLO. L. REV. 303, 315–16 (2022) (expressing concern with the lack of independence of immigration judges); Kate Aschenbrenner, *Ripples Against the Other Shore: The Impact of Trauma Exposure on the Immigration Process Through Adjudicators*, 19 MICH. J. RACE & L. 53, 82–89 (2013) (analyzing the impact of trauma suffered by immigrants on immigration judges); Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 227 (2012) (examining stereotypes of immigrants that influence immigration judges’ exercises of discretion); Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 417 (2011) (analyzing influence of implicit bias on immigration judges); For review of proposals to reform asylum determinations, see Philip G. Schrag, *The Border Crisis and the Right to Seek Asylum*, 53 HOFSTRA L. REV. 115, 115 (2024).

71. See *supra* text Part II.A.2.

72. See *Office of the Principal Legal Advisor*, DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, <https://www.justice.gov/eoir/immigration-court-information> [<https://perma.cc/ZL9Z-ZLUE>] (last visited Oct. 5, 2025).

73. See *Office of the Principal Legal Advisor*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/opla> [<https://perma.cc/GF8V-9N7K>] (last visited Oct. 5, 2025).

74. See *Board of Immigration Appeals*, DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, <https://www.justice.gov/eoir/board-of-immigration-appeals> [<https://perma.cc/V2AW-7ZH3>] (last visited Oct. 5, 2025).

75. Jayanth K. Krishnan, *Overstepping: U.S. Immigration Judges and the Power to Develop the Record*, 2022 WIS. L. REV. 57, 58 (emphasis added) (footnotes citing, *inter alia*, Catherine Y. Kim, *The President’s Immigration Courts*, 68 EMORY L.J. 1, 17–19 (2018); Shoba Sivaprasad Wadhia, *The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions*, 16 HARV. LATINO L. REV. 39, 40–42 (2013); Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2399–2402 (2012)).

that bias the entire adjudicatory system in favor of removal, resulting in an inescapably dysfunctional system.”⁷⁶ The one-sided structure of adjudications favors the U.S. government in its removal efforts, which is reflected in the outcomes. A recent empirical study found that, for the sample,

in almost eight out of ten cases, the noncitizen lost at the BIA. . . . [F]or three of [most common] claims – asylum, cancellation of removal, and adjustment of status – noncitizens were successful at the BIA only between 20.3% and 24.4% of the time. The win rate for voluntary departure claims was even lower at 12%.⁷⁷

The outcomes suggest that there is a thumb on the scales favoring the U.S. government in agency removal adjudications.

Review in the U.S. Court of Appeals is the first time that a removal case is reviewed outside the Executive Branch. The life and liberty interests at stake, as well as the pro-enforcement bias built into the immigration adjudication system, warrant careful and scrutinizing, not deferential, judicial review of agency removal adjudications. Article III judges with life tenure are likely more independent than the agency and freer of political pressures in reviewing the decisions of the immigration courts and BIA. To some observers, *Chevron* deference simply was never justified for interpretations of the immigration statute by immigration courts and the BIA in removal adjudications.⁷⁸

Adding to the politicization of the removal process, presidents have stood accused of employing political litmus tests in selecting immigration judges, choosing those more likely to side with the U.S. government in removal cases. The Department of Justice found that the Attorney General under President George W. Bush’s administration selected pro-immigration enforcement applicants to be immigration judges.⁷⁹ Critics levelled similar charges at the first Trump administration.⁸⁰ The second Trump administration dismissed immigration judges in large numbers in an attempt to remake the immigration court system.⁸¹

Interventions by Attorneys General in asylum cases to tighten the requirements for relief further tilt the adjudications toward denying relief to the

76. Note, *Courts in Name Only: Repairing America’s Immigration Adjudication System*, 136 HARV. L. REV. 908, (2023).

77. Jayanth K. Krishnan, *The Immigrant Struggle for Effective Counsel: An Empirical Assessment*, 2022 U. ILL. L. REV. 1021, 1047–1048 (footnotes omitted).

78. See *supra* note 32 (citing authorities).

79. See U.S. Dep’t of Justice, *Special Report: An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General* (2008).

80. See Tom Dart, *Jeff Sessions Accused of Political Bias in Hiring Immigration Judges*, GUARDIAN (United Kingdom) (June 16, 2018), <https://www.theguardian.com/us-news/2018/jun/16/jeff-sessions-political-bias-hiring-immigration-judges> [<https://perma.cc/S67W-J892>].

81. See E. Tammy Kim, *Inside Donald Trump’s Attack on Immigration Courts*, NEW YORKER (Oct. 23, 2025), <https://www.newyorker.com/inside-donald-trumps-attack-on-immigration-court> [<https://perma.cc/Y3JF-UHYM>].

noncitizen. That is the case even though Congress intended to have the agency decide asylum claims on their merits, not on ideological grounds, and without numerical limits.⁸² Despite the congressional mandate, the Attorney General in President Trump's first term intervened to review BIA rulings to push immigration courts to close open cases and tighten the requirements for asylum.⁸³ The administration also imposed a quota system on case closures that factored into performance reviews of immigration judges; such quotas arguably pressured judges to dispose of — not necessarily correctly decide — cases.⁸⁴ Abandoning these measures, the Biden administration took other steps to speed up immigration decisions and reduce the number of successful asylum claims.⁸⁵ Wide variations in the outcomes of asylum adjudications among immigration judges further undermine the legitimacy of the asylum process.⁸⁶

Reflecting political forces pushing to speed up case dispositions and removals and steps to skew the direction of the rulings, Presidents also regularly have tinkered with the composition of the Board of Immigration Appeals (BIA). In a so-called streamlining of the appeals process, President George W. Bush's Administration reduced the size of the BIA from 23 to 11 members, expedited review of cases, and increased summary dispositions.⁸⁷ As prominent immigration law professor Stephen Legomsky succinctly put it, “[t]he axe fell entirely on the most ‘liberal’ members of the BIA, as measured by percentages

82. See *INS v. Stevic*, 467 U.S. 407, 427 (1984) (“Elimination of the geographic and ideological restrictions [for asylum under the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980)] . . . was thought to bring the United States’ scheme into conformity with its obligations under” international law).

83. See, e.g., *Matter of S-O-G- & F-D-B-*, 27 I. & N. Dec. 462 (A.G. 2018) (restricting the authority of immigration judges to terminate or dismiss removal proceedings), [https://www.justice.gov/eoir/page/file/1095046/dl?inline=\[https://perma.cc/TW85-F4VM\]](https://www.justice.gov/eoir/page/file/1095046/dl?inline=[https://perma.cc/TW85-F4VM]), *overruled*, *Matter of Coronado Acevedo*, 28 I. & N. Dec. 648 (A.G. 2022); *Matter of L-A-B-R-*, 27 I. & N. Dec. 405 (A.G. 2018) (limiting the authority of immigration judges to grant continuances); *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018) (narrowing eligibility for asylum by applicants who claim to have fled domestic or gang violence), *vacated*, 28 I. & N. Dec. 307 (A.G. 2021); *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018) (rejecting the practice of administrative closure of removal proceedings), *overruled*, *Matter of Cruz-Valdez*, 28 I. & N. Dec. 326 (A.G. 2021). Stella Burch Elias & Paul Gowder, *Against Attorney General Self-Referral in Immigration Law*, 109 MINN. L. REV. 2331 (2025), and Richard Frankel, *Deporting Chevron: Why the Attorney General’s Immigration Decisions Should Not Receive Chevron Deference*, 54 UC DAVIS L. REV. 547 (2020) challenge the Attorney General’s authority in self-referrals to interpret the law in BIA rulings.

84. See Russell Wheeler, *Amid Turmoil on the Border, New DOJ Policy Encourages Immigration Judges to Cut Corners*, THE BROOKINGS INSTITUTION (Jun. 18, 2018), <https://www.brookings.edu/articles/amid-turmoil-on-the-border-new-doj-policy-encourages-immigration-judges-to-cut-corners/> [<https://perma.cc/3RFV-7RKQ>].

85. See Priscilla Alvarez, *Biden Administration Plans to Speed Up Court Cases for Recent Migrant Arrivals*, CNN (May 16, 2024), <https://www.cnn.com/2024/05/16/politics/biden-administration-speed-migrant-court-cases/index.html> [<https://perma.cc/Z7C5-VZUG>].

86. See generally Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 412 (2011) (providing empirical data showing disparities among immigration judges in asylum adjudications).

87. See Dep’t of Just., *Attorney General Issues Final Rule Reforming Board of Immigration Appeals Procedure* (Aug. 23, 2002), https://www.justice.gov/archive/opa/pr/2002/August/02_eoir_489.htm [<https://perma.cc/JB3Q-GJNK>]. For critical analysis of the streamlining measures, see Shruti Rana, “Streamlining” the Rule of Law: How the Department of Justice is Undermining Judicial Review of Agency Action, 2009 U. ILL. L. REV. 829, 894.

of their rulings in favor of noncitizens.”⁸⁸ In essence, the Bush administration dismissed Board members who more frequently than other members sided with noncitizens.

Other presidents also changed the number of BIA members. To better manage a heavy caseload, the first Trump Administration expanded the Board to 21 members.⁸⁹ The Biden Administration further expanded the BIA to 23 members.⁹⁰ Changing course, the second Trump Administration reduced the number of members to 15.⁹¹

The many changes to the size of the BIA suggest that the political turbulence over immigration—and the desire to accelerate removals—is affecting the size and political composition of the agency’s appellate body reviewing immigration court removal orders. That contributes to a lack of stability in decision-making that, in turn, places in serious question the legitimacy of those decisions as well as the propriety of judicial deference to them.

In addition, the Executive Branch’s interventions in agency removal adjudications through interpretations of the immigration statute often appear achieve desired pro-government outcomes; there are few indicators that the process is impartial, fair, and legitimate. To the contrary, the Attorneys General’s interventions demonstrate that the adjudicatory structures are subject to regular political maneuvering over the meaning of the immigration statute (i.e., the law) by the administration in power. Politics, not law, governs the interpretation of the immigration statute. Noncitizens are consistently disfavored in the political process. Under the totality of the circumstances, there are few justifications for deference to the agency in the interpretation of the law in removal adjudications.

Besides the political influences on agency removal adjudications, backlogs in the immigration courts have grown dramatically and there is increased pressure to dispose of cases. The backlog in 2024 was well over a million asylum cases alone.⁹² At the end of March 2025, more than 3.6 million active cases were pending in the immigration courts.⁹³ The size of the caseload makes it extremely difficult – some would claim impossible – for immigration judges to have the time necessary for careful decision-making in each individual removal case, which raise life-and-death issues as when a

88. Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 376 (2006) (footnote omitted).

89. Expanding the Size of the Board of Immigration Appeals, 83 Fed. Reg. 8321 (Feb. 27, 2018), <https://www.federalregister.gov/documents/2020/04/01/2020-06846/expanding-the-size-of-the-board-of-immigration-appeals> [<https://perma.cc/S2DQ-HYB3>].

90. See Expanding the Size of the Board of Immigration Appeals, 89 Fed. Reg. 22630 (Apr. 2, 2024), <https://www.federalregister.gov/documents/2024/04/02/2024-06929/expanding-the-size-of-the-board-of-immigration-appeals> [<https://perma.cc/S2DQ-HYB3>].

91. See *Reducing the Size of the Board of Immigration Appeals*, Fed. Reg. (Apr. 14, 2025), Federal Register: Reducing the Size of the Board of Immigration Appeals.

92. *News from TRAC: Nearly 1.3 Million Asylum Cases Now Pending in Immigration Court*, TRAC IMMIGRATION (May 10, 2024), <https://tracreports.org/whatsnew/email.240510.html> [<https://perma.cc/6A8G-YZF9>].

93. *Immigration Court Quick Facts*, TRAC IMMIGRATION, <https://tracreports.org/immigration/quickfacts/eoir.html> [<https://perma.cc/8RDL-HJXW>] (last visited Oct. 5, 2025).

noncitizen seeks asylum because of feared persecution if returned to her homeland. As observed by Justice Harry Blackmun in evaluating the stakes and challenges to the noncitizen in removal proceedings,

[t]he alien's stake in [a removal] proceeding is enormous (sometimes life or death in the asylum context); the legal rules surrounding deportation and asylum proceedings are very complex; specialized counsel are necessary but in short supply; and evidence suggests that some conduct on the part of the Government in deportation and asylum proceedings has been abusive.⁹⁴

Given the overwhelming caseload, immigration judges must decide cases quickly just to keep up. The concern is that they may not have the time to give the cases that they deserve. As one prominent immigration judge bluntly commented, “[i]n essence, we’re doing death penalty cases in a traffic court setting.”⁹⁵

The BIA caseload is also high, which could reasonably be expected to affect outcomes. Despite the life and liberty stakes of the appeals for noncitizens, the Board’s “judgments, on rare occasion, can be several pages long, but more frequently they are much shorter in nature (i.e., one to two pages).”⁹⁶ Short is not necessarily low quality. However, the shortness of the dispositions on matters affecting the significant life and liberty rights of noncitizens raises significant questions about the care and thoroughness of BIA review. The brevity of the rulings contrasts sharply with the lengthy judicial opinions ordinarily seen in death penalty appeals in the judicial system. Further undermining the legitimacy of its rulings, the BIA issues many unpublished dispositions that fail to explain inconsistencies with previous rulings.⁹⁷

In light of the size of the backlogs, it is hard to see how the end of *Chevron* deference will not have much of an impact on the overall caseload. Courts will save time by not needing to engage in the analysis of the applicability of *Chevron*, but will review the meaning of the statute anew. Consequently, in all likelihood, there should be little change in the court of appeals immigration workload.

C. Summary

The immigration courts and BIA bear all the characteristics of an agency adjudicatory system in need of having decisions it generates subject to meaningful judicial review. Courts applying *Chevron* deference to the interpretations of

94. *Ardestani v. INS*, 502 U.S. 129, 140 (1991) (Blackmun, J., dissenting).

95. LAST WEEK TONIGHT, *Immigration Courts: Last Week Tonight with John Oliver* (HBO), YOUTUBE (Youtube, Apr. 2, 2018), <https://www.youtube.com/watch?v=9fB0GBwJ2QA> [<https://perma.cc/EP5C-JSVX>] (interview with immigration court judge Dana Leigh Marks).

96. Krishnan, *supra* note 77, at 1046 (footnote omitted).

97. See Faiza W. Sayed, *The Immigration Shadow Docket*, 117 NW. U. L. REV. 893 (2023) (analyzing BIA practice of issuing unpublished dispositions).

the immigration statute by the BIA did so to decisions of an agency adjudicatory system with a reputation that did not warrant deference. In fact, by all indications, careful, not deferential, judicial review of agency immigration adjudications is justified. Nonetheless, because *Chevron* was applied across the vast federal administrative state, courts applied it almost reflexively to the decisions of a suspect immigration bureaucracy. Noncitizens suffered the consequences through removal orders in the vast majority of cases.

Put differently, the lack of independence and impartiality of the removal adjudication system suggests that deference to the agency was not warranted. The *Chevron* doctrine meant that the courts often deferred to the agency's interpretation of the immigration statute and orders of removal of noncitizens from the United States. Under the immigration statute, judicial review is limited and non-existent in many instances.⁹⁸ Adding one more layer of restriction on judicial review, *Chevron* deference contributed to a situation in which immigrants faced a most daunting challenge of successfully appealing removal decisions of the BIA to the federal court of appeals.

As discussed in Part III, the end of *Chevron* may not significantly change judicial review of removal orders. However, it will eliminate one barrier to noncitizens seeking meaningful judicial review of those orders by an independent judiciary.

III. REMOVAL ADJUDICATIONS AFTER *CHEVRON*

How will immigration adjudications fare with the end of *Chevron* deference? Any predictions, of course, could not be anything other than hazardous. Still, independent judicial review of the interpretation of the immigration statute might generate several possible outcomes. Some possibilities include the following scenarios, all that appear rather modest in terms of the overall impacts on the appeals of removal adjudications.⁹⁹

A. *Increased Scrutiny*

Without *Chevron*, the Executive Branch will no longer have the final word on the interpretation of ambiguous provisions of the immigration statute. Judicial review will allow for review of the interpretation of statutes in removal adjudications by more neutral decision-makers than those in the Executive Branch. Independent judicial review might result in closer adherence to the overall goals of the immigration statute, better protection of the rights of noncitizens, and more consistent — and legitimate — interpretations of the law.

98. See *infra* Part III.D.

99. For a discussion of the use of various forms of deference to the immigration agencies' interpretations of the immigration statute after *Chevron* as well as humanitarian considerations in agency interpretations of the statute, see Jill E. Family, *Immigration Law After Chevron's Demise*, 104 OR. L. REV. 75 (2025).

Moreover, without *Chevron* deference, courts might be less inclined to uphold broad, perhaps novel, interpretations of ambiguities in the immigration statute by the BIA and Attorney General that adversely impact noncitizens. This is especially an area of concern with President Trump's Departments of Justice and Homeland Security, which have taken creative and aggressive immigration enforcement steps to the limits of the law and beyond in efforts to remove non-citizens, at times without even immigration court review or any semblance of due process.¹⁰⁰ A prime example is the unprecedented invocation of the Alien Enemies Act of 1798, absent an ongoing war, to justify removals without due process, which led to a Supreme Court ruling that made it clear that migrants have a due process right to a hearing before removal.¹⁰¹

B. *Greater Clarity and Legitimacy in the Law*

The recent sea changes in interpretations of the immigration statute by the Trump and Biden Attorneys General have suggested that the immigration laws are malleable and subject to the political winds, thus undermining the legitimacy of the immigration removal system.¹⁰² With courts having the final say on the interpretation of the law in a post-*Chevron* era, the likely result will be fewer dramatic swings in the interpretations of the immigration statute. That, in turn, will add to the perceived legitimacy of immigration law and its enforcement at a time when the much-maligned agencies are much in need of it.

Independent judicial interpretations of the immigration statute in removal cases also could provide more consistent interpretations of the immigration statute across presidential administrations. Attorneys General who change interpretations of the immigration statute in response to pro-enforcement political pressures will continue to play a role in the process. However, they will not have their interpretations of the law deferred to by the courts, which has led to deference to dramatically different interpretations of the same statutory language by different presidential administrations. Article III judges will be the final arbiters of the immigration statute.

C. *More Challenges to Immigration Policies*

As required by the immigration statute, judicial review of removal orders after *Chevron* will continue to be deferential to fact findings and exercises of discretion but not to the agency's interpretations of the law.¹⁰³ However, more independent judicial review of the interpretations of the immigration

100. See, e.g., *Leading with Cruelty: Eight Impacts of Trump's First Day Executive Orders*, NAT'L IMMIGRANT JUSTICE CTR. BLOG. (Jan. 22, 2025), *Leading with Cruelty: Eight Impacts of Trump's First Day Executive Orders - National Immigrant Justice Center* (summarizing President Trump's initial second-term immigration executive orders).

101. *Trump v. J.G.G.*, 604 U.S. 670, 673 (2025).

102. See *supra* notes 82 (citing authorities).

103. See *infra* text accompanying notes & notes 108–11 (citing authorities).

statute (i.e., judicial review without deference) will tend to level the playing field on appeals between the U.S. government and noncitizens in immigration adjudications. Although the change may not be dramatic, the subtle shift toward less deference could make additional room for possible challenges to removal and other immigration decisions, as well as to immigration agency practices and policies. With less deference to the immigration bureaucracy, immigrant rights groups may have more room to challenge the application of the law that they contend violates the immigration statute. Moreover, expectations of deference inspired by *Chevron* will not tacitly encourage the immigration agencies to test the limits of the law.

D. *Little or No Change*

This brings us to the most likely scenario in the new era of administrative law. Put simply, noncitizens may be marginally better off without *Chevron* deference. With no deference to the BIA's interpretation of ambiguous provisions of the immigration statute in removal cases, courts will have the final say on the meaning of the law. With *Loper Bright*, immigration appeals will not start off with arguments over the applicability of *Chevron* deference.

Although different judges may have different interpretations, there will be no deference to the agencies, and different presidents bringing changing interpretations of the laws, in the interpretation of the immigration statute in removal adjudications. Different administrations have made very different political judgments on the direction of immigration law and enforcement that dramatically affect how that law has been interpreted and applied.¹⁰⁴ With courts now having the final word on the meaning of the law, one can expect greater integrity and legitimacy in the interpretation of the law with changing presidential administrations.

The bad news for immigrants is that the comprehensive immigration statute, the Immigration and Nationality Act of 1952 (INA),¹⁰⁵ as amended, is not anything that could be described as pro-immigrant. It leans toward restricting admissions, allowing for removals of noncitizens, and limiting relief from removal. Moreover, through several amendments to the INA, Congress has barred judicial review of many agency immigration decisions, including fact-findings and discretionary judgments.¹⁰⁶ It is not as if noncitizens before *Chevron* fared particularly well in the appeals of removal adjudications.¹⁰⁷

104. See *supra* text accompanying notes 81-85.

105. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

106. See, e.g., Immigration and Nationality Act § 242, 8 U.S.C. § 1252 (providing judicial review of removal orders to questions of law and barring review of fact-findings and exercises of discretion); *Patel v. Garland*, 596 U.S. 328, 347 (2022) (holding that the immigration statute bars judicial review of fact-findings in BIA decisions on discretionary relief). For analysis of judicial review in immigration cases, see Jayanth K. Krishnan, *Facts Versus Discretion: The Debate Over Immigration Adjudication*, 37 GEO. IMMIGR. L.J. 1 (2022); Jayanth K. Krishnan, *Overstepping: U.S. Immigration Judges and the Power to Develop the Record*, 2022 WIS. L. REV. 57.

107. See, e.g., *INS v. Phinpathya*, 464 U.S. 1834 (1984) (agreeing with the BIA and rejecting court of appeals finding that noncitizen was eligible for relief from removal).

The U.S. immigration statute, as a general matter, is designed to restrict noncitizens from coming to, or remaining in, the United States. The default position under the statute thus often does not favor the noncitizen. A product of the Cold War, the Immigration and Nationality Act was designed to bar the admission of, and deport, communists. One co-sponsor of the bill “viewed immigration policy as a matter of ‘internal security.’ The Senate subcommittee’s report rehearsed the well-worn charge that ‘the Communist movement in the United States is an alien movement, sustained, augmented, and controlled by European Communists and the Soviet Union.’ [The co-sponsor] stressed the need to bring our immigration system into line with the realities of Communist tactics.”¹⁰⁸ Although communism is no longer a pressing national concern, the INA remains more closed than open to noncitizens.

Even though deficiencies in agency removal adjudications militate in favor of robust judicial review,¹⁰⁹ Congress has restricted review in many instances.¹¹⁰ With judicial review of immigration matters out of the ordinary,¹¹¹ judicial immigration decisions frequently involve debates over whether the immigration statute permits any judicial review. Outcomes in the Supreme Court on those questions have been mixed for noncitizens.¹¹²

Because the immigration statute often speaks in broad terms with much discretion delegated to the agency, conservative courts will more likely rule against noncitizens with or without *Chevron* deference.¹¹³ In the past, deference has allowed the courts to duck difficult questions of statutory interpretation.¹¹⁴ With that safety valve no longer available, the meaning of the law is in the hands of the increasingly conservative courts. Noncitizens likely will not fare especially well, but possibly better than when the agency was the master of the law. Results will necessarily vary by the circuit, as is the case currently in immigration and other substantive bodies of law.

The end of *Chevron* deference will allow the courts in removal cases to safeguard the interests of noncitizens through the impartial and independent interpretation of the immigration statute. Other agencies and subject matter areas may face a different set of circumstances and will experience different outcomes. This is especially the case for agencies that bring technical expertise to bear on the interpretation of the statute and its implementation through

108. MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 237 (2004) (citation omitted).

109. See *supra* Part II.B.

110. See REAL ID Act, Pub. L. No. 109-13, 119 Stat. 302 (2005); Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996); Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

111. See *infra* text accompanying notes 115-18.

112. Compare *Wilkinson v. Garland*, 601 U.S. 209 (2024) (holding that a mixed question of law and fact in a removal case was subject to judicial review under the immigration statute), with *Patel v. Garland*, 596 U.S. 328 (2022) (holding that the immigration statute precluded judicial review of fact findings to determine whether discretionary relief would be granted).

113. See *supra* text accompanying notes 10-13.

114. See *supra* Part II.A.2. (discussing the Supreme Court’s application of *Chevron* deference in immigration cases).

generally applicable rules and regulations, as was the case in the environmental statute at issue in *Chevron*.¹¹⁵

Nor will the end of *Chevron* deference mark an end to deference to Congress and the Executive Branch on immigration matters. To the contrary, the plenary power doctrine of immigration law bars judicial review of the immigration judgments of Congress and the President.¹¹⁶ Separate and apart from *Chevron*, the doctrine immunizes the immigration statute from constitutional review. Plenary power deference is much more potent than *Chevron* deference. Running counter to modern constitutional law, such deference allows immigrants to be treated in ways that U.S. citizens never would be. The plenary power doctrine explains in part why noncitizens have fewer due process protections than citizens in non-immigration contexts. The U.S. Supreme Court has deferred to Congress in determining the applicability of constitutional protections in the realm of immigration law.¹¹⁷

Offering an idea of just how embedded the immunity of the immigration laws from judicial review is, the Supreme Court explained in 1977 that

[a]t the outset, it is important to underscore the limited scope of judicial inquiry into immigration legislation. This Court has repeatedly emphasized that “over no conceivable subject is the legislative power of Congress more complete than it is over” the admission of aliens. *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909); accord, *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972). Our cases “have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.” *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953); see, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Lem Moon Sing v. United States*, 158 U.S. 538 (1895); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *The Chinese Exclusion Case*, 130 U.S. 581 (1889). Our recent decisions have not departed from this long-established rule. Just last Term, for example, the Court had occasion to note that “the power over aliens is of a political character and therefore subject only to narrow judicial review.” *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n. 21 (1976), citing *Fong Yue Ting v. United States*, supra, at 713; accord, *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976). And we observed recently that *in the exercise of its broad power over immigration and naturalization*, “Congress regularly makes rules that would be unacceptable if applied to citizens.” *Id.*, at 80.¹¹⁸

115. See supra Part I (discussing *Chevron*).

116. See, e.g., *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889). See generally Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (reviewing the continuing modern vitality of the plenary power doctrine).

117. See Carrie Rosenbaum, *Immigration Law’s Due Process Deficit and the Persistence of Plenary Power*, 28 BERKELEY LA RAZA L.J. 118, 119 (2018).

118. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (emphasis added) (footnote omitted). Despite the plenary power doctrine, the Court in a few cases has found provisions of the immigration statute to be

More recently, the Supreme Court has applied the plenary power doctrine to uphold immigration policies of the President, including President Trump's controversial Muslim ban, as well as expedited (without due process) removal of migrants authorized by Congress.¹¹⁹

Thus, with or without *Chevron*, deference to Congress and the Executive Branch on immigration matters will remain. Any tinkering with administrative law on the proper form of judicial review in the interpretation of the immigration statute is likely to have minor positive impacts for noncitizens. The end of *Chevron* will not likely affect the outcomes of a great many cases except those at the margins. Consequently, immigration law and its application will not change dramatically, and immigrants can be expected to continue to lose more often than not in appeals of agency removal decisions. The lack of representation makes major changes unlikely in the success of noncitizens on appeals.¹²⁰

However, the end of the deference doctrine will marginally improve matters for immigrants pursuing appeals of BIA and other immigration agency decisions. *Chevron* never was a good match with removal adjudications, and its end will allow for more, not less, judicial review of the legal interpretations of the immigration statute by the Board of Immigration Appeals.

CONCLUSION

The invocation of *Chevron* deference by the courts in the appeals of Board of Immigration Appeals rulings often was the kiss of death to the appeals of many noncitizens. Thus, the end of *Chevron*, should be applauded by the private immigration bar. In contrast, known for strongly advocating deference to the Executive Branch, U.S. government attorneys no doubt will lament the loss of a powerful weapon in removal appeals. Although the ultimate impact of the end of *Chevron* remains to be seen, the lack of deference can do little to hurt – and may help – noncitizens appealing agency immigration adjudications.

Precisely how significant an impact the end of *Chevron* will have on immigration adjudications is difficult to predict. The elimination of deference

unconstitutional. *See Sessions v. Dimaya*, 584 U.S. 148 (2018) (holding that “crime of violence” serving as a ground for removal was unconstitutionally vague); *Sessions v. Morales-Santana*, 582 U.S. 47 (2017) (invalidating a gender-based distinction in a derivative citizenship provision of the immigration statute).

119. *See, e.g.*, *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103 (2020) (upholding expedited removal enacted by Congress of asylum seeker apprehended near U.S./Mexico border); *Trump v. Hawaii*, 585 U.S. 667 (2018) (refusing to disturb President Trump's Muslim ban on the admission of noncitizens from predominantly Muslim nations); *Sale v. Haitian Ctr. Council, Inc.*, 509 U.S. 155 (1993) (rejecting challenges to the President's policy of interdicting Haitian asylum seekers on the high seas and returning them to Haiti). Nonetheless, the Supreme Court has, in other instances, moved away from invoking the plenary power doctrine and has relied on conventional administrative law principles, including *Chevron* deference, in the review of immigration matters. *See generally* Kevin R. Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57 (2015) (analyzing Roberts Court immigration decisions and concluding that Court generally applies standard modes of statutory interpretation and routine administrative law doctrines); Kate Aschenbrenner Rodriguez, *Eroding Immigration Exceptionalism: Administrative Law in the Supreme Court's Immigration Jurisprudence*, 86 U. CIN. L. REV. 215 (2018) (contending that the courts today generally apply ordinary administrative and constitutional law principles in reviewing immigration cases).

120. *See supra* Part II.A.1.

may, in certain respects, level the playing field so that noncitizens are not at as great a disadvantage as they once were in the appeal of removal orders. It will modestly moderate the pro-immigration-enforcement politics that have come into play with respect to the interpretation of the immigration statute. One less degree of deference also may generally affect how the courts review removal adjudications, policies, and practices beyond the interpretation of the law. Of course, the lack of representation by counsel will continue to adversely affect the outcomes of removal appeals by noncitizens.

The dynamic seen in immigration cases is not the same for decisions of administrative agencies applying other statutes in regulatory matters. With the demise of *Chevron*, the Environmental Protection Agency, for example, lost a powerful tool in its mission to protect the environment through rules and regulations. Deferring to agency technical expertise in applying statutes through generally applicable rules and regulations may make sense in some instances. However, not all agencies rely on technical expertise in interpreting statutes, and *Chevron* deference did not work well for noncitizens in removal adjudications. Put differently, *Chevron* deference may make more sense with respect to agency decisions relying on science and technology in promulgating generally applicable rules and regulations, as opposed to matters involving individual life and liberty at the heart of immigration adjudications. However, one defines expertise in immigration adjudications, it is at best uncertain how that would justify deference to the agency's interpretation of the law. Immigration in certain ways differs with respect to the nature of the life and liberty interests at stake from those at the core of most other agency actions. In short, generally applicable administrative law doctrines may not always fit well in the review of removal adjudications.

This Essay has contended that, akin to a partisan political actor in the removal process, the Board of Immigration Appeals has relied on power and politics, not expertise, in its interpretations of the immigration statute to order the removal of noncitizens from the United States. Deference meant that the courts deferred to the exercise of raw political power. The end of *Chevron* deference to the Board's legal interpretations opens the door a bit to less political and more independent review by the courts and perhaps some modest improvements for noncitizens.