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IMMIGRATION ADJUDICATION, JUDICIAL REVIEW, AND THE UNEVEN INCORPORATION OF ADMINISTRATIVE LAW NORMS

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ABSTRACT

This article examines the interaction between immigration law and administrative law. Scholars and courts regularly treat immigration as outside of, or exceptional to, the normal operation of administrative law and its norms of judicial review. Yet in the past decade, the Roberts Court has radically reshaped administrative law. This broader administrative law project has largely emphasized the primacy of the federal courts and judicial review, enlarging the putative rights of regulated parties, at the cost of agency power. Within that project, immigration adjudication is a frequent conversation partner. Immigration adjudication is used to undermine the administrative state's claim to policymaking legitimacy and to reinforce the role of courts in other substantive areas. At the same time, the Roberts Court has largely excluded noncitizens from the benefits of a new, robust role for the courts. Noncitizens in removal proceedings thus appear as useful subjects throughout the Roberts Court's administrative law jurisprudence, incorporated into administrative law where convenient but largely excluded from the field's reach where it might actually matter.

Building on this understanding of the uses of immigration within administrative law, I argue that exceptionalism is the wrong framework to understand judicial review of immigration adjudication. Instead, I argue that

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immigration adjudication suffers from what I label an uneven incorporation of administrative law norms. That is: immigration adjudication has incorporated the bureaucratic functioning enabled by administrative law, but without the robust harmonizing functions and transubstantive access to judicial review, with attendant cross-doctrinal standards of review.

This article, therefore, makes three contributions. First, it develops the concept of immigration law's uneven incorporation of administrative law's norms and doctrines. Doing so allows for a more accurate and nuanced understanding than an exceptionalism framework, as well as an opening for noncitizens to utilize administrative law's toolkit to challenge the arbitrary decision-making of removal proceedings and enforcement. Second, the article offers the first examination of the Roberts Court's use of immigration adjudication within its larger administrative law project. Finally, the article uses immigration law as a lens to view administrative law writ large. Immigration adjudication offers one vision of what administrative law might look like in decades to come: increasingly context-specific doctrines, standards of review, and requirements for specific agencies. This would be a major shift in administrative law, retreating from transubstantive standards of judicial review dating back at least to the New Deal; it would also undermine administrative law's uniformity and harmonizing function, long seen as a primary justification of the field as a whole.

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INTRODUCTION

On April 25, 2025, the Trump Administration sent a four-year-old United States citizen with stage four cancer to Honduras. The child had been detained along with his mother, a noncitizen, following a routine check-in. Contrary to explicit government policies, the mother was prohibited from contacting counsel, prevented from coordinating alternative care with U.S.-based family members, and summarily removed along with her U.S. citizen children.[1]

One month earlier, the government took steps to remove noncitizens to countries where they'd never been. The Immigration and Nationality Act allows for limited third-country removals, although government policy has typically required notice and an opportunity to raise fear-based claims related to those third countries. Yet in March 2025, it provided no notice, even as it

1. Complaint at 1, J.L.V. et al v. Acuna et al, No. 3:25-cv-00669-BAJ-RLB (M.D. La. Jul. 31, 2025).

sought to deport people to countries with active conflicts or other civil society breakdowns that might mean those removed would face torture or other harm.[2]

Administrative law has developed answers to these problems, requiring agencies to comply with their own policies, even where those policies are not required by statute or the Constitution, and allowing for judicial enforcement. Yet applying these principles to removal proceedings today seems fraught, with pitched battles unfolding at all three levels of the federal courts.

This article examines the fraught and contested relationship between administrative law and immigration adjudication, and the extent to which immigration adjudication is within the normal functioning of administrative law's norms and doctrines.[3] Immigration has long been seen as exceptional in scholarship focused on both immigration law[4] and in broader administrative law.[5] Scholars and courts have traditionally seen immigration adjudication as exceptional, committed to agency discretion, outside the reach of the Administrative Procedure Act ("APA"), and with noncitizens excluded from meaningful judicial review presumed by administrative law generally.

Yet across a range of administrative law doctrines, the Roberts Court is aggressively asserting the power of the federal courts to undermine and question agency action. Throughout these decisions, immigration adjudication is a frequent conversation partner; immigration law and noncitizens are convenient foils. Sometimes noncitizens' interests are useful, as in *Loper Bright*, to undermine the administrative state's claim to policymaking legitimacy. Yet at other times, like in *Jarkesy*, noncitizens are excluded from the benefit of a new robust role for the courts in order to downplay the follow-on implications of the Court's opinion. And at the same time, in its immigration decisionmaking, the Roberts Court has often played on robust notions of immigration law's exceptionalism to preclude and undermine a robust judicial review, with far-reaching consequences. Noncitizens thus appear as useful subjects: incorporated into administrative law where convenient, but largely excluded from the field's reach where it might actually matter.

I argue that exceptionalism is the wrong framework to understand judicial review of immigration adjudication. Instead, I argue that immigration

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2. *See, e.g.*, Dep't of Homeland Sec. v. D.V.D., 145 S. Ct. 2627, 2630–33 (2025) (Sotomayor, J., dissenting).

3. By "normal operation" of administrative law, I mean rules and doctrines applied across the administrative state. I will also use "transubstantive" similarly: that the rules and doctrines' applications do not vary based on the substantive administrative law context in which they are being applied. *Cf.* David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 B.Y.U. L. REV. 1191, 1194–95 (2013).

4. *See, e.g.*, David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583 (2017).

5. *See, e.g.*, Alice Ristroph, *Exceptionalism Everywhere: A (Legal) Field Guide to Structural Inequality*, 65 ARIZ. L. REV. 921, 922–23 (2023); Michael J. Wishnie, *"A Boy Gets Into Trouble": Service Members, Civil Rights, and Veterans' Law Exceptionalism*, 97 B.U. L. REV. 1709, 1713 (2017); Emily Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 WISC. L. REV. 1351, 1352–53 & n.4 (2019).

adjudication suffers from what I label an uneven incorporation of administrative law norms. That is: immigration adjudication has incorporated the bureaucratic functioning enabled by administrative law, but without the robust harmonizing functions and transubstantive access to judicial review, with attendant cross-doctrinal standards of review.

Building on this understanding of the uses of immigration exceptionalism within administrative law, this article makes three contributions. First, it argues that our prevailing narrative of administrative law's impact on immigration adjudication is wrong and it is better to understand the relationship through uneven incorporation. In doing so, I address how immigration adjudication has incorporated the bureaucratic functioning enabled by administrative law without the robust harmonizing functions and transubstantive access to judicial review and attendant cross-doctrinal standards of review. Second, it looks at how the Roberts Court uses immigration adjudication within its larger administrative law project, whether in *Loper Bright*, for instance, or *Jarkesy*. Finally, the article uses immigration law as a lens to view administrative law writ large. Immigration adjudication offers one vision of what administrative law might look like in decades to come: increasingly context-specific doctrines, standards of review, and requirements for specific agencies. This would be a major shift in administrative law, retreating from transubstantive standards of judicial review dating back at least to the New Deal; it would also undermine administrative law's uniformity and harmonizing function long seen as a primary justification of administrative law's value as a whole.

To better understand this relationship, I primarily ground the discussion in judicial review of immigration courts and adjudication.[6] Doing so has value in that for many noncitizens, their rights and statuses, as well as their primary interaction with immigration enforcement and administration, will necessarily run through individual adjudications and petitions for review.[7] But such a focus also helps illuminate a broader range of immigration's interaction with administrative law. It still makes visible issues of reviewability, which have been central in debates about judicial review in immigration. But in light of the statutory authorities, it also allows us to see beyond reviewability and onwards to the way review actually operates in practice.

While at times the conversation may seem academic, clarifying administrative law's reach within immigration adjudication is vitally important in this

6. I mean this as opposed to the other major form of agency action: rulemaking or guidance, i.e., general applicability. At times, however, I will have to detour and reference other forms of policy-making.

7. *See* 8 U.S.C. § 1252(a)(5) ("[A] petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter . . . notwithstanding any other provision of law (statutory or nonstatutory) . . . ."); *id*. § 1252(g).

moment. Immigration courts — which have struggled with backlogs,[8] arbitrary decision-making[9] and political manipulation[10] — are now under increasing threat from a second Trump administration bent on accelerating many of these political pathologies and creating others. The Administration has attempted to remove individuals with summary processes or without immigration court proceedings at all.[11] It has weaponized rarely used statutory provisions to attempt to remove individuals, even lawful permanent residents, for protected speech.[12] Court administrators have also instructed immigration judges to increase pretermission of asylum applications without holding a hearing.[13] They have increased indiscriminate arrests based on quotas.[14] The Trump Administration has also undermined who is doing the adjudication, removing judges it perceives as lenient or not otherwise ideologically aligned with the Administration[15] and limiting Board of Immigration Appeals members.[16]

All this suggests that immigration adjudication within the immigration courts will only become increasingly arbitrary and punitive, and, in turn, federal courts will have to increasingly step in to enforce statutory, subconstitutional, and constitutional guardrails.[17] In theory, administrative law's judicial

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8. *See, e.g.*, Rebecca S. Gambler, *U.S. Immigration Courts See a Significant and Growing Backlog*, GOV'T ACCOUNTABILITY OFF. (Oct. 19, 2023), https://www.gao.gov/blog/u.s.-immigration-courts-see-significant-and-growing-backlog [https://perma.cc/98ZQ-MSQJ].

9. *See also* Andrew Schoenholtz, Jaya Ramji-Nogales & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 328–333 (2007).

10. Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control Over Immigration Adjudication*, 108 GEO. L. J. 579, 633 (2020).

11. This includes 1798's Alien Enemies Act, *see, e.g.*, Trump v. J. G. G., 145 S. Ct. 1003, 1007 (2025) (Sotomayor, J., dissenting); A.A.R.P. v. Trump, 145 S. Ct. 1364, 1367-68 (2025), as well as Cold War-era foreign policy provisions. *See* 8 U.S.C. § 1227(a)(4)(C)(i).

12. *See, e.g.*, Ozturk v. Hyde, 136 F.4th 382, 389 (2d Cir. 2025)*; see also* Adrian Florido & Ari Shapiro, *A Judge in Boston Will Rule on Whether Student Deportations Violate Free-Speech Rights*, NPR (Jul. 21, 2025), https://www.npr.org/2025/07/21/nx-s1-5471504/a-judge-in-boston-will-rule-on-whether-student-deportations-violate-free-speech-rights [https://perma.cc/B5NC-A8HB].

13. Memorandum from Sirce E. Owen, Acting Director, to All of Exec. Off. Immigr. Rev. (EOIR), *Pretermission of Legally Insufficient Applications for Asylum* (Apr. 11, 2025), https://www.justice.gov/eoir/media/1396411/dl?inline [https://perma.cc/J8Y8-Y53W].

14. Josh Gerstein & Kyle Cheney, *Judges Press Trump Administration on Deportation Quotas*, POLITICO (Jul. 28, 2025), https://www.politico.com/news/2025/07/28/judges-trump-administration-deportation-quotas-00480899 [https://perma.cc/HAW9-FSKU].

15. *See, e.g.*, *Justice Department Fires 20 Immigration Judges From Backlogged Courts Amid Major Government Cuts*, THE ASSOCIATED PRESS (Feb. 15, 2025), https://wtop.com/national/2025/02/justice-department-fires-20-immigration-judges-from-backlogged-courts-amid-major-government-cuts/ [https://perma.cc/V5ZY-U6PT]; Ximena Bustillo, *Trump Administration Fires More Immigration Judges*, NPR (Sept. 23, 2025), https://www.npr.org/2025/09/23/nx-s1-5550915/trump-immigration-judges [https://perma.cc/XM79-QH4K]. It has also looked to hire judges with no immigration law expertise or experience at all. Joe Bynes, *Florida Immigration Plan Includes Judges, Detention, Deportation Flights*, WUSF (May 13, 2025), https://www.wusf.org/politics-issues/2025-05-13/florida-immigration-plan-includes-judges-detention-deportation-flights [https://perma.cc/A5K6-V683] (noting plan to use Florida National Guard troops to adjudicate asylum applications); *EOIR Announces 11 Immigration Judges and 25 Temporary Immigration Judges*, U.S. DEP'T OF JUSTICE (Oct. 24, 2025), https://www.justice.gov/eoir/media/1415981/dl?inline [https://perma.cc/TZG3-2SV3] (noting temporary immigration judges, many without any immigration experience).

16. Reducing the Size of Board of Immigration Appeals, 90 Fed. Reg. 15525 (Apr. 14, 2024).

17. Indeed, the last time an administration attempted such a reworking of the bench, petitions for review flooded into courts of appeals. Jon O. Newman, *The Second Circuit's Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Caseload*

review doctrines and norms in theory can provide one toolkit for noncitizens to challenge the most arbitrary and harsh administrative processes. Yet prevailing notions of immigration exceptionalism stand as a serious impediment to meaningful judicial review in practice. And as the federal courts step up review of other administrative schemes, exceptionalism risks keeping noncitizens on the outside of that revolution looking in.

I therefore proceed in four parts. First, in Part I, I trace and trouble common narratives of immigration law's exceptionalism leading up to the Roberts Court. In Part II, I turn to the Roberts Court as read through its administrative law and immigration opinions. I highlight the ways in which immigration law and immigration adjudication have been imagined within several key opinions of this shifting administrative law landscape. Third, in light of these developments, Part III defines and describes the contours of immigration's uneven incorporation of administrative law. Finally, I conclude by briefly examining what immigration adjudication might tell us about the judicial review of agency action going forward.

I. EXCEPTIONALISM(S) IN ADMINISTRATIVE AND IMMIGRATION LAW

Exceptionalism is the idea that a given field of law is so unique as to render it separate and distinct from other fields of law.[18] Generally framed in criticism, the exceptionalism literature "focuses on the adoption or preservation of anomalous doctrines that depart from developments in administrative law, due process, federal jurisdiction, or other trans-substantive areas, without obvious justification."[19]

In this section, I begin by briefly defining and describing exceptionalism in administrative law. I then turn to immigration, and the ways that scholars and courts have understood the field as outside the operation of normal administrative law. Finally, I conclude the section by excavating a different history of immigration adjudication's relationship to administrative law running up to the advent of the Roberts Court.

A. *Exceptionalism(s) in Administrative Law*

There is a robust literature about whether various areas of administrative law should be viewed as exceptional. Definitionally, Stephanie Hoffer and Christopher Walker see administrative law exceptionalism as "the perception" that a given area of law (for them, tax) "is so different from the rest of the regulatory state that general administrative law doctrines and principles do not apply."[20] The administrative law exceptionalism(s)

Management, 74 BROOK. L. REV. 429, 432–34 (2009) (describing flood of petitions for review and new ad hoc procedures to address them).

18. *Cf.* Ristroph, *supra* note 5, at 924.

19. Wishnie, *supra* note 5, at 1713.

20. Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221, 222 (2014). Elsewhere, Walker has referred to such arguments as a "misperception."

literature has extended to antitrust,[21] patent law,[22] and tax,[23] as well as veterans' law[24] and immigration.[25] Even adjudication as a whole has been argued to be exceptional within the Administrative Procedure Act's framework.[26]

Comparative expertise is a foundational concept for administrative law, as we regularly ask which institution — the court or agency — would be better able to complete a given task.[27] Debates about exceptionalism(s) build on these understandings; they center on fights over comparative expertise and the institutional competencies of courts and agencies. In seeking to allocate responsibility and authority between agencies and courts, courts and commentators have primarily examined four different contextual dimensions: expertise, complexity, democratic legitimacy, and statutory particularity.

First, and perhaps most importantly, the question is usually whether a type of *expertise* is so necessary, or different in kind, as to merit a different balancing of the relative authority of the agency as opposed to the federal courts. That expertise might be in a given legal task — comparative expertise was central to *Chevron* deference regime, for instance. *Chevron* arrived at one answer for one set of questions: deference was merited because the agency was better equipped to fill gaps in the substantive statutes that Congress had tasked it with administering.[28] The *Loper Bright* majority took the opposite approach, concluding that "agencies have no special competence in resolving statutory ambiguities. Courts do."[29]

But whatever administrative law's general presumptions about task-oriented expertise are, individual institutions might also possess particular expertise tailored to specific subject matter areas. Scholars have thus invoked the specifics of an area of law to argue for allocating authority between courts and agencies. Does the Securities and Exchange Commission's comparative

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Christopher J. Walker, Chevron *Deference and Patent Exceptionalism*, 65 DUKE L. J. ONLINE 149, 149 (2016).

21. Justin (Gus) Hurwitz, *Administrative Antitrust*, 21 GEO. MASON L. REV. 1191, 1210 (2014); Justin (Gus) Hurwitz, Chevron *and Administrative Antitrust, Redux*, 30 GEO. MASON L. REV. 971, 972–73 (2023).

22. Walker, *supra* note 20; John M. Golden, *Working Without* Chevron*: The PTO as Prime Mover*, 65 DUKE L.J. 1657 (2016); Michael D. Frakes & Melissa F. Wasserman, *Patent Office Cohorts*, 65 DUKE L.J. 1601, 1601–02 (2016); Stuart Minor Benjamin & Arti K. Rai, *Who's Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 GEO. L.J. 269, 269–70 (2007).

23. Hoffer & Walker, *supra* note 20, at 222; James M. Puckett, *Structural Tax Exceptionalism*, 49 GA. L. REV. 1067, 1067–69 (2015); Richard Murphy, *Pragmatic Administrative Law and Tax Exceptionalism*, 64 DUKE L.J. ONLINE 21, 21 (2014); Eleanor D. Wood, *Rejecting Tax Exceptionalism: Bringing Temporary Treasury Regulations Back in Line with the APA*, 100 MINN. L. REV. 839, 840 (2015); Alice Abreu & Richard Greenstein, *Tax: Different, Not Exceptional*, 71 ADMIN. L. REV. 663, 663 (2019).

24. *See, e.g.,* Wishnie, *supra* note 5, at 1709–1710.

25. *See infra* Part I.B.

26. *See e.g.* Emily Bremer, *supra* note 5, at 1410; *see also* Michael Asimow, Evidentiary Hearings Outside the Administrative Procedure Act 3 (Nov. 10, 2016) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/sites/default/files/documents/adjudication-outside-the-administration-procedure-act-final-report_0.pdf [https://perma.cc/GF7J-WNNG].

27. *Cf.* Anya Bernstein, *Judicial Accountability*, 113 GEO. L. J. 651, 658 (2025).

28. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 865 (1984).

29. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 400–01 (2024).

insight into corporate form and structure, as compared to a generalist court, for instance, mean the agency should have greater weight placed on its factual findings than other areas of administrative law?[30] Or does the type of careful calculations and revenue collection tasks assigned to the Internal Revenue Service mean that tax regulation should be outside the normal operation of administrative law, again changing the relative balance between court and agency?[31]

Second, administrative law's exceptionalism(s) are also often grounded in arguments about complexity. Tax exceptionalism, for instance, has often been defended because of the complexity of the statutory scheme.[32] Antitrust exceptionalism, on the other hand, has traditionally been premised on the benefits of a common law, courts-centric approach, with the argument for an administrativist turn in antitrust focusing on whether generalist judges are the appropriate decision-makers in a complex economic system.[33]

Third, exceptionalism(s) might be premised on democratic responsiveness or legitimacy. Some have argued that agencies, located in the Executive Branch, may be perceived to have more democratic legitimacy and be more responsive to public pressure.[34] The courts, on the other hand, might be better placed to provide counter-majoritarian protections for vulnerable groups and those who do not control a political majority bent on enforcing their rights.[35] This tension can again be seen through the *Chevron* doctrine. The *Chevron* decision itself was premised in part on an understanding that the agency was the proper interpretive authority *because* it would have more democratic responsiveness than the reviewing court. And in helping overturn *Chevron*, Justice Gorsuch argued that Chevron deference was undermined by the way in which it hurt disempowered or disfavored groups who "have no power to influence agencies, who will never capture them, and whose interests are not the sorts of things on which people vote, generally speaking."[36]

Finally, many exceptionalism(s) debates look to the particularity of statutes governing a particular subfield of administrative law. That is: the default is the general provisions of the Administrative Procedure Act, which scholars have argued is a "super statute" creating uniformity across the administrative state.[37] Yet for *informal* adjudication writ large, the APA has little to say

30. Michael Morelli, *Courts, Competence, and Competition: Brewing Tensions Between Administrative, Antitrust, and Securities Law*, 54 B.C. L. REV. 1615, 1620 (2023).

31. Hoffer & Walker, *supra* note 23, at 222; Puckett, *supra* note 23, at 1067.

32. *Cf.* Abreu & Greenstein, *supra* note 23, at 693 (noting complexity arguments).

33. *See, e.g.*, Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals,* 54 J. L. ECON. 1 (2011); Hurwitz, *supra* note 21, at 39.

34. *Cf.* Bernstein, *supra* note 27, at 659–60.

35. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

36. As addressed below, Justice Gorsuch cited "the immigrant, the veteran seeking his benefits, the Social Security Disability applicant," and stated that he "didn't see a case cited, and perhaps I missed one, where *Chevron* wound up benefitting those kinds of peoples." *See* Transcript of Oral Argument at 133–34, Relentless, Inc., et al., v. Dep't of Commerce, 602 U.S. 369 (2024) (No. 22-1219).

37. *See, e.g.,* WILLIAM ESKRIDGE, JR. AND JOHN FEREJOHN, A REPUBLIC OF STATUTES (2010).

about the required procedures at the adjudicatory level.[38] Instead, the source of law for informal procedure will largely be substantive or organic statutes; that is, it will be purpose-built procedures, like those contained in the Immigration and Nationality Act, that will dictate agency procedure. As a result, those procedures may be unique — and uniqueness might give rise to claims of exceptionalism.

B. *Immigration Exceptionalism: The Dominant Narrative*

Immigration law, in particular, has often been defined by its perceived exceptionalism.[39] Immigration exceptionalism, however, is not just a function of its relationship within administrative law, but rather that the field is often defined by its uneasy place at the intersection of constitutional law, criminal law, federalism, and foreign relations (in addition to administrative law). And the precise contours of this exceptionalism might look slightly different depending on the context where it arises.

Immigration exceptionalism is commonly understood as relying on a few interlocking doctrinal moves. The first is plenary power, the powerful and pernicious idea that reviewing federal courts will largely defer to the political branches when setting the outer bounds of what is acceptable within immigration law. In applying plenary power, the Court has generally understood those boundaries to be largely divorced from the constitutional limits applicable in other domains.[40] Indeed, Congress and the Executive's plenary power is at its height at the border and in determining entry requirements. But the "entry fiction" allows for parole into the country while status is adjudicated, meaning that noncitizens physically within the country may still be considered at the border for the purposes of determining which rights apply.

The result is broad language in Court decisions — beginning in the Chinese Exclusion Era, up through the Cold War, and through the present — excluding noncitizens from important protections under constitutional law and, more importantly, access to meaningful judicial review, should Congress decide to preclude it. The Court has held that "[i]n the exercise of

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38. Emily S. Bremer, *supra* note 5, at 1352.

39. *See, e.g.*, Rubenstein & Gulasekaram, *supra* note 4.

40. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 769–770 (1972) (upholding attorney general's refusal to allow scholar into United States as a "valid[] exercise [of] the plenary power" despite First Amendment challenge from U.S. citizen scholars and student who wanted to hear him speak); U.S. *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.") (internal citations omitted); Trump v. Hawaii, 585 U.S. 667, 702–03 (2018) ("For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.") (internal citations omitted). The scholarship on plenary power is extensive. *See, e.g.*, Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77 (2017); Michael Kagan, *Plenary Power is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21 (2015); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (1984).

its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[41] Or "[w]hatever the procedure authorized by Congress is, it is due process as far as an [noncitizen] denied entry is concerned."[42] In other words, the political branches have the ability to draw lines that would violate the normal operation of equal protection or due process, and, relatedly, the federal courts will have a limited role in policing these lines.[43]

We might understand immigration exceptionalism as both broad and specific. David S. Rubenstein and Pratheepan Gulasekaram have argued, for instance, that scholars have developed a literature about immigration exceptionalism within particular contexts, which they label as the "disjunctive approach."[44] They argue, however, that "the Court's exceptional immigration doctrines are conceptually and pragmatically intertwined," in that "any of [those exceptionalism doctrines within rights, federalism, or separation of powers] can influence answers to the others."[45]

Even so, it is still useful to try to understand how immigration exceptionalism has been understood within administrative law in both weaker and stronger claims.[46] The weaker claims of exceptionalism consider the ways in which immigration law and adjudication exists in an uneasy relationship with administrative law values, documenting ways in which immigration has been, or arguing it should be, excluded from the normal operation of particular doctrines of administrative law. Numerous scholars, for instance, argued that immigration should be excluded from the *Chevron* regime.[47] These scholars took an exceptional approach to immigration law at a time when the normal operation of administrative law would have privileged agency interpretations of statutes. But in the *Chevron* era, scholars have looked to the particular institutional concerns and setup of immigration adjudication, as well as the important interests that noncitizens have in those adjudications, to

41. Mathews v. Diaz, 426 U.S. 67, 79–80 (1976).

42. United States *ex rel*. Knauff, 338 U.S. at 544 (internal citation omitted).

43. The scope of such a review has been contested, of course. Hiroshi Motomura has argued, for instance, that courts have not necessarily placed *no limits* on the political branches, but rather have operated through subconstitutional procedural substitutes to protect or enact what he labeled "phantom constitutional norms." *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation,* 100 YALE L. J. 545, 548–550 (1990).

44. Rubenstein & Gulasekaram, *supra* note 4, at 588–89.

45. *Id*. at 588.

46. There are some notable exceptions. *See generally* Aadhithi Padmanabhan, *Abandoning Deportation Adjudication,* 77 STAN. L. REV. 1557 (2025) (describing *inter alia* hard look review as a quintessential part of judicial review of immigration adjudication); Kim, *supra* note 40 (arguing that judicial review in immigration is better understood under a non-delegation theory rather than an individual rights theory).

47. *See, e.g*., Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against* Chevron *Deference in Immigration Adjudication,* 70 DUKE L. J. 1197, 1201–03 (2021); Richard Frankel, *Deporting* Chevron*: Why the Attorney General's Immigration Decisions Should Not Receive* Chevron *Deference*, 54 U.C. DAVIS L. REV. 547, 554 (2020); Michael Kagan, Chevron's *Liberty Exception*, 104 IOWA L. REV. 491, 494–96 (2019).

emphasize the role Article III courts might play in overseeing such a flawed adjudicatory system.[48]

Other scholars note the ways in which immigration adjudication functions largely without key administrative law values. Shalini Bhargava Ray, for instance, notes that there is a range of "shadow" sanctions within immigration law and that those sanctions fail basic administrative law norms of notice, transparency, and reason-giving.[49] Ray notes that those protections cannot come from the APA, given the INA's displacement, but instead from prudential reasons for implementing reform.[50] And in doing so, immigration law can learn from other areas of administrative law, even absent formal APA or constitutional constraints or commands to do so.[51]

But the strongest, and perhaps leading view, comes from Professor Jill E. Family.[52] Professor Family understands immigration law as almost wholly outside the normal operation of administrative law. Tracing some of the history of immigration adjudication, she argues that the immigration courts were not part of the founding era of modern administrative law and were unmentioned in Congress with the passage of the Administrative Procedure Act.[53] After the Supreme Court held in *Wong Yang Sung* that immigration proceedings must follow the APA's separation of functions protections, Congress clarified its intent to exclude immigration adjudications from the APA's terms and eliminated those protections in an appropriations rider.[54] Professor Family thus focuses on the role of broader administrative law norms and doctrines at the adjudication level, and understands immigration law as wholly outside administrative law. Family argues that the immigration court system Congress has set up is a dysfunctional system that exists outside the APA's procedural requirements and thus provides fewer protections than the APA might provide.[55] Family sees these protections as particularly

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48. As should be clear as the piece progresses, these arguments rhyme with my emphasis on judicial review but arrive at that from a different direction. We agree that judicial review is important—but at the time, administrative deference was the dominant doctrine, and so scholars emphasized the particularities of immigration adjudication to try to exempt it from that dominant doctrine. Today, after *Loper Bright*, one need not say that immigration is to be *exempted* from normal administrative law, although the particularities and pathologies highlighted in the works above continue to strengthen the argument for robust judicial review.

49. *See* Shalini Bhargava Ray, *Immigration Law's Arbitrariness Problem*, 121 COLUM L. REV. 2049, 2091–92 (2021).

50. *Id.*

51. *Id.* at 2096. Ray suggests that immigration law is currently exceptional but would benefit from drawing from other administrative settings: "As immigration law comes to be appreciated as administrative law, it makes sense to learn how other administrative agencies navigate the tradeoffs between formality and informality, or rules and discretion, and what kind of procedures agencies devise beyond those strictly required by the Constitution or the APA (and for what reasons)." *Id.*

52. *See, e.g.*, Jill E. Family, *A Lack of Uniformity, Compounded, in Immigration Law*, 98 NOTRE DAME L. REV. 2115 (2023); Jill E. Family, *Immigration Law Exceptionalism and the Administrative Procedure Act*, 27 PUB. AFFS. Q. 209 (2023).

53. *See A Lack of Uniformity*, *supra* note 52, at 2117 (arguing APA "was designed to address concerns over economic regulation" and "immigration regulation was not top of mind").

54. Supplemental Appropriation Act of 1951, ch. 1052, 64 Stat. 1044, 1048 (1951).

55. *Immigration Law Exceptionalism*, *supra* note 52 at 209. Immigration courts are "out of the ordinary" because they are outside the APA, Family writes, and "[t]he recognition that the APA dismisses

important, given that there is a "double void, with fewer constitutional protections" available as a result of plenary power, alongside the lack of protection derived from the APA and administrative law more generally.[56]

There is little doubt that immigration adjudication is often treated separately within the administrative law literature and court decisions. But one might trouble the narrative, however, that immigration law has long been viewed as exceptional within administrative law. The reality, at least, leading up to the advent of the Roberts Court and its anti-administrativist turn,[57] was much more complex. It is to tracing out some of this alternative reading that I now turn.

C. *Unsettling The Dominant Narrative and Revisiting Administrative Law's Role*

As addressed above, the dominant narrative places immigration law largely outside the normal operation of administrative law. In its retelling, the dominant narrative often begins with the early plenary power cases and the Chinese Exclusion era.[58] It then follows the Court's invocation of plenary power in defining broader exceptionalism during the Cold War and into the present day.[59]

In recent pathbreaking work, however, Adam Cox has challenged this received wisdom.[60] He argues that the early plenary power cases did not entail exceptionalism as we currently understand it. Rather, the cases dealt with the normal operation of public law for the time period. At the time the key plenary power cases were decided, according to Cox, the process of any individual's legal claims turned on whether those claims were classified as a *private right* or merely a *privilege*. Fewer claims qualified as private rights, but if they did, the doctrine triggered maximum procedural protections: a trial in an actual court. Legal claims that were merely public rights, however, could be adjudicated by Executive branch officials.

The plenary power cases, therefore, were not about immigration's exceptionalism, but a more mundane constitutional question about whether or not noncitizens could claim a vested *private right*. For the most part, the answer was no, and thus it followed that noncitizens did not have a constitutional right to federal court adjudication for fact-finding and trial. But that did not mean that immigration was exceptional, only that, like other public rights, it could be tasked to administrative adjudication in the first instance.

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uniformity in adjudication should not distract from the need for a conversation about how the lack of uniformity can lead to dysfunction, or that a lack of uniformity may necessitate administrative law guardrails tailored to individual adjudication systems." *Id*.

56. *Id*.

57. *See infra* Part II.

58. *See, e.g*., Rubenstein & Gulasekaram, *supra* note 4, at 595 (linking exceptionalism and plenary power to immigration exceptionalism).

59. *See, e.g*., U.S. *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950); Shaughnessy v. U.S. *ex rel*. Mezei, 345 U.S. 206 (1953).

60. Adam B. Cox, *The Invention of Immigration Exceptionalism*, 134 YALE L. J. 329 (2024).

Modern administrative law began to take shape over time, and with it came the advent of the *appellate model*.[61] The Court began to expand the category of claims that triggered due process protections, but watered down what those protections meant. Claims subjected to administrative treatment still were not *private* rights, with the attendant need for full trials and a jury in a federal district court. But due process increasingly required procedural safeguards, and some access to review by a federal court. For most administrative proceedings, judicial review would take the form of *appellate* review of the agency's proceedings, on the record as it existed before the agency, rather than a trial de novo in district court. Thus was born the appellate model, which allowed many claims to be tasked to administrative adjudication in the first instance, but required a reviewing court that heard appeals from that administrative adjudication. Immigration seems to have followed this path as well.

As Cox lays out, even commentators prior to the APA regularly included immigration within the broader sweep of this revolution.[62] The two main treatises on immigration adjudication, published at the height of the plenary power era, both include courts in their understandings of the administrative scheme. Writing in 1912, Clement L. Bouvé argued that "the right of foreigners to enter or remain cannot be adequately considered as a purely administrative question," nor strictly an application of "the accepted precepts of international law."[63] Rather, it was a "distinct and important branch of our municipal law."[64] But as far as availability of judicial review, even for exclusion cases, Bouvé highlighted decisions maintaining judicial review that would look relatively familiar today: examining whether individual officers were acting within their statutory authority, and reviewing questions of law, via habeas petitions, even if agency fact-finding and discretionary decisions merited deference.[65] Likewise, William C. Van Vleck's 1931 treatise, *The Administrative Control of Aliens: A Study of Administrative Law and Procedure*, noted that statutes seemed to say that administrative decisions were final.[66] But "[c]ourt review has, however, not been lacking," and that "[j]udicial review extends to . . . exclusion."[67] In other words, contrary to what one might expect given the plenary power caselaw, both authors saw a robust place for judicial review within immigration's administrative law scheme.

In 1938, Henry M. Hart Jr. — still a few decades removed from writing his seminal *Dialectic*[68] and casebook — was commissioned with two others to

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61. Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 940 (2011).

62. *See, e.g.*, Cox, *supra* note 60 at 396, 408.

63. CLEMENT L. BOUVÉ, A TREATISE ON THE LAWS GOVERNING THE EXCLUSION AND EXPULSION OF ALIENS IN THE UNITED STATES v (1912).

64. *Id.*

65. *Id.* at 484–85.

66. *See, e.g.*, WILLIAM C. VAN VLECK, THE ADMINISTRATIVE CONTROL OF ALIENS: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE 149–50 (1932).

67. *Id.* at 149.

68. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

study immigration adjudication for what was then the Department of Labor's Immigration and Naturalization Service.[69] The resulting report, published in 1940, documented the form and setup of both exclusion and deportation hearings as they existed at the time. But importantly, the report appeared to take as given the idea that immigration was normal administrative law. It repeatedly cited to the *Morgan* cases, for instance, to argue that immigration adjudication would have to be reformed in line with developing administrative law doctrine. That included procedural protections like the separation of functions at issue in the *Morgan* cases,[70] and that such procedural protections were to be judicially enforceable.[71] For the standards of judicial review, the report writers primarily drew on broader administrative law rather than immigration-specific doctrines.[72] The report also included numerous suggestions for reforms to adjudicatory procedure that would mirror the various reforms proposed by the Attorney General's Committee several years later and eventually enacted into the Administrative Procedure Act.[73]

Indeed, Henry Hart would be the linchpin between immigration and the Attorney General's Committee, which submitted their initial report to the attorney general in 1941. The Committee was formed, in part, to stall efforts by New-Deal Era skeptics in Congress to curtail administrative power.[74] It undertook an extensive study of the everyday practice of various agencies to inform a series of recommendations that would later inform the Administrative Procedure Act, passed after the conclusion of the war. The Committee included the Immigration and Naturalization Service as one of the objects of its study, but its staff did not undertake a new study of the agency.[75] There was no need. Immigration adjudication had only transferred to the attorney general in 1940, in part over a concern over wartime security and in part a reaction to Francis

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69. *See* U.S. Dep't of Labor, Committee on Administrative Procedure, Immigration and Naturalization Service (1940) [hereinafter *Labor INS Report*]. The report was written by Marshall E. Dimock, Second Assistant Secretary of Labor, Professor John McIntire of George Washington University, and Hart.

70. *See, e.g.*, Labor INS Report, *supra* note 69, at 109–114 (citing Morgan v. U.S., 298 U.S. 468 (1936) and Morgan v. U.S., 304 U.S. 1 (1938)). The *Morgan* cases were perhaps sleeper big-ticket opinions within terms packed full of other administrative law landmarks. *See* Daniel Ernst, Morgan *and the New Dealers,* 20 J. POL'Y HIST. 447, 448 (2008). But the opinions and the limitations on who could preside and decide cases were immensely influential in administrative adjudication at a time of administrative law churn. *Id.* at 449–50. And the two opinions fixed many key points of the ways in which agencies would have to structure adjudications to survive judicial review, including adversarial proceedings with notice and a right to be heard. *Id.*

71. Labor INS Report, *supra* note 69, at 120–21 (describing procedural safeguards like separation of functions as "judicially enforceable standards of fairness" in that "courts will enforce, whenever they are violated, by setting aside the administrative decision irrespective of its substantive correctness").

72. That included questions of law, although the report makes note that interpretations of immigration law by the agency generally would receive deference, *id.* at 121, as well as assuring that any fact-finding was supported in the record. *Id.* at 121–22.

73. Labor INS Report, *supra* note 69, at 153–159.

74. *See* Joanna Grisinger, *Law in Action: The Attorney General's Committee on Administrative Procedure*, 20 J. POL'Y HIST. 379, 380 (2008).

75. ATT'Y GEN.'S COMM. ON ADMIN. PROCEDURE, FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE 3, 4 & n.2 (1941). The objects of study were agencies that "substantially affect persons outside the Government through the making of rules and regulations or the adjudication of rights." *Id.* at 3.

Perkins's controversial tenure at the Department of Labor.[76] That means that during the key period of study for the Committee — from 1939 until 1941 — immigration was in transition. Nonetheless, the Committee noted that one of its members had only just completed an "exhaustive analysis" (by Hart and his two compatriots) on which the Committee could rely.[77]

Following the passage of the APA, the Immigration and Naturalization Service attempted to argue that it did not apply to immigration. But the Court incorporated immigration courts into the broader administrative law fold with *Wong Yang Sung v. McGrath*.[78] There, the Supreme Court held that the immigration adjudication procedures then in place violated the APA's separation of functions provisions.

Rather than provide for such isolated adjudicators, Congress instead overrode the decision and moved immigration adjudication outside the provisions of the APA, at least for the separation of functions. The Court ultimately upheld that move in *Marcello v. Bonds*.[79] *Wong Yang Sung*, however, still remains one of the leading citations in caselaw and in administrative law casebooks as blackletter administrative doctrine.

Immigration exceptionalism was becoming useful with the advent of the Cold War. And so, alongside *Wong Yang Sung,* the Court issued some of its broadest pronouncements on the entry fiction, with *Knauff* in 1950[80] and *Mezei* in 1953.[81] According to Cox, the Court overread the history of the early plenary power cases and allowed for plenary power to undermine the normal operation of the due process clause for administrative proceedings for the first time. And many of these cases came with some of the broadest language about the power of the political branches to set the terms and procedures of immigration adjudication.[82]

Yet even at this point, immigration courts were not fully adrift from the normal functioning of administrative law. Even after *Knauff* and *Mezei,* the Court continued to apply the APA's judicial review provisions to deportation hearings.[83] Likewise, in 1954, the Court chose to articulate what has become known as the *Accardi* principle.[84] The principle holds that agencies must comply with their own policies and procedures, even when those procedures are not statutorily or constitutionally required — a fundamental and almost

76. *See generally* ALISON PECK, THE ACCIDENTAL HISTORY OF THE U.S. IMMIGRATION COURTS: WAR, FEAR, AND THE ROOTS OF DYSFUNCTION (2022). *See also* FRANCIS PERKINS, THE ROOSEVELT I KNEW 318–19, 360–61 (1946) (describing efforts to impeach Perkins related to the Harry Bridges case and the shift from Labor to Justice for the INS during wartime).

77. ATT'Y GEN.'S COMM. ON ADMIN. PROCEDURE, *supra* note 75, at 4 n.2 (1941).

78. Wong Yang Sung v. McGrath, 339 U.S. 33, 52–53 (1950).

79. 349 U.S. 302 (1955).

80. United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537 (1950).

81. Shaughnessy v. United States *ex rel*. Mezei, 345 U.S. 206 (1953).

82. *Id*.

83. Shaughnessy v. Pedreiro, 349 U.S. 48 (1955).

84. United States *ex rel*. Accardi v. Shaughnessy, 347 U.S. 260 (1954); *see also* Thomas W. Merrill, *The* Accardi *Principle*, 74 GEO. WASH. L. REV. 569 (2006).

universally accepted principle of administrative law, but first articulated in judicial review of a removal proceeding.

These cases have continued to have salience in the modern administrative state, and they help demonstrate that immigration adjudication was expressly part of the center of administrative law. This history suggests that immigration law was largely considered administrative law for procedural purposes and judicial review, even if it had some unique features in its substantive operation. But many areas of law are *different* without needing to be considered *exceptional*.

At the very least, this history should make us pause before adopting a vision of immigration law as truly *exceptional* and fully outside of administrative law. Yet misconceptions about immigration exceptionalism — and its imagined historical pedigree, certainly persist. It is why, for instance, Justice Alito could assert that the Court had a "century-old rule" preventing access to due process for noncitizens seeking entry.[85] And this Court has leaned into immigration law's perceived exceptionalism in its fullest forms. This includes the developments detailed below in *Thuraissigiam,* but also for equal protection and First Amendment norms,[86] and more recently by reinforcing the doctrine of consular non-reviewability to prevent citizens from claiming a fundamental liberty interest in their marriages to noncitizen spouses.[87]

We must, therefore, turn our attention fully to the Roberts Court.

II. IMMIGRATION ADJUDICATION WITHIN THE ROBERTS COURT'S BROADER ADMINISTRATIVE LAW PROJECT

There can be little doubt that we are living through a period of upheaval in administrative law and judicial review of agency action.[88] Across multiple agencies and in multiple doctrinal areas, the Supreme Court has chipped away at the administrative state and its power, reaching its latest high-water mark with last term's overturning of *Chevron* and what had been a forty-year project of deference to agency interpretations of statutory authority.

The Roberts Court's administrative law project is largely one of accretion of power, with the Court accreting power to itself and the lower federal courts at the expense of agencies' policymaking control. To the extent we can understand the shifts in administrative doctrine as a concerted project with concrete ends, it seems aimed at unsettling the broader post New Deal-era compromises embodied in the APA.[89] Those compromises sought to bring uniformity to administrative practice and procedure across multiple different

85. Dep't of Homeland Sec. v. Thuraissigiam, 591 U.S. 103, 139 (2020).
86. Trump v. Hawaii, 585 U.S. 667 (2018).
87. Department of State v. Munoz, 602 U.S. 899 (2024).
88. *See, e.g.*, Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 2–8 (2017).
89. *Cf.* Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L. J. 1769, 1771, 1785 (2023).

settings, reducing exceptionalism while allowing administrative agencies to maintain significant policymaking control.

Immigration law and immigration adjudication are woven throughout this Court's administrative law jurisprudence. Immigration law is a frequent conversation partner in opinions arising in other administrative contexts. In this role, immigration is often deployed to support a skepticism of the administrative state, to justify undermining agency policymaking control, and to encourage an enhanced role for judicial review. In still other opinions, immigration law plays foil, serving as the marker for the purported outer edge of doctrinal change. And within the Court's *immigration adjudication* decisions, administrative law doctrines often lose their salience, and administrative law does much less work protecting litigants from agency power.

A. *The Roberts Court's Administrative Law Project and the Accretion of Power to the Courts*

I begin by sketching the Roberts Court's administrative law project, emphasizing judicial review and the federal courts' role before turning to immigration adjudication's place within that project. Here, I highlight three areas: deference regimes, agency structure and design, and the Court's anti-novelty decisions.

1. *Deference Regimes from Skidmore to Chevron to Loper Bright*

Administrative law scholars have long argued that some version of deference is inevitable or necessary.[90] The Court's first attempt, *Skidmore* deference, emphasized the *persuasive* nature of the agency's chosen path: agencies' views "constitute a body of experience and informed judgment" that could guide courts. [91] The weight to be given would "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[92] In other words, the agency interpretation was just one of the inputs into the statutory analysis undertaken by courts.

Chevron deference replaced this standard with its now familiar two-step test.[93] If the statutory authority was clear, courts operating under *Chevron*

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90. *See, e.g.*, Nicholas Bednar & Kristin E. Hickman, Chevron's *Inevitability*, 85 GEO. WASH. L. REV. 1392, 1377–78 (2017).

91. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

92. *Id.*

93. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984). *Chevron's* methodology, at least as announced in the decision itself, seemed deceptively simple. First, a court reviewing an agency's interpretation of a statute must decide if Congress's intent was clear. If it were, then the court must give effect to the clear Congressional intent and greenlight the agency's interpretation only if it was in line with that intent. But if Congress's intent was unclear and there was an ambiguity or a gap that the agency was filling, then a reviewing court should not displace the agency's judgment unless the agency's interpretation was unreasonable. Scholars have not always agreed, however, about whether *Chevron* was *actually* a two-step test. *See, e.g.*, Daniel J. Hemel & Aaron L. Nielsen, Chevron *Step One-And-A-Half*, 84 U. CHI. L. REV. 757 (2017); Matthew C. Stephenson & Adrian Vermeule,

deference should implement that clear meaning; if there was ambiguity or a gap in the statute, however, courts should defer to agency interpretations so long as they were reasonable.[94] In other words, *Chevron* deference allowed for a range of agency action, permissible and likely to be upheld, so long as the action was within that reasonable range.[95]

The deference due, of course, is in part an understanding of the comparative competence of agencies versus courts. *Chevron* and the subsequent decisions that supplemented the *Skidmore* justification for deference focused on agencies' institutional competencies when compared to courts.[96] First, as in *Skidmore*, the Court recognized that agencies had relevant expertise that might lead them to the correct result. That expertise meant that the agencies were better steeped in the lived realities of whatever problem needed to be solved and, thus, better able to craft an appropriate solution. Second, agencies were more democratically accountable to the public. Agencies were thus the best suited to resolve the issues that Congress had not resolved, and if they got it wrong, the public could pressure the Executive Branch to change course. Finally, the *Chevron* majority added a new justification for deference: the implied delegation theory.[97] By granting an agency rulemaking authority, and then passing statutes with a gap or ambiguity within the agency's remit, Congress was impliedly delegating authority to the agency to interpret the statutory text. It was therefore appropriate for courts to defer to the agency in that interpretation, as doing so was part of the implied will of Congress, at least where Congress intended those decisions to have the force of law.[98]

Chevron, of course, remained controversial. Over time, the Supreme Court usually chose to resolve challenges to agency statutory interpretation at Step 1 rather than finding an ambiguity or gap,[99] although lower courts continued to apply the framework.[100] And in the lower courts, agency "win rates" varied depending on the subject matter and the agency advancing the interpretation,

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Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2013); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006).

94. *Chevron*, 467 U.S. at 842–43.

95. *Cf.* Kagan, *supra* note 48, at 511.

96. Kristin E. Hickman & Aaron Nielson, *Narrowing* Chevron's *Domain*, 70 DUKE L. J. 931, 953–54 (2021).

97. 467 U.S. at 843–44.

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

99. *Cf.* Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 406–07 (2024) ("This Court, for its part, has not deferred to an agency interpretation under Chevron since 2016."); *see also* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L. J. 969, 981–82 (1992). Smaller-scale studies appeared to show that agency win-rates were relatively unchanged whether the reviewing court applied *Chevron* or *Skidmore*. *See, e.g.*, William N. Eskridge & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to Hamdan,* 96 GEO. L. J. 1084, 1099 (2008) (noting an agency win rate of 76.2 per cent for *Chevron* and 73.5 per cent for *Skidmore*); Merrill, *supra* at 984.

100. In a large-scale study, Kent Barnett and Christopher Walker found that agencies won more often under *Chevron* than other standards of review, lower courts regularly reached Step 2, and the agencies almost always won if the court did so, and that the lower courts were more likely to uphold interpretations adopted through formal adjudication rather than notice and comment rulemaking. Kent Barnett & Christopher Walker, Chevron *in the Circuit Courts*, 116 MICH L. REV 1, 6–9 (2017).

suggesting that the lower courts were more skeptical of some agencies than others.[101] Yet *Chevron*'s end ultimately came not with a bang, but with a question of who should pay for monitors for the Atlantic herring fisheries.[102]

Chief Justice Roberts began his *Loper Bright* opinion by grounding it in an understanding of Article III and the judicial function that emphasized courts, rather than agencies, as the primary authorities on questions of law.[103] In his retelling, courts maintained that role for most of the country's history, even through the rapid expansion of the administrative state during the New Deal.[104] Agencies might help courts figure out what the law meant, but their interpretations' persuasiveness was based on their contemporality with the statute's enactment, consistency in interpretation over time, or any specialized expertise the agency possessed.[105] This *status quo* also apparently found its way into the APA, which merely "codifie[d] for agency cases the unremarkable yet elemental proposition reflected by judicial practice dating back to *Marbury:* that courts decide legal questions by applying their own judgment."[106] As a result, *Chevron* deference could not be harmonized with the APA.[107] Courts must, according to the majority, resolve statutory interpretation questions to the best of their ability, even technical ones, without any binding effect given to agency interpretations.[108]

2. *The Court's Role in Policing Agency Structure*

Just as the Court was gutting *Chevron* and administrative authority to interpret organic and substantive statutes, it was also turning its attention to the agency adjudicatory structures created by those statutes. It has reaffirmed its commitment to policing the line between public rights, where adjudication could be tasked to administrative bodies and non-Article III courts, and private rights, where it could not. But when the Court deems administrative adjudication appropriate, it has largely sought to undermine attempts at making that adjudication more court-like, or at least ensure adjudicatory independence.

In *SEC v. Jarkesy*, for instance, a majority of the Court determined that allowing the Securities and Exchange Commission to enforce the anti-fraud provisions of the Dodd-Frank Act in an administrative proceeding violated the Seventh Amendment.[109] Those provisions were broader than common law fraud and involved the government as a party rather than two private parties. But the Court, in a majority opinion written by Chief Justice Roberts,

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101. *Id.* at 7–8.
102. *See Loper Bright*, 603 U.S. at 380–84.
103. *Id.* at 384–86.
104. *Id.* at 387–89. During the New Deal, Roberts wrote, agency *factual* determinations were binding, but not their resolutions as to questions of law. *See id.*
105. *Id.* at 388–390.
106. *Id.* at 391–92.
107. *Id.* at 398–401.
108. *Id.* at 401–03.
109. Sec. & Exch. Comm'n v. Jarkesy, 603 U.S 109 (2024).

focused on the administrative remedy. The civil fines, Roberts wrote, were the type of remedy intended to deter fraudulent conduct, and therefore, they were the type of monetary penalty traditionally enforced at common law.[110] The fraud provisions were also close enough to the common law fraud provisions existing at the Founding, and they did not fit into what the Court saw as a limited public rights exception.[111] The SEC, therefore, could not choose to enforce the fraud provisions in administrative proceedings, rather than in federal court, because the Seventh Amendment required that Jarkesy be allowed to proceed before a jury.

In a concurring decision, Justice Gorsuch, writing for himself and Justice Thomas, went even further. The Seventh Amendment was meant to be read "together with Article III and the Due Process Clause of the Fifth Amendment to limit" government intrusion on life, liberty, or property.[112] The shift to an administrative tribunal robbed Jarkesy of "many of the procedural protections our courts supply."[113] For Gorsuch, Jarkesy's case was the reason the Framers adopted Article III: to put in place the "judicial power" with "life-tenured, salary-protected judges."[114] Article III, the Fifth Amendment's due process clause and the Seventh Amendment's jury right were intended to restrict Congress's authority and preserve federal courts as the chief arbitrators of what process is due.

In reaffirming the applicability of the Seventh Amendment for so-called private rights, the Court thus emphasized the role of Article III courts in adjudicating certain disputes. But the courts' role was not boundless. The Court refused to "definitively" explain the distinction between public and private rights, but it placed immigration clearly on the public side of the line, presumably due to plenary power.[115] And just in case the point was too subtle, Justice Gorsuch emphasized it further in his concurrence: public rights were a "narrow class defined and limited by history," here rightly limited by the majority to "collection of revenue, customs enforcement, immigration, and public benefits."[116]

The renewed focus on the public/private rights distinction, therefore, is likely to undermine enforcement efforts in areas traditionally disliked by the conservative legal movement: financial regulation, for instance, or the environment.[117] But noncitizens and other low-income or marginalized groups that rely on court-like (or court-light) mass adjudications will miss out on the revolution.

Perhaps the public/private rights distinction would be less meaningful with appropriate protections and guardrails for those claimants, beneficiaries, and

110. *Id.* at 122–27.
111. *See id.* at 127–132.
112. *Id.* at 141 (Gorsuch, J., concurring).
113. *Id.* at 143 (Gorsuch, J., concurring).
114. *Id.* at 150 (Gorsuch, J., concurring).
115. *Id.* at 131.
116. *Id.* at 151–53 (Gorsuch, J. concurring).
117. Indeed, in the first major application of *Jarkesy,* the Third Circuit has held that *employers* have the right to proceed in court for labor violations. *See* Sun Valley Orchards, LLC v. U.S. Dep't of Lab., 148 F.4th 121 (3d Cir. 2025).

respondents forced into administrative adjudication. Yet the Roberts Court has spent the last ten years increasing political control and diminishing agency and adjudicatory independence.

The adjudication side of the administrative state has various structures for who does the adjudication.[118] Congress, when creating these structures, has largely sought to insulate adjudication from political control in two ways. The first is through hiring and appointment: requiring agencies to hire from a generic pool of administrative law judges ("ALJs"), for instance, or requiring adjudicators to be appointed by agency personnel other than the politically accountable agency head.[119] A second method is through removal protections: ensuring a term of a set number of years,[120] for instance, or allowing removal only for "good cause" that can be challenged in the Merits System Protection Board.[121]

In a series of decisions, the Court has undermined protections for ALJs, adjudicators, and other officials throughout the administrative state.[122] *Arthrex*, which addressed "Administrative Patent Judges" on the Patent Trial and Appeal Board ("PTAB"),[123] is instructive here. Under the Appointments Clause, government employees can either be inferior officers or principal officers. PTAB judges were appointed as inferior officers because they were appointed by the Secretary of Commerce without Senate confirmation. But the Board is "the last stop for review within the Executive Branch," without review by the director of the Patent Office. As a result, the Court held that the PTAB's judges were doing the work of principal officers, in that they exercised executive power vested in the President.[124] But since they were not appointed as principal officers, and "[g]iven the insulation of PTAB decisions from any executive review, the President can neither oversee the PTAB himself nor attribute the Board's failings to those whom he can oversee."[125] As a result, the ALJs "exercise power that conflicts with the design of the Appointments Clause to preserve political accountability," and thus violated the separation of powers.[126]

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118. *See* Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1654–57 (2016).

119. 5 U.S.C. § 5372; 5 C.F.R. § 930.201.

120. Consider, for instance, the initial structure of the Consumer Financial Protection Board, or CFPB, which was led by a single director appointed for a fixed term. *See* Seila Law LLC v. Consumer Financial Protection Bureau, 591 U.S. 197, 207 (2020).

121. *See* 5 U.S.C. § 7521(a).

122. *See, e.g.*, United States v. Arthrex, Inc., 594 U.S. 1 (2021) (the administrative patent judges of the Patent Trial and Appeal Board); *Seila Law LLC*, 591 U.S. at 197 (director of the CFPB); Lucia v. Sec. & Exch. Comm'n, 585 U.S. 237 (2018) (Security and Exchange Commission administrative law judges); *see also* Freytag v. Comm'r, 501 U.S. 868 (1991) (special tax judges). Notably, the Fifth Circuit had reached a similar result as to the SEC in *Jarkesy,* as an alternative holding to the Seventh Amendment argument the Supreme Court eventually upheld. *See* Sec. & Exch. Comm'n v. Jarkesy, 603 U.S. 109, 120 (describing proceedings below that had "found that the insulation of the SEC ALJs from executive supervision with two layers of for-cause removal protections violated the separation of powers").

123. *Arthrex, Inc*., 594 U.S. at 1.

124. *Id*. at 17.

125. *Id*. (internal quotation marks omitted).

126. *Id*. (internal quotation marks omitted).

As Adam B. Cox and Emma Kaufman have pointed out, these separation of powers decisions are grounded in unitary executive theory.[127] They have "begun to unravel the New Deal settlement" that turned over large parts of American life to regulation with an understanding that agency adjudication would be shielded from political control.[128] Under *Arthrex*, according to Cox and Kaufman, political control of adjudication may be constitutionally required, and the "Constitution is satisfied so long as a politician can either fire *or* overturn an administrative judge."[129] The traditional forms of insulation central to adjudicative fairness may now be unconstitutional.[130]

For our purposes here, it also represents a powerful role for the federal courts — with the risk of creating chaos throughout the regulatory infrastructure. This role is marked by both a formalism with regard to the initial violation and a pragmatism with regard to remedy, both of which increase the power of the federal courts. As to violation, the Court is in effect placing itself as the ultimate arbitrator of agency design. In exercising this power, the Court has largely rejected congressional attempts to shield agency decision-making and increase independence, taking a formalist approach to the question that almost always rejects even modest attempts at creative legislative problem-solving. The formalist approach to whether there *is* a separation of powers issue yields way, however, to a pragmatic one with regard to remedy. The Court appears to recognize that a strict adherence to its own holdings would cause chaos; as a result, the majority in these cases often takes it upon themselves to rewrite the statutory scheme in order to hide the harshest effects and ratify decisions the agencies previously made.

3. *Anti-Novelty and Undermining the Congress-Agency Relationship*

In addition to policing agency structure, the Court has also increasingly begun to review Congress's various delegations to administrative agencies. First, various justices have raised questions about whether or not there should be new life in the old non-delegation doctrine, i.e., whether Congress *can* delegate a given problem for an agency to resolve in the first place.[131] Second, the major questions doctrine examines whether Congress *has* properly delegated to an agency, and with the proper specificity.[132]

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127. Cox & Kaufman, *supra* note 89, at 1779. Unitary executive theory would require presidential control over administrative agencies and limit Congress's power to constrain the executive's ability to structure the appointment and removal of administrative officials, including adjudicators. *Id.*

128. *Id.* at 1771, 1785.

129. *Id.* at 1783.

130. *Id.* at 1784.

131. *See, e.g.,* Gundy v. United States, 588 U.S. 128, 157–60 (2019) (Gorsuch, J. dissenting); *see also* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refin. Co. v. Ryan, 293 U.S. 388 (1935).

132. *See, e.g.*, Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023).

Scholars have questioned the provenance of both doctrines.[133] And, sitting alongside the structural considerations addressed above, the concern is that courts will continue to frustrate novel and creative problem-solving from Congress.[134] But even so, there has been robust use in the lower federal courts, especially the Fifth Circuit, to frustrate policy priorities and undermine agencies that movement conservatives disagree with.[135]

But while the precise contours of both doctrines are in transition, their use seems to be in their eye-of-the-beholder quality. Take the major questions doctrine, for instance. How "major" does an issue have to be to trigger the doctrine — and how will we know if an individual issue is sufficiently major? How much precision is required in the statutory text? Or for non-delegation, how much delegation is permissible? Why can't Congress allow gap-filling from the agency, given the structural limitations and positioning of both agencies and Congress? The answers to each of the questions, at least at the moment, seem to be: it depends. And it is this quality that enables the courts to accrete power: it is a major question when it seems major to the Court, or it is an insufficient delegation in places where the Court does not want agencies to regulate.

Admittedly, it is possible that the major questions and non-delegation doctrines may have less direct impact on immigration *adjudication* rather than on rulemaking. But for our purposes here, however, it is just important to note that it is again the federal courts seizing power. It sets up the federal courts to be the ultimate reviewer of federal policymaking. Any matter of public importance will have to run through the courts. And the various tests provide enough flexibility to be implemented in an outcome-determinative way; judges and justices may be able to launder their policy preferences through the doctrines.

B. *Immigration Law Inside The Roberts Court's Administrative Law Project*

Immigration has been central to the Roberts' Court administrative law project. As I detail below, the Court regularly invokes immigration with these decisions, even in decisions that don't arise in immigration law settings, to justify its work. In these decisions, then, immigration law is often understood as within the normal operation of administrative law.

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133. *See, e.g.*, Deacon & Litman, *supra* note 132; Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021).

134. Leah Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1456 (2017); Note, *The Presumption Against Novelty in the Roberts Court's Separation-of-Powers Case Law*, 137 HARV. L. REV. 2034, 2045 (2024).

135. *See, e.g.*, Shane Pennington, *Fifth Circuit Review-Reviewed: Nondelegation Bonanza*, YALE J. REG.: NOTICE & COMMENT (Aug. 13, 2024), https://www.yalejreg.com/nc/fifth-circuit-review-reviewed-nondelegation-bonanza [https://perma.cc/MGR8-H9PH].

1. *Loper Bright and Chevron's Overturning*

The Supreme Court at first seemed skeptical of the role of *Chevron* in immigration adjudication.[136] But *Chevron's* application in immigration became even clearer over time,[137] and in the lower courts, at least, deference had an outsized effect. Setting aside the D.C. Circuit and the Federal Circuit, a large percentage of citing references to the *Chevron* framework in the federal reporters come from immigration cases.[138] Likewise, in a large-scale study of *Chevron* deference in the lower courts, Christopher Walker and Kent Barnett found that immigration decisions made up 30.6 percent of interpretations within their sample, more than double those on the environment, the next most popular subject.[139] It is possible these numbers demonstrate quantity rather than impact. That is: perhaps *Chevron* was doing more work, or more impactful work, say, in fewer cases, litigating major EPA rulemaking or public health guidelines. But deference was being invoked, repeatedly, in individual petitions for review of immigration court proceedings.

And for immigration law, the work *Chevron* deference was doing was important. These issues included the agency's interpretations of criminal grounds of removal: whether, for instance, an underlying offense constituted a "crime involving moral turpitude," or a "particularly serious crime."[140] Courts deferred to agency interpretations of the substantive criteria for asylum and other forms of relief.[141] Courts also deferred to the agency on procedural issues, like whether an immigration judge had to request corroboration during the hearing, when the noncitizen would have an opportunity to respond, or could merely note it as a reason for denying relief when ordering the noncitizen removed.[142]

By and large, immigration scholars were critical of *Chevron*'s application, both wholesale and to component parts of the immigration bureaucracy. Just as in broader critiques of *Chevron*, these arguments often focused on either type of agency action or specific substantive areas. As to the former category, Shoba Wadhia and Christopher Walker argued that immigration adjudication

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136. INS v. Cardoza-Fonseca, 480 U.S. 421, 446–450 (1987). The Court declined to defer to the Board of Immigration Appeals in *Cardoza-Fonseca*. Justice Stevens, who had also authored the main *Chevron* opinion, wrote that the statute was clear and there was no need to defer to the agency on a question of statutory construction. The Court did discuss *Chevron* extensively, however, and planted the seed that *Chevron* might come to control parts of judicial review of removal decisions. *See id.*

137. *See, e.g.*, INS v. Aguirre-Aguirre, 526 U.S. 415 (1999).

138. Just a quick back-of-the-envelope calculation: in the five years leading up to the day *Loper Bright* was decided, for instance, Westlaw reports that *Chevron* was cited 555 times in the courts of appeals. 377 referenced the "attorney general," 282 of those cases referenced "immigration," and 294 referenced "removal." These numbers are imprecise — the attorney general is sometimes a party in challenges to the sentencing guidelines, for instance, and it includes decisions in other subjects that describe "immigration" decisions in the body of the decision. But I include them to give some sense of scale.

139. Barnett & Walker, *supra* note 100, at 27–28.

140. *See, e.g.*, Kagan, *supra* note 47, at 527–28. It is important to note, however, that the Supreme Court's primary methodology for determining whether state convictions triggered immigration consequences — the categorical approach — is not an inquiry that generally triggered deference.

141. *See, e.g.*, Negusie v. Holder, 555 U.S. 511, 516 (2009).

142. Wei Sun v. Sessions, 883 F.3d 23 (2d Cir. 2018).

as a whole should be considered outside *Chevron*'s domain, although they conceded that perhaps rulemaking could remain within it.[143] Likewise, Richard Frankel argued immigration decisions rendered by the attorney general under his or her certification authority should be reviewed under *Skidmore* rather than *Chevron*.[144] On the substantive side, scholars have argued against *Chevron* deference in cases involving asylum and withholding of removal,[145] and for those decisions in immigration court involving liberty,[146] such as interpretations of the criminal grounds for removal[147] or the immigration detention provisions.[148]

Indeed, even while *Chevron* remained in place, the lower courts appeared more skeptical of the value of deference when reviewing removal orders. Walker and Barnett found that the Board of Immigration Appeals' win rate when invoking *Chevron* was fifteen percentage points lower than the win rate for all other agencies.[149] Removing immigration cases from their dataset also increased the rate at which *Chevron* was applied to formal adjudications overall.[150] Anecdotally, federal judges repeatedly expressed skepticism of the immigration court's competency and the quality of immigration court decision-making, especially after Ashcroft-era reforms "streamlined" Board decisions.[151] It is also possible that, in light of the large number of petitions for review, repeated exposure to immigration adjudication soured many federal judges' perceptions of immigration adjudication and thus made them less likely to defer. But yet lower courts continued to defer in many cases, even as *Chevron* appeared on the chopping block.[152]

At the Supreme Court, immigration was certainly part of the anti-*Chevron* imaginary in the lead-up to *Loper Bright*. In *Pereira v. Sessions*, for instance, the majority side-stepped the issue by finding that the statute was unambiguous. But Justice Kennedy noted that lower courts had shown "reflexive

143. Wadhia & Walker, *supra* note 47, at 1201–03.

144. Frankel, *supra* note 47, at 554.

145. *See, e.g.*, Maureen A. Sweeney, *Enforcing/protection: The Danger of* Chevron *in Refugee Act Cases*, 71 ADMIN. L. REV. 127, 133 (2019).

146. *See, e.g.*, Kagan, *supra* note 47, 494–96.

147. *See, e.g.*, Rebecca Sharpless, *Zone of Nondeference:* Chevron *and Deportation for a Crime*, 9 DREXEL L. REV. 323, 326 (2017).

148. *See, e.g.*, Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 150 (2015).

149. Barnett & Walker, *supra* note 100, at 36, 38.

150. *Id.* at 7, 39; *see also* Wadhia & Walker, *supra* note 47, at 1221.

151. *See, e.g.*, Bouras v. Holder, 779 F.3d 665, 681 (7th Cir. 2015) (Posner, J., dissenting) (noting immigration judge's decision as a "prime example of administrative incompetence"), *as amended* (Mar. 13, 2015), *reh'g en banc granted*, *opinion vacated* (Jul. 14, 2015); *see also* Elizabeth Cronin, *When the Deluge Hits and You Never Saw the Storm: Asylum Overload and the Second Circuit*, 59 ADMIN. L. REV. 547 (2007).

152. *See, e.g.*, Pereira v. Sessions, 585 U.S. 198 (2018) (Kennedy, J., concurring) ("The type of reflexive deference exhibited in some of these cases is troubling . . . . 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." (citations omitted)); Wong v. Garland, 95 F.4th 82, 89 n.2 (2d Cir. 2024), *cert. granted, judgment vacated*, 145 S. Ct. 432 (2024) ("Although the Supreme Court appears poised to revisit its decision in *Chevron* later this term . . . it remains law that is binding upon this Court." (emphasis in original) (citation omitted)).

deference" to the agency and that "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."[153] As proof, Justice Kennedy cited his former clerk, then-Judge Gorsuch's concurring opinion in *Gutierrez–Brizuela v. Lynch*.[154]

Justice Gorsuch, now on the Court and concurring in *Loper Bright*, returned to *Gutierrez-Brizuela* as proof, in his understanding, of *Chevron*'s inconsistency with the APA's mandate that reviewing courts decide questions of law.[155] At argument, Justice Gorsuch grounded his critiques in a surprising context. He was not concerned with the normal regulated business or corporate entities often central to critiques of the administrative state. Those groups could "take care of themselves," Justice Gorsuch said at argument.[156]

Instead, Justice Gorsuch stated he was concerned about "the immigrant, the veteran seeking his benefits, the Social Security Disability applicant."[157] These three groups are the type of people who "have no power to influence agencies, who will never capture them, and whose interests are not the sorts of things on which people vote, generally speaking."[158] Justice Gorsuch claimed that "I didn't see a case cited, and perhaps I missed one, where *Chevron* wound up benefitting those kinds of peoples."[159] The *Chevron* regime should be torn down, he seemed to be saying, because, in those mass adjudicatory contexts, the doctrine "is exploited against the individual and in favor of the government."[160]

Likewise, in his concurrence, Justice Gorsuch also wrote about how "ordinary people" — exemplified by veterans and immigrants — "suffer the worst kind of regulatory whiplash *Chevron* invites."[161] These agencies could not, in his framing, "invoke a judge-made fiction to unsettle our Nation's promise to individuals that they are entitled to make their arguments about the law's demands on them in a fair hearing, one in which they stand on equal footing with the government before an independent judge."[162]

Thus, noncitizens and immigration adjudication were understood within the *Loper Bright* court, explicitly, as one reason the Court needed to step in and exercise its power at the expense of agency policymaking. Here,

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153. *Pereira*, 585 U.S. at 221 (Kennedy, J., concurring) (emphasis in original).
154. 834 F.3d 1142, 1149–58 (10th Cir. 2016).
155. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 428–29 (2024) (Gorsuch, J., concurring).
156. Transcript of Oral Argument at 133, Relentless, Inc., et al., v. Dep't of Com., 603 U.S. 639 (2024) (No. 22-1219).
157. *Id.*
158. *Id.* at 133–134.
159. *Id.* at 134.
160. *Id.* at 136.
161. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 438–40 (2024) (Gorsuch, J. concurring).
162. *Id.* at 441 (Gorsuch, J. concurring).

immigration law is part of the mainstream administrative law, offering a context that counsels in favor of setting a less deferential standard across the administrative state. That is: immigration law speaks to, and is ultimately incorporated into, transubstantive deference regimes.

2. *Jarkesy, Public Rights, and Political Control*

Advocates might have hoped that the Supreme Court's recent interest in agency design, structure, and adjudication might be put to service as a check against an arbitrary immigration adjudication system. Yet the Court still managed to place immigration explicitly outside the benefit of its renewed interest in preserving a judicial, rather than administrative, enforcement forum.

As addressed above, the *Jarkesy* majority once again waded in to police the line between public and private rights. The majority declined to "definitively" resolve what would be private and what would be public.[163] However, the enforcement proceedings at the SEC were clearly private rights according to the majority, despite their longstanding enforcement in administrative proceedings. And immigration was a paradigmatic example of a public right, despite the clear harms and individual interests that Justice Gorsuch and others had noted in expressing concerns about the administrative state in *Loper Bright*. [164]

One might be forgiven, however, for noting the similarities between both the immigration court system and the parts of SEC adjudication that gave members of the *Jarkesy* majority pause. Of course, neither goes before a jury.[165] Both involve the government as a party.[166] Both issue remedies that can seem like punishment in the way the government weaponizes them for "culpability, deterrence and recidivism."[167] Neither follows the Federal Rules of Civil Procedure nor the Federal Rules of Evidence.[168] Neither system proceeds before a "neutral adjudicator" but rather "concentrate[s] the roles of prosecutor, judge, and jury in the hands of the Executive Branch"[169] who decides both the law and the facts.[170] And any appeal will first go before a board or commission of the "politically accountable body," with any further federal court review reviewing the agency's factual findings under a highly deferential substantial evidence standard.[171]

Yet the majority opinion drew direct contrasts between Jarkesy's case, which it determined to be about private rights, and fines for steamship owners

163. Sec. and Exch. Comm'n v. Jarkesy, 603 U.S. 109, 131–32 (2024).
164. *Id.* at 153 (Gorsuch, J. concurring).
165. *Id.* at 115.
166. *Compare Jarkesy,* 603 U.S. at 135, *with* 8 U.S.C. § 1229.
167. *Compare Jarkesy,* 603 U.S. at 122–125, with Emily Ryo, *Detention as Deterrence*, 71 STAN. L. REV. ONLINE 237 (2019).
168. *See Jarkesy,* 603 U.S. at 143 (Gorsuch, J. concurring).
169. *Id.* at 140–141.
170. *See id.* at 143 (Gorsuch, J. concurring).
171. *Id.* at 145 (Gorsuch, J., concurring).

who had brought noncitizens prohibited by Congress into the country.[172] It was no problem, under the Seventh Amendment, to "prohibit immigration by certain classes of persons and enforce those prohibitions with administrative penalties assessed without a jury."[173]

The Roberts Court's opinions about administrative adjudicatory structure thus incorporate immigration law within them. But they do so in ways that will largely insulate immigration adjudication from the safeguards the Roberts Court has adopted in *Jarkesy* and others.

C. *Deferred Action,* State Farm*, and Judicial Review of Executive Policymaking*

Judicial review in administrative law has long emphasized a concern with the procedures of notice-and-comment rulemaking and executive policymaking.[174] Courts have wrestled, first, with whether and where an agency must undertake rulemaking in the first place, or whether agencies can shield their decision-making as guidance rather than legislative rules and thus escape the APA's procedural requirements.[175] And, where notice and comment rulemaking is required, courts have enforced hard look and arbitrary and capricious review, ensuring that agencies must explain "what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did."[176]

In recent years, however, many of these debates have centered on prosecutorial discretion in immigration enforcement. Beginning in 2011, the Obama Administration sought to implement wide-scale prosecutorial discretion through a series of memos to line prosecutors and other Immigration and Customs Enforcement ("ICE") officers.[177] The two highest profile pieces of the initiatives, however, came with 2012's Deferred Action for Childhood Arrivals ("DACA")[178] program, which temporarily stayed enforcement for a group of younger noncitizens, and 2014's Deferred Action for Parents of

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172. *Id.* at 129 (discussing Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320 (1909)).

173. *Jarkesy,* 603 U.S. at 129.

174. *See* 5 U.S.C. §§ 553(c) & (d); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971).

175. 5 U.S.C. § 553(b) (exempting "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice"). *See also* Perez v. Mortgage Bankers Ass'n, 575 U.S. 92, 101 (2015) (rejecting D.C. Circuit's one bite rule and holding that an agency does not need to use notice-and-comment rulemaking when it issues or revises an interpretive rule).

176. Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968).

177. Most prominent were a series of memos from then-ICE Director John Morton, defining categories of "enforcement priorities" and attempting to deprioritize enforcement against individuals who did not fall within those categories. *See, e.g.,* Memorandum from John Morton, Director, U.S. Immigr. and Customs Enf't, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, to All ICE Employees (Mar. 2, 2011); Memorandum from John Morton, Director of U.S. Immigr. and Customs Enf't, to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel (Jun. 17, 2011).

178. Memorandum from Janet Napolitano, Secretary of Homeland Sec., to David V. Aguilar et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (Jun. 15, 2012).

Americans (DAPA), which expanded eligibility for parents of DACA recipients and others.[179]

The first round of litigation over DACA and DAPA came as conservative-led states challenged DAPA.[180] *Texas et al*. raised several arguments, but they primarily argued — and won — on the grounds that DAPA memos were legislative rules because the agency had treated them as binding.[181] The Obama Administration appealed, but the Supreme Court affirmed by an equally divided court following Justice Scalia's death.[182]

When the first Trump Administration took office, it attempted to unwind *DACA*, relying primarily on the Fifth Circuit's DAPA conclusions to argue that the DACA program was unlawful.[183] Before the Supreme Court, the Administration defended the rescission as a lawful exercise of executive discretion, in line with the transubstantive *Heckler v. Chaney,* and thus unreviewable.[184] Those principles, the Trump Administration argued, had "particular force" given that the cases were arising within the immigration enforcement context.[185]

In a majority decision authored by Chief Justice Roberts, the Supreme Court held that it could review the rescission. First, the Court applied administrative law's presumption of reviewability and rejected the government's *Heckler* argument as inapplicable.[186] Second, it held that the agency could not rely on a later-adopted explanation meant to shore up the rescission legal grounds, an application of the canonical *Chenery* doctrine.[187]

Third, proceeding to the merits, the Court followed a relatively straightforward, arbitrary, and capricious analysis. DACA, the Court noted, included two parts: "forbearance" of removal, coupled with eligibility for a range of benefits, including work authorization and social safety net programs.[188] The DAPA litigation — and the Fifth Circuit — had held that the grant of benefits following forbearance was unlawful, but did not address the forbearance policy. In relying on the Fifth Circuit's DAPA holding to rescind DACA, then,

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179. Memorandum from Jeh Charles Johnson, Secretary of Homeland Sec., to Leon Rodriguez et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014).

180. Texas v. United States, 809 F.3d 134, 169–79 (5th Cir. 2016).

181. *Id.*

182. United States v. Texas, 579 U.S. 547 (2016).

183. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 10–13 (2020) (recounting history).

184. *See* Brief of Petitioners at 17–19, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1 (2019) (No. 18-587).

185. *Id*. at 20.

186. According to the Court, DACA was not merely a non-enforcement policy but also included the grant of deferred action, which ultimately provided a focus for judicial review. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 18 (2020). The Court also held that 8 U.S.C. §§ 1252(b)(9) and 1252(g) did not bar review. *Regents*, 591 U.S. at 19–20.

187. *Regents*, 591 U.S. at 22–23.

188. *Id*. at 26–27.

the government had neither "addressed the forbearance policy at the heart of DACA nor compelled DHS to abandon that policy."[189]

In Roberts' telling, focusing on only one half of the issue "repeated the error we identified in one of our leading modern administrative law cases[:]" *State Farm*.[190] Looking to reduce crash fatalities, the agency in *State Farm* had initially proposed two separate strategies, airbags or automatic seatbelts, but later rescinded the policy because it claimed that automatic seatbelts alone would not provide adequate protection.[191] The Court, embracing hard look review, determined that NHTSA's failure to consider its alternative options, airbags, was arbitrary and capricious.[192] So, too, for the DACA rescission.[193]

In other words, in each aspect of the *Regents* case, the Court relied on normal principles of the judicial review of agency policymaking. The majority made no attempt to ground the decision in specialty aspects of immigration law, or the Executive branch's purported discretion and control over its enforcement.

D. *Immigration Adjudication Outside The Benefits of Administrative Law*

Immigration law's integration within administrative law is only complicated, however, when examining the Roberts Court's immigration adjudication decisions. Noncitizens have not always lost at this Court when administrative law doctrines are brought to bear in immigration cases. To highlight one example, the Court rejected giving jurisdictional effect to an exhaustion provision because, among other things, the practical effects of doing so might allow the statute to be "at war with itself."[194] The opposite result would have made it incredibly onerous to preserve issues for judicial review, requiring multiple procedural steps atypical even for most administrative contexts. The Court also preserved review for certain mixed questions of law and fact, and when the agency applied a legal standard to settled facts, as it narrowly interpreted a jurisdiction-stripping provision that limited federal court review to questions of law.[195]

Yet alongside these reasonable, narrow decisions has been sweeping change. The overall effect of these decisions has been to consistently undermine the independence of immigration courts from the whims of the Executive, while at the same time ensuring that the federal courts will not serve as a meaningful backstop, either because they lack jurisdiction or because the standards of review are not fit for purpose.

189. *Id.* at 28.
190. *Id.*
191. Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 38–42 (1983).
192. *Id.* at 42.
193. *Regents*, 591 U.S. at 29.
194. Santos-Zacaria v. Garland, 598 U.S. 411, 429 (2023).
195. Guerrero-Lasprilla v. Barr, 589 U.S. 221, 228–30 (2020).

1. *Plenary Power and Jurisdictional Stripping*

As addressed above, immigration exceptionalism is commonly understood as relying on both the plenary power doctrine and the entry fiction. Perhaps the most robust statement of these doctrines came in 2020's *Department of Homeland Security v. Thuraissigiam*. There, the Court held for the first time that Congress could strip individuals within the territorial United States of judicial review, without either the Suspension Clause or due process as providing a constitutional backstop.[196] *Thuraissigiam* is a radical, ahistorical decision that will prevent thousands from accessing meaningful judicial review.[197]

Petitioner Vijayakumar Thuraissigiam was a Sri Lankan asylum seeker who had fled persecution during the country's civil war.[198] After crossing the southern border into the United States, he was apprehended by Border Patrol agents; he was therefore placed in expedited removal proceedings.[199] He claimed asylum, but DHS officers seemed to misunderstand the vital cultural context underlying his claim and determined he lacked a credible fear of persecution.[200] He was thus ordered removed under the expedited removal provisions, which provided for only limited review of the DHS decision in immigration court and no further judicial review.[201] Thuraissigiam filed a petition for a writ of habeas corpus in federal district court. The district court denied the writ, but the Ninth Circuit held that the limited jurisdictional provisions of the expedited removal statute violated the Suspension Clause.[202]

The Supreme Court reversed. The bulk of the decision addressed Thuraissigiam's arguments under the Suspension Clause. Writing for the Court, Justice Alito focused on what he perceived to be Thuraissigiam's proposed remedy: vacatur of his removal order and a new hearing to apply for asylum.[203] In other words, according to Alito, Thuraissigiam sought the "right to enter or remain in a country or to obtain administrative review potentially leading to that result," rather than the traditional release from restraint or detention.[204] Dismissing various historical precedents as irrelevant, Alito claimed that the writ had never extended to encompass the right to remain, and therefore Thuraissigiam's claim lay outside of the writ as it existed in 1789, and there was no Suspension Clause concern as a result.[205]

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196. Dep't of Homeland Sec. v. Thuraissigiam, 591 U.S. 103, 140–41 (2020).

197. Catherine Y. Kim, *Rights Retrenchment in Immigration Law*, 55 U.C. DAVIS L. REV. 1283, 1287–91 (2022).

198. *See Thuraissigiam*, 591 U.S. at 114.

199. *Id.* Congress created "expedited" removal proceedings in 1996 for noncitizens who had not been admitted and apprehended within 2 years of their arrival in the United States. *See* 8 U.S.C. § 1225(b).

200. Brief for Respondent at 7–8, Dep't of Homeland Sec. v. Thuraissigiam, 591 U.S. 103 (2020) (No. 19-161).

201. *Thuraissigiam*, 591 U.S. at 108–10.

202. *See* Thuraissigiam v. U.S. Dep't of Homeland Sec., 287 F. Supp. 3d 1077, 1078 (S.D. Cal. 2018), *rev'd and remanded sub nom.* Thuraissigiam v. U.S. Dep't of Homeland Sec., 917 F.3d 1097, 1100 (9th Cir. 2019).

203. *Thuraissigiam*, 591 U.S. at 117–18.

204. *Id.* at 116–18.

205. *Id.*

The decision's Suspension Clause holding has been roundly criticized.[206] Like many of this Court's originalist holdings, the Court invented a history it could use for its modern purposes.[207] The origin of the writ lay in forcing the King to justify the lawfulness of his corporal restraint of a petitioner to the judiciary. The decision also conflates jurisdiction with remedy. Within that power, the jurisdiction to hear the writ was a separate consideration from the remedy, and even in England, there were circumstances where a court entertained the writ even where the proposed remedy could not be granted. Regardless of whether a habeas court has authority to order the government to grant Thuraissigiam asylum on the merits, the court has long had the jurisdiction to haul the Executive before it to justify its decision-making and, where necessary, ensure that that decision-making is on firm procedural and factual grounds, whatever the final merits decision is.

In addition to its Suspension Clause holding, the Court also rejected Thuraissigiam's due process argument. Playing the plenary power greatest hits, Justice Alito wrote that "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, *are due process of law*."[208] Just because Thuraissigiam had made it into the United States did not mean he had "entered" the United States, according to the Court, and even noncitizens "paroled elsewhere in the country for years pending removal—are 'treated' for due process purposes 'as if stopped at the border.'"[209] Thuraissigiam "has only those rights regarding admission that Congress has provided by statute," — and that did not include a right to judicial review in an Article III Court.[210]

Thuraissigiam thus places a large swath of immigration adjudication beyond the sweep of judicial review. Even on its own terms, *Thuraissigiam* will have far-reaching effects. In 2019, the first Trump Administration sought to expand expedited removal to the maximum allowed by the statute: noncitizens who entered without inspection and who could not prove they had been continuously present for two years.[211] The Second Trump Administration has renewed that policy, while dismissing pending immigration court cases

206. Cox, *supra* note 60, at 439–41; Kim, *supra* note 197, 1309–1313. *See also* Diana G. Li, *Due Process in Removal Proceedings After* Thuraissigiam, 74 STAN. L. REV. 793, 796 n.12 (2022) (noting criticisms).

207. *Thuraissigiam*, 591 U.S. at 168 (Sotomayor, J. dissenting) (collecting cases and noting that "[a]pplying the correct (and commonsense) approach to defining the Great Writ's historic scope reveals that respondent's claims have long been recognized in habeas"); Brief of Legal Historians as Amici Curiae in Support of Respondent at 4–5, Dep't of Homeland Sec. v. Thuraissigiam, 591 U.S. 103 (2020) (No. 19-161); *see also* Lee Kovarsky, *Habeas Privilege Origination and* DHS v. Thuraissigiam, 121 COLUM. L. REV. F. 23, 38–40 (2021) (reflecting on finality-era cases and noting strategic misreading by Supreme Court); James Oldham & Michael Wishnie, *The Historical Scope of* Habeas Corpus *and* INS v. St. Cyr, 16 GEO. IMMIGR. L.J. 485, 496–99 (2002) (noting colonial-era precedents appearing to apply habeas to refugees).

208. *Thuraissigiam*, 591 U.S. at 138 (emphasis added) (quoting Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892)).

209. *Id.* at 139–40.

210. *Id.* at 140.

211. *See* Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409 (Jul. 23, 2019).

previously filed for individuals who the Administration now claims would have been subject to its expanded expedited removal definition.[212]

But even prior to that expansion, the vast majority of removal orders were issued not from immigration courts, but by Department of Homeland Security officials under the expedited removal or reinstatement of removal statutes.[213] DHS staff, without any formal legal training, serve as prosecutors and adjudicators, with only limited review by immigration courts.[214] Yet *Thuraissigiam* explicitly shuts these noncitizens out of Article III review of the substantive decision-making of the Department.

Thuraissigiam could also be read to be deliberately ambiguous about its reach and thus could threaten the foundations of federal court judicial review over large swaths of immigration court decision-making, even in formal removal hearings held under the INA. Many procedural protections for noncitizens in removal proceedings are grounded in due process.[215] And the Supreme Court has stated that "[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."[216]

Justice Alito's opinion in *Thuraissigiam* at least pays lip service to these concerns, but goes on to suggest that such due process rights only apply to noncitizens "who have established connections in this country" and are thus challenging their "deportation" hearings.[217] Prior to the 1990s, immigration courts heard two types of hearings: *deportation* hearings for individuals lawfully admitted and *exclusion* proceedings for those who had not been admitted. Since the 1990s, immigration courts have heard unified *removal hearings*. Removal hearings share a set of procedures but might address grounds of removal that differ depending on a respondent's status and the charges brought by DHS prosecutors. Reviewing courts have generally continued to apply the due process considerations previously recognized to removal proceedings, or to recognize new ones, without regard to the underlying charges that brought a noncitizen into immigration court in the first place.

The *Thuraissigiam* decision, however, appears to tie an individual's due process rights to their ties to the United States. At the same time, the Court extends the "entry fiction" from its historical formulation — an administrative convenience allowing, say, for the parole of noncitizens stopped at the

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212. *See generally* Complaint, Immigrant ARC et al. v. Department of Justice et al., No. 25-cv-2279 (D.D.C. Jul. 16, 2025).

213. Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 184 (2017).

214. 8 U.S.C. § 1225(b); Koh, *supra* note 213, at 184.

215. *See, e.g.*, Oshodi v. Holder, 729 F.3d 883, 885 (9th Cir. 2013) (applying Mathews v. Eldridge, 424 U.S. 319, 343–44 (1976) and holding IJ violated noncitizen's "due process rights at his removal hearing by cutting off his testimony on the events of his alleged past persecution"); Malets v. Garland, 66 F.4th 49, 59 (2d Cir. 2023) ("However, where an IJ bars readily available testimony, and then predicates an adverse credibility finding on the failure to provide corroborating evidence on an issue about which that testimony may be relevant, such a finding cannot stand.").

216. Reno v. Flores, 507 U.S. 292, 306 (1993) (citing Yamataya v. Fisher, 189 U.S. 86 (1903)).

217. Dep't of Homeland Sec. v. Thuraissigiam, 591 U.S. 103, 106–07.

border into the United States while the right to entry is determined — to those already within the territorial boundaries of the United States but who have not been formally admitted.[218] Extended beyond its immediate holding, then, *Thuraissigiam* might suggest that one's procedural due process rights in removal proceedings turn not on bright-line considerations but rather on a messy and shifting conception of just how "established" each noncitizen is or whether they have been formally admitted before triggering procedural due process protections.[219]

In other words, this Court has closed off judicial review of administrative actions by an Article III court for the vast majority of removal orders. *Thuraissigiam* thus places a large swath of immigration adjudication beyond the sweep of normal constitutional and administrative law. And it has done so with the broadest and most radical restatement of the plenary power doctrine since at least the Cold War.

2. *Shielding Decision-making and Agency Procedure*

This Supreme Court has also undermined the normal operation of judicial review in petitions for review of removal proceedings. Judicial review of immigration court proceedings has long been subject to the push and pull of jurisdiction stripping and channeling. At present, a petition for review is the "sole and exclusive means" for judicial review under the INA[220] for federal courts to consider "all questions of law and fact, including interpretation and application of constitutional and statutory provisions."[221] In other words, for most legal and factual questions that arise within the context of a removal hearing, including challenges to precedential Board decisions or their application to individual cases, the means for obtaining judicial review will be through individual petitions for review at the circuit courts.

In undertaking that review, the Supreme Court and circuit courts have traditionally interpreted standards of review in line with the Administrative Procedure Act.[222] For instance, the INA provides that administrative findings of fact are "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."[223] In removal proceedings, those factual findings — whether a noncitizen has been persecuted in the past,[224] for instance, or likely to

218. Kim, *supra* note 197, 1309–13.
219. *See, e.g.*, Li, *supra* note 206, at 838–49.
220. 8 U.S.C. § 1252(a)(5).
221. 8 U.S.C. § 1252(b)(9).
222. *See, e.g.*, Judulang v. Holder, 565 U.S. 42, 55 (2011) (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983)) (noting holding that BIA decision was arbitrary and capricious under the APA); Shaughnessy v. Pedreiro, 349 U.S. 48, 51–52 (1955) (finding "rights to full judicial review" of a removal order under the Administrative Procedure Act's judicial review provisions). This is not to say all courts have been uniform in the way they have approached reviewing claims. *See, e.g.*, Mary Hoopes, *Judicial Deference and Agency Competence: Federal Court Review of Asylum Appeals*, 39 BERKELEY J. INT'L L. 161, 182–92 (2021).
223. 8 U.S.C. § 1252(b)(4)(B).
224. *See, e.g.*, Thayalan v. Att'y Gen. of U.S., 997 F.3d 132, 137–38 (3d Cir. 2021).

be harmed upon removal, or whether a noncitizen is credible[225] — are central to any chance of success. The deferential standards of review mean that, taken head-on, most federal courts will affirm even shaky factual findings without some other legal error.

But reviewing courts have understood the INA's scope of review provisions to be informed by the APA's substantial evidence standard, and they have applied meaningful standards of review intended to correct arbitrary or cursory agency decision-making, even reviewing factual findings.[226] Professor Aadhithi Padmanabhan has noted that with the APA-style review have come two key procedural requirements that facilitate judicial review of errant removal orders.[227] First, circuit courts have generally required that the agency demonstrate it has considered all material and probative evidence before it, and not overlooked or cherry-picked the record.[228] Second, courts have generally required an *explanation* of the immigration court's reasoning that the federal court is capable of reviewing on appeal.[229] And — coupled with *Chenery I* — these two requirements have facilitated grants of petitions and a potential toolkit for circuit courts to correct lackluster reasoning from the agency, or where the same factual finding, properly adopted, might have withstood review based on a deferential standard on the merits.[230]

Yet Professor Padmanabhan has also demonstrated that these critical standards are now under threat based on the Supreme Court's 2021 decision in *Garland v. Ming Dai*. In *Garland v. Ming Dai,* the unanimous Supreme Court rejected a Ninth Circuit rule that deemed testimony true on appeal in the absence of an explicit adverse credibility determination at the agency.[231]

Ming Dai involved two separate consolidated petitions for review, and in both, there was cause to disbelieve the petitioners' testimony.[232] The Ninth

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225. Gurung v. Barr, 929 F.3d 56, 60 (2d Cir. 2019) ("[T]he IJ's factual findings—including her adverse credibility determinations—merit deference so long as they are supported by substantial evidence.").

226. *See, e.g.*, Smith v. Garland, 103 F.4th 1244, 1252 (7th Cir. 2024); Malets v. Garland, 66 F.4th 49, 52–53 (2d Cir. 2023).

227. Padmanabhan, *supra* note 46, at 1563.

228. *See, e.g.*, Castillo v. Barr, 980 F.3d 1278, 1283 (9th Cir. 2020) ("Where the Board does not consider all the evidence before it, either by 'misstating the record [or] failing to mention highly probative or potentially dispositive evidence,' its decision cannot stand.").

229. Ming Shi Xue v. Bd. of Immigr. Appeals, 439 F.3d 111, 124–25 (2d Cir. 2006).

230. *See, e.g.*, *Gurung*, 929 F.3d at 60–61 (citing S.E.C. v. Chenery Corp., 318 U.S. 80 (1943)) (holding that where agency errs in factual finding, remand is required so the agency can "reconsider the matter free from the error it made" unless such remand is futile).

231. Garland v. Ming Dai, 593 U.S. 357, 365 (2021).

232. *Id.* at 361, 363. Ming Dai claimed he had fled to the United States after his wife became pregnant with their second child in violation of China's family-planning policies. The immigration judge raised "concerns," however, that Ming Dai had "failed to disclose" that his wife and daughter had returned to China, despite the alleged persecution risk, and did "not find that Mr. Dai's explanations for his wife's return to China while he remained here are adequate." *Id.* at 364 (cleaned up). In the companion case, the key consideration was whether petitioner Cesar Alcaraz-Enriquez had committed a "particularly serious crime" that would bar him from relief from removal. *Id.* at 361–63. The answer, according to the Court, turned on whether one accepted Mr. Alcaraz-Enriquez's testimony in immigration court about the underlying criminal offense or a potentially contradictory probation report prepared at the time of his sentencing in the state criminal proceedings. *Id.* at 361–62. Both the immigration court and the Board

Circuit applied its longstanding standard of review that required an explicit adverse credibility determination; without one from the agency, the circuit would credit the petitioner's testimony as true when determining whether to grant the petition. In the two cases, that meant crediting Ming Dai's stated reasons for fleeing China and remaining in the United States, and Alcaraz-Enriquez's description of the underlying criminal offenses that the immigration court had held were serious enough to bar him from relief. The circuit thus appeared to privilege the noncitizen's testimony over contradictory evidence in the record and faulted the agency for failing to do the same.

Justice Gorsuch's opinion for the unanimous Court held that the deemed-credible rule "ha[d] no proper place in a reviewing court's analysis" because "Congress ha[d] carefully circumscribed judicial review of BIA decisions."[233] "Nothing in the INA" — which states that administrative findings of fact are "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary" — "contemplates anything like the embellishment the Ninth Circuit has adopted."[234]

The opinion, especially had it stopped there, could be read as a narrow one: merely a unanimous Court correcting what it saw as an outlier rule from one of the circuits on statutory grounds. But Justice Gorsuch goes on to invoke *Vermont Yankee*.[235] *Vermont Yankee* involved rulemaking and held that reviewing courts were not free to impose additional procedural requirements beyond the scope of Section 553 of the APA's notice-and-comment rulemaking provisions. The deemed-credible rule is not, in the Court's framing, merely a standard of review. Instead, it would involve imposing "additional judge-made procedural requirements on agencies that Congress has not prescribed and the Constitution does not compel."[236]

But this framing risks further muddying the lines between what is a substantive standard of review (i.e., necessary and appropriate for an appellate court to review the agency's decision), and a court-imposed procedure forbidden by *Vermont Yankee*. And it would appear to throw many administrative standards of review into doubt, even the lauded hard look review most often applied to notice-and-comment rulemaking.

Indeed, as Professor Padmanabhan demonstrates, some circuit courts, and individual judges on those courts, have taken *Ming Dai* as a "springboard" to water down their standards of review.[237] While still a minority, these courts have used *Ming Dai* as an opening to bring what Padmanabhan notes were "once-fringe theories" into the mainstream of immigration and administrative

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considered both versions, seemed to credit the probation report where there was conflict, and determined it was, in fact, a particularly serious crime. *Id*.

233. *Id*. at 365.

234. *Id*. (citing 8 U.S.C. § 1252(b)(4)(B)).

235. *Id*. (citing Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978)).

236. *Id*. (citing *Vermont Yankee*, 435 U.S. at 524).

237. Padmanabhan, *supra* note 46, at 1599.

law.[238] Some courts and judges have advocated watering down judicial review standards to something closer to rational basis than hard look review.[239] Still others have argued that what Padmanabhan describes as "hard look" review of deportation orders, the consideration and explanation requirements, are procedures foisted on the agency by a reviewing court and thus untenable under *Ming Dai* and *Vermont Yankee*.[240]

Ming Dai thus risks the albeit already-forgiving standards of review that courts have developed in response to arbitrary and capricious decision-making in the immigration courts. Without these meaningful standards, noncitizens will face an even steeper hill in trying to get a circuit court to overturn a removal order.

III. IMMIGRATION ADJUDICATION AND THE UNEVEN INCORPORATION OF ADMINISTRATIVE LAW NORMS

Given the above discussion, it should be clear that immigration law generally — and immigration adjudication in particular — is not truly exceptional within administrative law. Instead, under this Court, immigration adjudication seems to be imagined as both inside and outside the bounds of ordinary administrative law. This complicates the picture for scholars trying to understand how, exactly, immigration law fits amid broader administrative law structures, and has important implications for administrative law as a field more broadly.

In order to capture this dynamic, I argue that it is more accurate to frame immigration's interaction with administrative law norms as one of *uneven incorporation*.[241] On the one hand, immigration adjudication has incorporated many of the bureaucratic norms and values from administrative law. This includes the recent push towards political control over adjudicators and adjudications inherent in the removal and appointment clause cases. Immigration law has also incorporated the whims of the bureaucracy, including those parts of administrative law that seek to bureaucratize and increase discretion for policymakers. At the same time, immigration law has not incorporated administrative law norms for judicial review in an Article III court, largely excluding noncitizens from access to constitutional rights, or even the "phantom" sub-constitutional protections under

238. *Id.* at 1599–1600.
239. *Id.* at 1600.
240. *Id.* at 1586, 1605–08, 1612.
241. A similar trend has been noted in immigration law's relationship to *criminal* law. *See* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 469–70 (2007). There, according to Stephen Legomsky, immigration law has incorporated the various doctrines and justifications associated with criminal enforcement but rejected the procedural aspects and protections that would come from criminal procedure. *Id.* I have deviated in terminology knowingly, even as my thinking is greatly influenced by Legomsky's work. I have chosen "uneven" versus "asymmetric" to represent a more fluid relationship between immigration and administrative law than I believe the latter term suggests. That is: rather than either in or out, there is a continuum of incorporation that better fits immigration's relationship to administrative law.

the APA aimed at ensuring fair process even when appearing before administrative agencies.

Properly recognizing administrative law's uneasy relationship to immigration adjudication allows for a more accurate framework to evaluate the Court's decisions, as well as the impacts on lower courts and noncitizens themselves. For scholars, it provides a better lens to nuance and describe specific impacts within a broader framework without resorting to an exceptionalism framework. But recognizing the uneven incorporation of administrative law norms also more accurately captures the ways in which immigration adjudication's relationship to administrative law is strategically useful — and allows for ambiguities and contestation. With the added ambiguity, the second Trump Administration has attempted to push immigration beyond any meaningful judicial review in the press[242] and in its filings.[243] At the same time, noncitizens and their advocates should continue to draw upon transubstantive doctrines when claiming protections. In other words, properly contextualizing immigration law's uneven incorporation is necessary to understand several major aspects of immigration law in the years to come. I will highlight several of those impacts here, including the availability of review, the scope of review, and judicial oversight of immigration courts, and remedial questions for erroneous removals.

A. *Availability of Review*

As addressed below, judicial review is a key part of the New Deal settlement. It has also been a central preoccupation within the administrative law literature. Indeed, in his now-classic treatise, Professor Louis L. Jaffe once wrote that "[t]he availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid."[244] But the Court, most notably in *Thuraissigiam*, has been willing to tolerate jurisdiction stripping and preventing judicial review to a greater extent in immigration litigation than in other settings.

Indeed, lower courts have taken up *Thuraissigiam*'s charge.[245] The Second Circuit's decision in *Bhaktibhai-Patel* exemplifies the changes *Thuraissigiam* has wrought.[246] Bhaktibhai-Patel had been ordered removed twice previously, and when the Department of Homeland Security reinstated his prior removal

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242. *See, e.g.*, Maria Ramirez Uribe, *Stephen Miller Said Courts Can't Rule on Trump's Immigration Actions. Experts Say He's Wrong*, AUSTIN AMERICAN-STATESMAN (May 16, 2025), https://www.statesman.com/story/news/politics/politifact/2025/05/16/stephen-miller-wrong-that-courts-cant-rule-on-trump-immigration-orders/83158463007/ [https://perma.cc/3MNG-9JWT].

243. *See infra* Part III.B.

244. See LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965).

245. *See, e.g.*, United States v. Guzman, 998 F.3d 562, 565 (4th Cir. 2021) (finding no due process right to counsel in connection with expedited removal); Rauda v. Jennings, 55 F.4th 773, 776–77 (9th Cir. 2022) (finding no jurisdiction to enjoin removal pending motion to reopen).

246. Bhaktibhai-Patel v. Garland, 32 F.4th 180, 183–84 (2d Cir. 2022).

orders in a third set of proceedings, he claimed asylum.[247] The Second Circuit held that, in order to seek judicial review, Bhaktibhai-Patel would have had to file a petition for review within thirty days of the moment DHS *reinstated removal*, even though immigration court proceedings reviewing DHS's credible fear determination had not yet completed. Because Bhaktibhai-Patel had only filed his petition within thirty days of the immigration court's ultimate denial of his claim, rather than the earlier initial reinstatement, the Circuit lacked jurisdiction over the appeal.

Writing for the panel, Judge Steven J. Menashi dismissed concerns that the decision could bar all judicial review, including constitutional claims, by noncitizens with a prior removal order. *Thuraissigiam* meant that those petitioners could not rely on the Suspension Clause. Barring review would also "raise[] no due process concerns with respect to illegal reentrants, such as Bhaktibhai-Patel, who have failed to effect an entry into the country."[248]

And, even if we were to set aside constitutional considerations, administrative law's background presumptions when interpreting statutory provisions will not be enough to preserve judicial review. Administrative law, including in decisions of this current Court, has long recognized a "strong presumption favoring judicial review of administrative action."[249] Yet lower courts have relied on *Thuraissigiam* and rejected arguments based on the presumption of judicial review.[250] Courts have also refused to hear constitutional claims, even while noting the "serious constitutional question[s]" raised by doing so under *Webster v. Doe*.[251]

Just last term, the Supreme Court rejected the Second Circuit's minority rule and held that the time limit was not jurisdictional.[252] Yet it still inverted administrative law's general procedures and presumptions. Rather than having the time frame for filing an appeal run from the culmination of agency proceedings, Justice Alito's opinion placed it in the middle of proceedings, requiring noncitizens to file appeals in certain circumstances before they would know if it was actually necessary.

The uneven incorporation of administrative law thus overlaps with broader notions of immigration exceptionalism, or perhaps it is *conditioned* by immigration's larger exceptionalism from constitutional law. That is: because noncitizens are perceived by this Court as having limited access to constitutional

247. *Id.* at 183.
248. *Id.* at 199.
249. Salinas v. U.S. R.R. Ret. Bd., 592 U.S. 188, 196 (2021).
250. *See, e.g.*, *Bhaktibhai-Patel*, 32 F.4th at 197.
251. *Compare* Webster v. Doe, 486 U.S. 592, 603 (1988) (noting the court's reluctance to hear constitutional question that "would arise if a federal statute were construed to deny any judicial forum" for constitutional claim), *with* Guerrier v. Garland, 18 F.4th 304, 311 (9th Cir. 2021) (concluding Guerrier raised a serious constitutional claim), *and Bhaktibhai-Patel*, 32 F.4th at 197 (finding no legally protected due process interest required to raise a constitutional question).
252. *Riley v. Bondi*, 606 U.S. 259, 261 (2025). That conclusion was overdetermined: the Court has been made clear, over and over, that the jurisdictional reasoning of *Bhaktibhai-Patel* was inconsistent with *Arbaugh v. Y & H Corp.* and related cases. *See, e.g.*, 544 U.S. 1031 (2005).

protections that might be available to them as citizens, they cannot use those constitutional protections to claim rights or to reform the functioning of the immigration courts through judicial review. As noted above, this might be a newer phenomenon than the Court would credit, with full due process exceptionalism only really coming into force with *Thuraissigiam*. But this Court is routinely willing to exclude courts from adjudicating rights claims from noncitizens in a wide variety of settings. The result is the exclusion of uneven incorporation; without access to the full scope of judicial review promised by the due process and suspension clauses, courts will largely be sidelined.

B. *Scope of Review and Judicial Oversight of the Immigration Adjudication System*

There is, of course, a longstanding debate about the value of judicial review in administrative law. Jerry Mashaw has argued that internal agency law is a much better check for quality control than judicial review.[253] In more recent work, however, Jonah Gelbach and David Marcus have questioned these conclusions. Instead, examining judicial review of social security proceedings, they have argued that courts reviewing high-volume adjudications engage in "problem-oriented oversight."[254] That is, by reviewing high volumes of individual adjudications, federal judges may "identify and respond to 'problems,' defined either as flawed administration of policy by the agency, or as the agency's nonresponse to an entrenched decision-making pathology."[255]

The uneven incorporation of administrative law norms threatens the potential of such a role for federal courts reviewing immigration adjudication. Political control has allowed various administrations to change staffing on the immigration courts, as well as dictate harsher laws, wreaking havoc on the entire immigration court system. Without independence or adequate resources, the immigration courts have struggled to perform with the care due to the weighty matters — "all that makes life worth living" — tasked to them.[256] Agency adjudicators are not neutral arbitrators.[257] Immigration judges are appointed by the attorney general without removal protections.[258] They are

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253. See Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974); JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985); *see also* Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017).

254. Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1100–1101 (2018).

255. *Id.* at 1130.

256. *See* Bridges v. Wixon, 326 US 135, 147 (1945).

257. Sharpless, *supra* note 147, at 345 (arguing that Board is "in an awkward middle position" that undermines political accountability rationale for deferring to agencies); Kim & Semet, *supra* note 10, at 630.

258. During the Ashcroft era, for instance, "streamlining" initiatives adopted by attorney general Ashcroft dismissed the majority of liberal members of the Board of Immigration Appeals and made it harder to overturn immigration judge denials. *See* Amit Jain, *Bureaucrats in Robes: Immigration "Judges" and the Trappings of "Courts"*, 33 GEO. IMMIGR. L.J. 261, 272 (2019).

subject to strict performance quotas and other forms of bureaucratic control, which may impact decisional independence.[259] The courts are facing ever-lengthening backlogs.[260] Even in the best of circumstances, asylum decisions were notoriously arbitrary and turned primarily on the particular immigration judge assigned.[261]

Recent empirical work also demonstrates immigration judges' lack of independence.[262] Professors Catherine Kim and Amy Semet found that the administration's appointment of an immigration judge had little impact on the likelihood of an immigration judge ordering removal. There was also little variation with the backgrounds of immigration judges appointed by different administrations; judges were largely appointed from government service, mostly with prior employment at DHS as an immigration prosecutor.[263] But the current Administration was a statistically significant variable: across the board, judges were more likely to order removal during the Trump Administration than the Bush and Obama Administrations.[264] The findings suggested that "[d]ecisions to deport individuals might not be solely the result of apolitical assessments of individual hearing records" but rather that IJ decisions may be influenced by political considerations as well as by legal ones."[265]

There is a broad consensus over the need to reform immigration courts.[266] The most popular suggestion has been to transform immigration adjudication by removing it from the Department of Justice and creating an Article I court. Indeed, just such a proposal was endorsed by the American Bar Association.[267]

An Article I court could be possible, under current law, but each of the judges would likely have to be confirmed by the Senate. But doing so would be a huge undertaking. As of drafting, there were nearly 600 immigration judges in around 68 immigration courts and three adjudication centers

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259. *See* Memorandum from James R. McHenry III, Dir., to the Off. of the Chief Immigr. Judge et al., *Case Priorities and Immigration Court Performance Measures* (Jan. 17, 2018), https://www.justice.gov/eoir/page/file/1026721/download [https://perma.cc/88Q8-MV23]; E-mail from EOIR Director to All Immigration Judges, Immigration Judge Performance Metrics (Mar. 30, 2018), https://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics [https://perma.cc/N83J-L5AU].

260. *Immigration Court Backlog Tops 3 Million; Each Judge Assigned 4,500 Cases*, TRAC IMMIGRATION (Dec. 18, 2023), https://trac.syr.edu/reports/734/ [https://perma.cc/F5PZ-ERYF].

261. For instance, the chance of lodging a successful asylum claim may be as low as twenty-two percent before one judge in the New York court; colleagues in the same court, likely hearing similar claims, may have grant rates closer to 83 percent. *See* ANDREW I. SCHOENHOLTZ, JAYA RAMJI-NOGALES & PHILLIP G. SHRAG, REFUGEE ROULETTE (2009).

262. Kim & Semet, *supra* note 10.

263. *Id.* at 621.

264. *Id.* at 625–28.

265. *Id.* at 588.

266. *See, e.g.*, Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1676 (2010); Note, *Courts in Name Only: Repairing America's Immigration Adjudication System*, 136 HARV. L. REV. 908 (2023); U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-438, *Immigration Courts: Actions Needed to Reduce Case Backlog and Address Longstanding Management and Operational Challenges* (Jun. 1, 2017), https://www.gao.gov/products/gao-17-438 [https://perma.cc/7A7M-8CHP].

267. *See* AM. BAR ASS'N, ACHIEVING AMERICA'S IMMIGRATION PROMISE (2021), https://www.americanbar.org/content/dam/aba/administrative/immigration/achieving_americas_immigration_promise.pdf [https://perma.cc/WU93-3LRE].

located throughout the United States.[268] The Senate struggles to confirm appointees as is, and creating an Article I immigration court would likely only exacerbate those delays.[269] There are other incremental options that might increase adjudicatory independence, such as creating an independent agency or making immigration judges formal ALJs with removal protections. But if Cox and Kaufman are correct, adopting any of those proposals might run up against an Appointment Clause issue, with the Court reintroducing political control as a remedy to correct the perceived separation of powers issue.

So for many noncitizens, federal court review may be the only path to a meaningful independent substantive decision and accessing procedural safeguards. Yet the Roberts Court's decisions undermine that role for courts reviewing removal orders, even as the Court emphasizes judicial review in other administrative contexts. Cases like *Ming Dai* have undermined the use of common standards, like requiring an agency's examination of key pieces of evidence and then providing an explanation that facilitates judicial review.

Immigration's uneven placement within administrative law thus enables a lack of meaningful independence at the adjudicatory level while also thwarting courts of appeals' ability, in an appellate posture, to serve as problem-oriented review.

C. *Remedies*

Another impact of immigration adjudication's uneven incorporation of administrative law is related to remedies. There is a robust and growing debate about how much flexibility courts can and should have in addressing unlawful agency action.[270] Administrative law largely assumes a remedy, with the APA noting that courts have the power to "hold unlawful and set aside" agency actions.[271] In adjudication, building on the *Chenery* Doctrine,[272] the mine run remedy is to vacate the agency order and remand for the agency to redo the order or grant relief.[273]

For immigration proceedings, the remedy for a flawed removal order should mean that the noncitizen is not removed, with the opportunity for return if the removal order has already been effectuated. In light of the flawed decision-making at the immigration courts, however, there is a significant risk that those with unlawful removal orders will need to seek appellate review. The Supreme Court has held that the fact of removal itself is not

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268. *Office of the Chief Immigration Judge*, EXEC. OFF. FOR IMMIGR REV., https://www.justice.gov/eoir/office-of-the-chief-immigration-judge [https://perma.cc/94RZ-M3ZP] (last visited Nov. 2, 2025).

269. *See* Legomsky, *supra* note 266, at 1684.

270. *See, e.g.*, Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM L. REV. 253 (2017).

271. 5 U.S.C. § 706(2).

272. SEC v. Chenery Corp., 318 U.S. 80, 95 (1943).

273. Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553, 1555–58 (2014).

irreparable harm,[274] and Congress has chosen not to automatically stay removal during a pending removal, absent a judicial stay.[275] Yet for many asylum seekers, wrongful removal would result in torture or mistreatment; indeed, that is the very claim on the merits.

A meaningful system of judicial review should therefore have a method to ensure maintenance of the status quo while the petition for review is adjudicated, and an opportunity to correct erroneous removals. In the past, the government has claimed that it had a program to facilitate the return of noncitizens were they to succeed in their petition for review.[276]

In the case of Kilmar Abrego Garcia, however, DOJ attorneys admitted that they wrongly removed Abrego Garcia to El Salvador, despite an immigration judge's order that prohibited it.[277] The government argued, however, that ordering his return — in other words, issuing a remedy for a removal that all considered unlawful — would violate Article II. Doing so would require the government to convince El Salvador to return someone the government claimed was "a member of a designated foreign terrorist organization who is on foreign soil under foreign control."[278]

In other words, the government argued that the courts could not order a return, *even* in a situation where everyone agreed that the removal was unlawful. The government's premise is exceptionalism; the argument suggests that immigration's remedy of return would violate special foreign affairs or national security conventions that courts are not experts in and not authorized to make.[279]

Ordinary administrative law would require a remand. But immigration's perceived exceptionalism obscures this — giving the government an opening to make the argument and making it seem like a hard question once the courts consider it.

IV. WHAT IMMIGRATION ADJUDICATION MIGHT TELL US ABOUT THE FUTURE OF ADMINISTRATIVE LAW

Judicial review of immigration adjudication before this Court might suggest a larger trend: the breakdown of administrative law's uniformity and harmonizing functions. As addressed above, one of administrative law's animating values has long been seen, and in some ways justified, as being transubstantive.[280] Indeed, a common theme throughout the exceptionalism(s) literature in tax, patent law, and antitrust has been to reject most pushes toward exceptionalism at

274. Nken v. Holder, 556 U.S. 418, 435 (2009).
275. *See* 8 U.S.C. § 1252. Congress repealed an automatic stay provision in 1996. *Nken*, 556 U.S. at 424.
276. *See* Brief for Respondent at 44, Nken v. Holder, 556 U.S. 418 (2009). It turned out, however, that the return program was more promise than substance—even as the Supreme Court relied on its existence to hold that removal itself would not provide irreparable harm sufficient to support a stay pending appeal.
277. *See, e.g.*, Reply in Support of Application, Noem v. Abrego Garcia, 145 S. Ct. 1017 (2025).
278. *Id.* at 3.
279. Noem v. Abrego Garcia, 145 S. Ct. 1017, 1018 (2025).
280. *See. e.g.*, Emily S. Bremer, *supra* note 5, at 1358–60.

the cost of uniformity.[281] A prevailing view is that exceptionalism represents the "*misperception* that a particular regulatory field is so different from the rest of the regulatory state that general administrative law principles do not apply."[282] Administrative law's value — in some ways, its existence as a modern field worthy of study and teaching — is in the way it provides general legal principles that cut across contexts and agencies; that is, administrative law is greater than the sum of its contextual parts.

Ironically, through empowering courts, the Roberts Court may enable courts to adopt increasingly context-specific doctrines, standards of review, and requirements for specific agencies. That removes the harmonizing function that judicial review has provided since the New Deal-era compromises and the advent of the APA's judicial review standards. This would represent a major shift in how administrative law has functioned as a field and, ultimately, whether the field itself represents something greater than the sum of its parts.

In some places, that uniformity breakdown might be explicit. Consider *Chevron*. One value of *Chevron* was that it provided for a uniform standard.[283] There might be some initial debate over whether or not *Chevron* applied in a specific subject area. Indeed, *Mead* could be seen as opening the door to exceptionalism-style arguments as to certain *methods* of agency action within specific contexts. But once a court held *Chevron* applied, the agency could have a better sense of how to defend its decision-making in court, regulated entities could have a better sense of how to frame their challenges, and reviewing courts could have a body of caselaw from a variety of contexts to draw upon for precedent.

Loper Bright undermines that uniformity function. Even a straight return to the wholesale adoption of *Skidmore* would do so, given that the test focuses on the particular agency's expertise and the particular agency action's power to persuade. These are context-specific discussions. One path forward from *Loper Bright* might entail courts adopting various deference doctrines — an immigration-related deference doctrine, for instance, or a tax-related deference doctrine — each with different standards of deference and levels for how searching judicial review will be as applied to specific agencies.

In other places, the standards will be loose enough to enable context-specific and outcome-determinative reasoning. This has been one particular criticism of the major questions doctrine, as I addressed above. Judges have been more willing to see "major" questions lurking in environmental regulation, public health, or student loans, for instance.[284] Yet will the Court apply the

281. *See, e.g.*, Mayo Foundation for Medical Education and Research v. U.S., 562 U.S. 44, 55 (2011).
282. Walker, *supra* note 20, at 149 (emphasis added).
283. *Cf.* Barnett & Walker, *supra* note 100, at 18.
284. Sohoni, *supra* note 132.

same logic to the Trump Administration's birthright policies, say, or DOGE's actions?[285] Likewise, as to agency structure, we will likely see a divergence in administrative adjudication. In some areas, the courts will undermine administrative enforcement and force agencies to go to federal courts, as documented in *Jarkesy*. In other areas, adjudicative policy and procedure will be increasingly ad hoc, under political control, and, thus, context-specific.[286] The result "reduces administrative government in some places but defends and expands it in others," especially those relied on by marginalized groups.[287]

Such an increasingly context-specific approach would be a novel change, at least to the Administrative Procedure Act. While the law of administrative agencies has a longer pedigree,[288] it may not necessarily have been as much a field as a set of decisions situated to deal with particular social problems and historically situated.

But much of modern administrative law can be traced to this period—the New Deal and the subsequent passage of the Administrative Procedure Act. The APA arose as what one scholar described as a "fierce compromise," pitting the large-scale (and often *ad hoc*) policymaking and regulation of New Deal agencies against conservatives in Congress bent on reining those agencies in.[289] Initial proposals like the Walter-Logan Bill sought to greatly constrain agency power,[290] and sought to create an Article III administrative court, for instance, to handle administrative adjudication, among other innovations.[291] The agencies themselves pushed back, attempting to maintain autonomy; the Roosevelt Administration stalled for time after a veto to allow the attorney general time to study the "problem" and eventually produce a report as to the operation of multiple different agencies. The APA then followed.

The Administrative Procedure Act thus must be seen as a compromise between those supporting New Deal administrative expansion and New Deal skeptics who sought to curtail agency authority. As part of that compromise, the APA left many of the *ad hoc* administrative agencies in place, but built a foundation under them in a transubstantive way. It provided a set of requirements for informal rulemaking and formal adjudication, for instance.[292] It

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285. *See* Melissa Quinn, *Trump's Executive Actions Kicked Off Race to Courts on Birthright Citizenship, DOGE. It's Just the Beginning*., CBS NEWS (Jan. 24, 2024), https://www.cbsnews.com/news/trump-executive-actions-birthright-citizenship-doge-courts/ [https://perma.cc/ZYX3-WLZR].

286. *Cf*. Cox & Kaufman, *supra* note 89, at 1814–15. Cox and Kaufmann note that recent opinions "reflect the Court's increasing interest in insulating administrative courts from judicial oversight" while at the same time strengthening judicial review in others. *Id*.

287. *Id*. at 1817.

288. *See generally* JERRY MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012).

289. *See* George Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics,* 90 NW. U. L. REV. 1557 (1996).

290. *See id*. at 1593.

291. *See id*. at 1593–94.

292. 5 U.S.C. § 556 (2025).

also codified standards of review and applied them to federal court review across the administrative state.[293]

Over time, the APA has increased the administrative law's uniformity function and been seen as the field's greatest strength. Scholars have argued that the APA is a "super statute," one passed after significant debate and compromise, and that has been relatively stable and seemingly impervious to modification in the decades since.[294] And many of the APA's norms are often seen as *quasi-constitutional*. The APA, other overarching statutes, and the administrative common law fill a gap in the Constitution but speak to constitutional values, including fundamental touchstones like notice and opportunity to be heard, and petitioning, among others.

Alongside such statutory stability, administrative common law has often provided uniformity. Key cases like *Chenery I* and *II,* and principles like arbitrary and capricious or hard look review, have provided guidance to agencies across the administrative state as to how courts would undertake their judicial review.[295] These have generally been seen to increase uniformity and predictability, with courts providing guidance on how agencies should proceed with their work if they want it to survive judicial review. But the salience of these transubstantive doctrines looks to be in question. And with it, many of the justifications for administrative law norms themselves.

One might question whether exceptionalism is all that new to adjudication. Emily Bremer has argued, for instance, that exceptionalism is the norm for adjudication.[296] She faults many of the arguments about the APA-as-super-statute, and about administrative law's broader turn towards uniformity, as being grounded in rulemaking and therefore only focused on half the picture. The vast majority of adjudication is *informal* adjudication, and the APA has very little to say, if anything, about the required procedures at the agency level.[297]

It is certainly true that at the agency level, many individual agency procedures are unique, purpose-built, and context-specific, looking to the particular administrative context or organic statutes first and to general administrative law principles second.

But that misses the significant uniformity functioning of judicial review. Courts, of course, articulated the minimum due process safeguards required of agency adjudication.[298] Under the APA, Section 706 helped provide for uniform standards of review that apply to a wide range of judicial review of

293. 5 U.S.C. § 706 (2025).

294. *See* WILLIAM ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES (2010).

295. SEC v. Chenery Corp., 318 U.S. 80, 87 (1943); SEC v. Chenery Corp., 332 U.S. 194, 196, 207 (1947); Motor Vehicle Mfrs. Ass'n of the United States v. State Farm, 463 U.S. 29, 42–44 (1983).

296. Bremer, *supra* note 5.

297. In fact, the APA explicitly *exempts* agency practice manuals and procedures from rulemaking, *see* 5 U.S.C. § 553(b), and provides little guidance as to informal adjudication.

298. Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

administrative action. In reviewing agency adjudication, then, courts were largely applying those standards.

And even when Congress has provided specific standards of review, courts regularly draw on their precedent in other areas to help understand and articulate what the agency had to do in response.[299] In other words, courts could look to general principles of administrative law — whether presumptions, like the presumption of reviewability, questions of scope of review, or standards like arbitrary and capricious or hard look review.

Immigration adjudication offers one vision of what administrative law might look like in decades to come. To be clear, my argument here is not that all of administrative law will begin to look like immigration law, or that the Court is likely to import immigration's plenary power to other contexts in a carbon copy. Instead, it is that, for each setting within administrative law, the Court has opened the door to picking and choosing which parts of administrative law to apply.

CONCLUSION

This paper has examined the ways in which the Court has used immigration adjudication — and the rights of noncitizens — within its broader project to reshape judicial review of administrative action. The Roberts Court has radically reshaped administrative law. This project has largely emphasized the primacy of the federal courts and judicial review, while also enlarging the putative rights of regulated parties within that review, at the cost of agency power. Immigration law is a frequent conversation partner within this project and is frequently invoked as a reason to undermine administrative agencies. Yet the Court has largely excluded immigration adjudication from meaningful federal court review where it would really matter for noncitizens. Looking again at the Roberts Court through its immigration decisions helps show the pretextual and outcome-determinative nature of its broader administrative law opinions. Noncitizens appear as useful subjects: incorporated into administrative law and judicial review where convenient, but largely excluded where it might actually matter.

299. This is particularly true of the three main mass adjudicatory agencies — veterans appeals, social security, and immigration. This allows meaningful cross-doctrinal pollination. For one example of this phenomenon, consider Aadhithi Padmanabhan's articulation of reason-giving standards, which cut across all three contexts. *See* Padmanabhan, *supra* note 46.