An Inconsistent *Chevron* Standard: Refining *Chevron* Deference in Immigration Law

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Recent developments in the composition of the Supreme Court have fueled academic and journalistic speculation about the future of one of the foundational cases in modern administrative law, Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Thirty-five years ago,* Chevron *established the current legal foundation for judicial deference to agency interpretations of ambiguous statutory language. This Article contains an empirical study of the manner in which courts of appeals have applied* Chevron *in one specific area of administrative law: immigration law.*

Immigration law provides a unique case study because it implicates a number of legal and constitutional considerations related to national security, foreign relations, civil rights, international human rights, and criminal law. In contrast to other areas of administrative law, the jurisprudential underpinnings of the modern deference regime—expertise, political accountability, and delegation—apply with varying force within immigration law, depending on the particular nature of the statutory interpretation at issue, and with inconsistent results. Despite these variables, or perhaps because of them, the judiciary has developed inconsistent practices in its application of Chevron *in immigration cases.*

This Article presents an empirical study of 473 instances of statutory interpretation where federal circuit courts considered the application of Chevron *deference in immigration cases during an eleven-year period from 2003 to 2013. The study considers the factors and elements within immigration cases that produce distinct results in the courts' precedent.*

This study finds that three categories of variables shape the manner and frequency with which courts of appeals apply Chevron*. First, the nature of*

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the immigration case may lead to strikingly different rates of application and agency success. Of the categories of immigration cases studied by this paper, courts apply Chevron *at starkly lower rates when the legal issue concerns the government's authority to detain the noncitizen or the immigration consequences of criminal convictions ("crimmigration"). In contrast, courts apply* Chevron *at rates consistent with other areas of administrative law in cases where a noncitizen has affirmatively initiated the litigation or is in removal proceedings regardless of the relief sought. Second, the formality of the agency's underlying interpretation also affects the frequency with which courts apply* Chevron*. This variable, however, does not appear to influence the court differently in immigration cases than it does in administrative law cases, generally. Finally, geography matters when considering court's willingness or hesitation in applying* Chevron *in immigration cases. There exists significant disparities in circuits' application of* Chevron *in immigration cases. These findings illustrate invisible trends in the appellate courts' jurisprudence and informs ongoing debates about* Chevron*'s role in immigration cases, as well as in administrative law.*

INTRODUCTION

In *Pereira v. Sessions*, the Supreme Court reviewed the interpretation by the Board of Immigration Appeals (BIA) of an immigration statute describing the requirements for a Notice to Appear, the document that

initiates removal proceedings.[1] Writing for the majority, Justice Sotomayor found that the statutory language at issue, which had been previously interpreted by the First Circuit and several administrative judges to varying results, did not support the application of *Chevron* deference,[2] because it was not sufficiently ambiguous.[3] Despite the majority's conclusion that the statutory language was unambiguous, the question of whether to defer to the agency's interpretation turned contentious.

In a lone concurrence, Justice Kennedy noted his displeasure with lower courts' (mis)application of *Chevron* in recent years.[4] In one of his final opinions as a member of the Supreme Court, Justice Kennedy decried the judiciary's abdication of its role in interpreting federal statutes.[5] Specifically, Justice Kennedy criticized the lower courts' "reflexive deference" in immigration cases and the lower courts' unreasoned affirmances of the interpretations of immigration statutes by the BIA.[6] While he agreed with the majority's conclusion in *Pereira*, Justice Kennedy noted that the lower courts had reached the opposite conclusion based on their cursory analysis of the statute.[7] The problem, in Justice Kennedy's view, was that lower courts would summarily conclude that immigration statutes were ambiguous before fully applying the "ordinary tools of statutory construction."[8] His resignation palpable, Justice Kennedy concluded his concurrence with a general call to reconsider the underpinnings of *Chevron* in some future case.[9]

While Justice Kennedy wrote separately to address the lower courts' perceived overzealous application of *Chevron*, Justice Alito penned a

1. Pereira v. Sessions, 138 S. Ct. 2105, 2110 (2018).

2. In *Chevron*, the Court articulated a two-step analytical framework for clarifying statutory ambiguity. First, a reviewing court must determine whether the statute is ambiguous. If the reviewing court concludes that the statute is ambiguous, it must then progress to the second step to determine whether the agency's proposed interpretation is reasonable enough to receive deference. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

3. *Pereira*, 138 S. Ct. at 2113–14 ("[T]he Court need not resort to *Chevron* deference, as some lower courts have done, for Congress has supplied a clear and unambiguous answer to the interpretive question at hand.") (citing *Chevron*, 467 U.S. at 842–43). *See also id.* at 2120 (Kennedy, J., concurring) (noting that at least six Courts of Appeal had found the language of 8 U.S.C. § 1229b(d)(1) ambiguous and the BIA's interpretation to be reasonable).

4. *Id.* (Kennedy, J., concurring).

5. *Id.*

6. *Id.*

7. *Id.*

8. *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring) ("In according *Chevron* deference to the BIA's interpretation, some Courts of Appeals engaged in cursory analysis of the questions whether, applying the ordinary tools of statutory construction, Congress' intent could be discerned . . . .") (citation omitted).

9. *Id*. at 2121 ("[I]t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision.").

lone dissent wherein he expressed his concern with the manner of the majority's application of the deference doctrine in the case under consideration. Justice Alito's dissent took issue with what he described as the Court's rejection of the government's statutory interpretation in favor of one that it *preferred*—actions which would violate the *Chevron* precedent if accurate.[10] While acknowledging the *Chevron* deference's questionable future, he accused the majority of undermining the precedent by disingenuously concluding there was no statutory ambiguity.

In essence, both Justice Kennedy's concurrence and Justice Alito's dissent express dueling concerns about the current state of the *Chevron* doctrine in the courts. While such debates about the continued viability of *Chevron* are not novel in the Supreme Court,[11] it is appropriate that these diametrically opposed views of the same doctrine arose in an immigration case.[12] The justices' frustrations with lower courts' application of *Chevron* deference are echoed by legal scholars who have studied the doctrine's application in immigration cases.[13] These scholars have documented the unpredictable application of *Chevron* deference in immigration cases, and, in some instances, have attempted to articulate organizing principles for this seemingly erratic jurisprudence.

This Article builds on previous empirical studies and shows that within immigration law there is a variety of legal issues and deference considerations that affect the manner and frequency with which courts apply *Chevron* deference. In particular, this Article challenges the use of "immigration law" as a singular label in such studies and proposes the introduction of a wider vocabulary when analyzing and discussing these

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10. Alito dissenting:

> [H]ere, a straightforward application of *Chevron* requires us to accept the Government's construction of the provision at issue. But the Court rejects the Government's interpretation in favor of one that it regards as the best reading of the statute. I can only conclude that the Court, for whatever reason, is simply ignoring *Chevron*.

Id. at 2121 (Alito, J., dissenting).

11. *See, e.g.*, City of Arlington v. Fed. Commc'ns Comm'n, 569 U.S. 290, 318 (2013) (Roberts, C.J., dissenting) (discussing the Court's history of applying *Chevron*).

12. What's more, Justice Kennedy's criticisms appear targeted at lower courts' application of *Chevron* in immigration cases specifically. *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring).

13. *See, e.g.*, Michael Kagan, Chevron*'s Liberty Exception*, 104 IOWA L. REV. 491, 513–17 (2019) (describing the Court's application of *Chevron* deference in different immigration cases); Jill E. Family, *Immigration Law Allies and Administrative Law Adversaries*, 32 GEO. IMMIGR. L.J. 99, 116 (2017) (examining efforts to discredit *Chevron* deference); Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 163–66 (2015) (questioning the application of *Chevron* deference in immigration detention challenges); Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 GEO. IMMIGR. L.J. 515, 530–35 (2003) (comparing the immigration rule of lenity and *Chevron* deference).

cases. "Immigration law," as currently conceived and applied by scholars and jurists, is too broad and amorphous of a category to provide meaningful categorization of the *Chevron* precedent.[14] To illustrate this point, this Article adapts a data set compiled by professors Kent Barnett and Christopher J. Walker to study appellate courts' application of *Chevron* deference.[15] In adapting this data set, I identify six distinct subcategories of "immigration" cases and analyze the manner and frequency with which courts of appeal apply *Chevron* deference in each subcategory.[16] This Article also finds that the formality of the agency's underlying action and geographic variables also play key roles in shaping the jurisprudential landscape.[17] While formality shapes the application of *Chevron* in immigration cases in a manner similar to other areas of administrative law, geographic considerations diverge significantly.[18]

This Article is structured into three parts. Part I discusses the foundations of *Chevron* generally and its application in immigration cases. This section explores *Chevron*'s inconsistent history in immigration cases almost from the doctrine's inception. Part II discusses the basis and structure of earlier empirical studies, including the Barnett-Walker study that serves as a foundation for the current study. This section discusses the current study's coding decisions and methodology, as well as limitations on the data used. The third and final section presents the results of this study and the implications of these findings for future discussions.

I. *CHEVRON* IN IMMIGRATION LAW

Few cases in American history have garnered as much attention from academics, lawyers, and the judiciary as the Supreme Court's 1984 decision *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[19] *Chevron* plays an outsized role in modern administrative law because it is often considered by scholars to have supplanted prior Supreme Court precedent regarding agency deference with a singular

14. *See infra* Part I.

15. Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1 (2017) [hereinafter Chevron *in the Circuit Courts*]. Kent Barnett et. al., *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463 (2018) [hereinafter *Administrative Law's Political Dynamics*] (analyzing the same data set); Kent Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 NOTRE DAME L. REV. 1441 (2018) [hereinafter Chevron *Step Two's Domain*] (analyzing the same data set). *See infra* Part II.

16. *See infra* Part II.

17. *See infra* Part III.

18. *See infra* Part III.

19. *See* Thomas W. Merrill, *The Story of* Chevron: *The Making of an Accidental Landmark*, ADMIN. L. REV. 253, 254–55 (2014) (discussing the frequency of law review articles and the judiciary citing to *Chevron* and comparing *Chevron* to other prominent cases).

formula governing the administration of deference to an agency's statutory interpretation.[20] This precedent has become so pervasive that the decision is simply referred as "Chevron" with no concern that it will be confused with any of the number of other lawsuits surrounding the eponymous, global conglomerate with a reputation for litigious behavior.[21] Indeed, *Chevron* has become so prodigious in the legal parlance that it has inspired law students to choreograph, practice, and perform satirical dances referencing this case that is ubiquitous in law schools.[22]

Despite *Chevron*'s pervasiveness, legal scholars have long criticized courts' capricious application of the precedent. Empirical studies have repeatedly found that *Chevron* is not applied with the rigor or consistency that a strict reading of the precedent would require.[23] A great deal of ink

20. The Supreme Court has a long and storied history of reviewing agency's statutory interpretation. *See, e.g.*, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) (concerning deference to executive interpretations involving foreign affairs and national security); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 411 (1945) (concerning deference to agency interpretations of their own regulation); Beth Israel Hosp. v. Nat. Labor Rels. Bd., 437 U.S. 483, 500 (1978) (concerning deference to statutory interpretations); Nat'l Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472, 476 (1979) (concerning deference to statutory interpretations). *See also* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1098–1120 (2008) (analyzing agency-interpretation cases to develop a continuation approach to deference).

21. Amanda Ernst, *America's Most Litigious Energy Companies*, LAW 360 (Feb. 14, 2007, 12:00 AM), https://www.law360.com/articles/18608/america-s-most-litigious-energy-companies [https://perma.cc/VBV5-M4YB] (listing Chevron Corp. as the second most litigious energy company with 208 new cases in 2006); Daniel Fisher, *Fighting 'Misguided' Lawsuits,* Chevron *Shows It Can Play the Climate Change Blame Game Too*, FORBES (Feb. 1, 2018), https://www.forbes.com/sites/legalnewsline/2018/02/01/facing-meritless-lawsuits-chevron-says-it-can-play-the-climate-change-blame-game-too/#7419635c7cd4 [https://perma.cc/9NV8-7T57] ("Chevron has a reputation for deploying aggressive and innovative litigation strategies.").

22. *See* Lewie Briggs, *The* Chevron *Two Step*, YOUTUBE (May 4, 2014), https://www.youtube.com/watch?v=uHKujqyktJc [https://perma.cc/X6R5-HTXD] (demonstrating law students choreographing and performing a dance referencing *Chevron*).

23. *See, e.g.*, Eskridge, Jr. & Baer, *supra* note 20 at 1120–26 (2008) (offering statistics showing numerous times the Court did not apply the *Chevron* doctrine even though it appeared applicable); *see generally* Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727 (2010) (finding that Justices apply *Chevron* differently in different contexts); Ann Graham, *Searching for* Chevron *in Muddy* Watters*: The Roberts Court and Judicial Review of Agency Regulations*, 60 ADMIN. L. REV. 229, 271 (2008) ("Analysis of the Roberts Court cases shows that classic *Chevron* analysis is dead—or at least critically wounded. Unfortunately, it appears that stray bullets, in the form of inconsistent applications of the doctrine, may have done it in."). *See also* Daniel J. Gifford, *The Emerging Outlines of a Revised* Chevron *Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783, 833 (2007) ("A new model for judicial review of agency interpretations seems to be emerging. That model is one in which the mandatory obligation to defer, set forth in *Chevron*, is limited."); Kagan, *supra* note 13, at 494 ("At a surface level, the Supreme Court has sent mixed messages about whether deference would be appropriate in these cases. On the one hand, the Court has

has been spilled attempting to make sense of the judiciary's seemingly idiosyncratic application of *Chevron*. Nowhere is this inconsistent application more pronounced than in immigration law.

A. Chevron*'s Inconsistent Gas Mileage in Immigration Cases*

Chevron is intricately woven into the fabric of modern immigration law. Although the precedent emerged in a case concerning environmental law, it took a mere three years for the Supreme Court to formally recognize *Chevron*'s application in immigration cases.[24] During the three years between *Chevron*'s publication and its extension into immigration, the Supreme Court cited the now-foundational precedent three times.[25] While *Chevron* was cited in these interim decisions, it was cited for the simple proposition that courts generally owed agency decisions deference and not to invoke the two-step analysis with which it is currently associated.[26] It would take some time before *Chevron*'s highly structured deference formula transformed into the seminal principle of modern administrative law.[27]

The Court revisited the analytical underpinnings of *Chevron* three years later in *INS v. Cardoza-Fonseca*, an immigration case where the Court attempted to articulate restrictions on the precedent that were not present at the outset. In *Cardoza-Fonseca*, the Supreme Court considered the phrases "well-founded fear of persecution" and "clear probability of persecution" as used in the asylum and withholding of removal statutes, respectively.[28] The statutes did not define either phrase. Contrary to the petitioner's proposed interpretation of the relevant language, both the immigration judge and the BIA concluded that these two phrases denote the same legal standard for these two distinct forms of immigration relief.[29] Justice Stevens, author of the *Chevron* decision three years prior, wrote the majority opinion in *Cardoza-Fonseca* wherein he noted that the statutory language at issue was ambiguous and that gaps in the statutory language, whether implicit or explicit, required courts to defer to the

repeatedly said, clearly and strongly, that courts should defer to the Attorney General's interpretation of immigration laws, as the *Chevron* doctrine prescribes.").

24. Immigr. & Naturalization Servs. v. Cardoza-Fonseca, 480 U.S. 421, 446–48 (1987) (applying *Chevron*).

25. Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1, 33–69 (2013) (describing *Chevron's* slow adoption by court of appeals). *See also* Kagan, *supra* note 13, at 497 (2019) ("[W]hen the Supreme Court announced *Chevron*, it was understood as a more narrow decision about environmental law.").

26. Chem. Mfrs. Ass'n v. Nat. Res. Def. Council, Inc., 470 U.S. 116, 125 (1985); Cornelius v. Nutt, 472 U.S. 648, 659 (1985); United States v. City of Fulton, 475 U.S. 657, 667 (1986).

27. Lawson & Kam, *supra* note 25, at 33–69 (discussing the progression of courts' of appeals citations to *Chevron*).

28. *Cardoza-Fonseca*, 480 U.S. at 421.

29. *Id.* at 425.

agency.[30] Justice Stevens quoted his earlier opinion, declaring that the judiciary, not the agency, is the "final authority" in interpreting statutes before clarifying *Chevron*'s role in cases that involve "pure question[s] of statutory construction" and mixed questions of law and fact.[31] According to Justice Stevens, *Chevron* applied in the latter category of cases, while the judiciary's interpretation controlled in the former.[32] Thus, in the process of broadening *Chevron*'s application to immigration cases, the Court simultaneously narrowed the precedent to cases raising "pure" legal questions.[33] Ultimately, the majority concluded that the question at issue in *Cardoza-Fonseca* was a pure legal question to which *Chevron* did not apply.[34]

This revised *Chevron* standard did not go unchallenged. In a lone dissent, Justice Scalia criticized the majority's discussion of *Chevron* deference as an unnecessary and unjustified rewriting of the precedent.[35] Justice Scalia's relatively restrained dissent contended that the majority opinion was wrong to raise the specter of *Chevron* in a case where it did not apply. He took special umbrage with the majority's reworking of *Chevron* in what amounted, in his view, to dicta. Justice Scalia would ultimately be proven correct as courts silently abandoned Justice Stevens's pure/mixed question framework for applying *Chevron*.[36]

While *Cardoza-Fonseca* survived to the modern era of administrative

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30. *Id.* at 448.

31. *Id.* at 446–47.

32. *Id.* at 447–48.

33. The pure/mixed question distinction had appeared previously in Supreme Court discussions of deference.

34. *Cardoza-Fonseca*, 480 U.S. at 453 (Scalia, J., concurring) ("Since the Court quite rightly concludes that the INS's interpretation is clearly inconsistent with the plain meaning of that phrase and the structure of the Act . . . there is simply no need and thus no justification for a discussion of whether the interpretation is entitled to deference.").

35. *Id*. at 453–54 (1987) (Scalia, J., concurring) ("Even more unjustifiable, however, is the Court's use of this superfluous discussion as the occasion to express controversial, and I believe erroneous, views on the meaning of this Court's decision in *Chevron.*").

36. While courts of appeal initially attempted to apply Justice Stevens's narrowing framework in earnest, the pure/mixed question distinction largely disappeared from the Court's jurisprudence within a year. *See generally* Mead Corp. v. Tilley, 490 U.S. 714 (1989); Pittston Coal Grp. v. Sebben, 488 U.S. 105 (1988); K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988). *See also* Kagan, *supra* note 13, at 517–18 (discussing the Court's quick abandonment of the Stevens framework).

> [*C*]*ardoza-Fonseca* gave rise to a brief period of uncertainty in the lower courts over whether *Chevron* still applied to pure questions of law. By the end of the next Term, however, the Court was again applying the *Chevron* doctrine (irregularly, as ever) to questions of law, and *Cardoza-Fonseca* quietly dropped from sight.

Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 986 (1992). The pure/mixed question distinction does, however, still appear sporadically in court of appeal discussions of *Chevron*.

law, it has largely been stripped of Justice Stevens's narrowing principles and now stands solely for the proposition that *Chevron* applies to all cases of statutory interpretation within administrative law. While Justice Stevens's pure-legal or mixed-fact-and-legal question framework disappeared from Supreme Court jurisprudence, it nevertheless continues to have lingering influence in courts of appeals' discussions of the precedent.[37]

Although *Cardoza-Fonseca* appeared to broaden *Chevron*'s application, the Court's invocation of the deference precedent created an unclear foundation for its application in immigration cases broadly. This confusion was compounded five years later in *INS v. Elias-Zacarias*, another asylum case raising a question of statutory interpretation where the Court was tasked with determining whether a Guatemalan guerilla group's coercive practices constituted "persecution on account of . . . political opinion" under the asylum statute.[38] Although the case involved a seemingly ambiguous statute, the Court made no mention of *Chevron*. What's more, the question in *Elias-Zacarias* arguably presented the Court with precisely the type of mixed question of law and fact that Justice Stevens described as warranting *Chevron* deference.[39] Both the majority opinion and dissent cited *INS v. Cardoza-Fonesca*; however, they did so solely for the opinion's discussion of the asylum statute.[40] It is unlikely that the Court's decision to ignore *Chevron* was a mere oversight since the government raised *Chevron* in its briefing and the court discussed deference during oral argument.[41] While the first post-*Chevron*

37. *See, e.g.*, De Leon v. Holder, 761 F.3d 336, 341 n.4 (4th Cir. 2014) ("[T]his case presents a pure question of law, as the many appellate opinions assessing freedom from official restraint confirm."); Dinnall v. Gonzales, 421 F.3d 247, 251 (3d Cir. 2005) ("Dinnall's Petition presents a legal question, and our review is therefore de novo; the agency's views garner no special deference."); Mayers v. Dep't of Immigr. & Naturalization Servs., 175 F.3d 1289, 1301–02 (11th Cir. 1999) ("It is far from clear, however, that deference is appropriate under these circumstances. . . . The question of a statute's effective date is generally considered to be a pure question of law for courts to decide.") (citations omitted); *contra* Santos-Quiroa v. Lynch, 816 F.3d 160, 167 (1st Cir. 2016) (citations omitted) ("[H]is petition presents us with 'pure questions of law, triggering de novo review.' Aguirre v. Holder, 728 F.3d 548, 552 (1st Cir. 2013). Even under the de novo standard, however, we have recognized that because immigration law frequently implicates some expertise in matters of foreign policy, BIA interpretations of the statutes and regulations it administers are accorded substantial deference."); Siwe v. Holder, 742 F.3d 603, 612 (5th Cir. 2014) (applying *Skidmore* deference to a "pure question of law" because the BIA failed to issue a precedential opinion on the question before it).

38. Immigr. & Naturalization Servs. v. Elias-Zacarias, 502 U.S. 478, 479 (1992).

39. Immigr. & Naturalization Servs. v. Cardoza-Fonseca, 480 U.S. 421, 446–48 (1987).

40. *Elias-Zacarias*, 502 U.S. at 481–82; *id.* at 485, 487, 489 (Stevens, J., dissenting).

41. Brief for the Petitioner, Immigr. & Naturalization Servs. v. Elias-Zacarias, 502 U.S. 478 (1992) (No. 90-1342), 1991 WL 11003946, at *23–24. *See also* Kagan, *supra* note 13, at 518 (discussing the Court not applying *Chevron* deference in its decision in *Elias-Zacarias* despite the government asking for application of the deference); Transcript of Oral Argument, Immigr. & Naturalization Servs. v. Elias-Zacarias, 502 U.S. 478 (1992) (No. 90-1342), at 49.

immigration case held that the deference standard extended to immigration cases, the Court's subsequent immigration jurisprudence reintroduced uncertainty into its application in such cases.

It would be another seven years before the Court would return to the question of *Chevron*'s role in immigration cases and provide some much-needed clarity on the matter. It did so in *INS v. Aguirre-Aguirre*.[42] Much like *Elias-Zacarias* and *Cardoza-Fonseca*, *Aguirre-Aguirre* concerned a petitioner's eligibility for humanitarian forms of relief from removal.[43] In contrast to these prior cases; however, this time the Court conclusively affirmed *Chevron*'s role in immigration cases *and* applied the two-step analysis in a manner consistent with our current understanding of *Chevron*.[44]

Following this tumultuous beginning, there is no longer any question that *Chevron* applies in immigration cases. Nevertheless, the Supreme Court still maintains an inconsistent record of applying *Chevron* deference in immigration cases.[45] This inconsistency has not gone unnoticed by members of the Court or legal scholars.[46]

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42. Immigr. & Naturalization Servs. v. Aguirre-Aguirre, 526 U.S. 415, 418 (1999) ("We granted certiorari to consider the analysis employed by the Court of Appeals in setting aside a determination of the Board of Immigration Appeals (BIA).").

43. *Aguirre-Aguirre*, 526 U.S. at 418. While both *Cardoza-Fonseca* and *Elias-Zacarias* concerned petitioner's eligibility for asylum, *Aguirre-Aguirre* concerned petitioner's eligibility for a different but related form of relief known as withholding of removal.

44. *Id.* at 424–25 ("It is clear that principles of *Chevron* deference are applicable to this statutory scheme . . . . In addition, we have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials exercise especially sensitive political functions that implicate questions of foreign relations.") (internal quotation marks omitted). *See* Kagan, *supra* note 13, at 518–19 ("Since *Aguirre-Aguirre*, the Court has more consistently deferred to the Attorney General in cases concerning eligibility for asylum. Even in cases where the government lost, the Court sometimes applied the ordinary remand rule to send the case back for administrative interpretation in the first instance.").

45. *Compare* Scialabba v. Cuellar de Osorio, 573 U.S. 41, 56 (2014) ("Principles of *Chevron* deference apply when the BIA interprets the immigration laws."), *and* Negusie v. Holder, 555 U.S. 511, 516 (2009) ("Consistent with the rule in *Chevron*, 467 U.S. at 842–43, the BIA is entitled to deference in interpreting ambiguous provisions of the INA."), *with* Zadvydas v. Davis, 533 U.S. 678, 696–97 (2001) (concluding that although Congress has plenary power to create immigration law, the Judicial Branch does defer to Executive and Legislative Branch decision making with regards to immigration detention), *and* Leocal v. Ashcroft, 543 U.S. 1 (2004) (making no mention of *Chevron* or deference generally).

46. *See, e.g.*, Pereira v. Sessions, 138 S. Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring) (expressing concern with developments in the *Chevron* jurisprudence); *id.* at 2129 (Alito, J., dissenting) ("In recent years, several Members of this Court have questioned *Chevron*'s foundations . . . . But unless the Court has overruled *Chevron* in a secret decision that has somehow escaped my attention, it remains good law.") (internal citations omitted); *see also* Shruti Rana, Chevron *Without the Courts?: The Supreme Court's Recent* Chevron *Jurisprudence Through an Immigration Lens*, 26 GEO. IMMIGR. L.J. 313, 343–59 (2012) (examining immigration cases to discuss recent revisions in the deference regime by the Supreme Court); Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1398 (2017)

B. Immigration Variability and Disaggregation

The judiciary's inconsistent application of *Chevron* is not a feature unique to immigration law. A veritable cottage industry of administrative law scholars has developed over the years to study and evaluate trends in courts' inconsistent application of *Chevron*. One of these empirical studies of *Chevron*'s application is notable in its attempt to provide a comprehensive study of this phenomenon as it occurs in courts of appeals. In their 2017 study, Barnett and Walker studied appellate courts' application of *Chevron* in administrative law cases globally.[47] Their expansive data set included immigration cases along with a litany of cases from other areas of administrative law, such as telecommunications, housing, employment, tax, and Indian affairs, to name a few.[48] While the study identified a number of variables that shaped courts of appeals' application of *Chevron*, they notably found that what they labeled "immigration law" frequently constituted outliers which repeatedly skewed their findings. Specifically, the authors found that including immigration cases in the calculation of global averages for *Chevron* application rates and agency win rates would depress the overall rate by up to ten percent.[49] In an attempt to reach findings that were in "closer parity," Barnett and Walker frequently excised the immigration cases from their calculations.[50] These two scholars briefly noted idiosyncrasies in the structure of the agencies administering immigration laws were likely the cause of these aberrations, but they did not explore the issue further.[51]

This study returns to these immigration interpretations in order to better understand why these cases produced such wildly different results. However, this first requires a discussion of what constitutes "immigration law." The Barnett-Walker study omitted any discussion of their definition of "immigration law." It is not unique in this regard as many previous empirical studies have adopted the Justice Potter Stewart approach[52]

(commenting on the inconsistency with *Chevron* jurisprudence); Michael Kagan, *Loud and Soft Anti*-Chevron *Decisions*, 53 WAKE FOREST L. REV. 37, 43 (2018) [hereinafter *Anti*-Chevron *Decisions*] (noting the inconsistencies in *Chevron's* history).

47. Chevron *in the Circuit Courts*, *supra* note 15, at 35–36 (describing the study's findings when looked at globally).

48. *Id.* at 50.

49. *Id.* at 39.

50. *Id.*

51. *Id.*

52. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But *I know it when I see it* . . . .") (emphasis added).

when identifying immigration cases.[53] This task is not as forthright as it may initially appear. While the Immigration and Nationality Act (INA)[54] seems like the ideal place to start, this body of law is a dense and convoluted morass of statutes known for its "fiendish complexity."[55] While all laws comprise portions of a larger complex system,[56] immigration law is considered particularly unwieldy.[57] The INA contains a plethora of provisions ranging from those related to admission to the United States[58] and deportation from the United States,[59] to protections against workplace discrimination,[60] statistical reporting requirements for the Department of Homeland Security (DHS),[61] restrictions on employers,[62] and limitations on eligibility for state and local public benefits.[63]

Given the range of subject areas covered in what are ostensibly labeled "immigration laws," jurists and immigration scholars have developed various lexica for categorizing laws within the "immigration" label. These efforts are often necessary to discern the precise legal and constitutional constraints that apply to these statutes. For example,

53. *See, e.g.*, Raso & Eskridge Jr., *supra* note 23 at 1175–76 (categorizing immigration law cases as "highly normative" with no discussion of what constitutes "immigration case"); *see generally* Eskridge, Jr. & Baer, *supra* note 20 (omitting any discussion of what qualifies as an "immigration case").

54. 8 U.S.C. § 1101.

55. Akram v. Holder, 721 F.3d 853, 854 (7th Cir. 2013). *See also* Zeqiri v. Mukasey, 529 F.3d 364, 370 (7th Cir. 2008) (describing the INA as "Byzantine"); Filja v. Gonzales, 447 F.3d 241, 253 (3rd Cir. 2006) (characterizing immigration regulations as "labyrinthine"); Baltazar-Alcazar v. Immigr. & Naturalization Servs., 386 F.3d 940, 948 (9th Cir. 2004) ("It is no wonder we have observed '[w]ith only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity. A lawyer is often the only person who could thread the labyrinth.'"); Drax v. Reno, 338 F.3d 98, 99 (2nd Cir. 2003) ("This case vividly illustrates the labyrinthine character of modern immigration law—a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike."); Chi Thon Ngo v. Immigr. & Naturalization Servs., 192 F.3d 390, 394 (3rd Cir. 1999) ("[T]he Immigration Act has never been a model of clarity . . . .").

56. Daniel Martin Katz, *Quantitative Legal Prediction-or-How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry*, 62 EMORY L.J. 909, 962 (2013) ("Legal systems are complex adaptive systems with elaborate levels of complexity and extensive feedback loops between their respective institutions and agents as well as outside institutions and agents.").

57. *See, e.g.*, Stephen Manning & Juliet Stumpf, *Big Immigration Law*, 52 U.C. DAVIS L. REV. 407, 425–26 (2018) ("The nature of law is, in general, a complex system of rules and applications. Immigration law in particular is widely considered 'labyrinthine,' 'a maze of hyper-technical statutes and regulations.'").

58. 8 U.S.C. § 1182.

59. 8 U.S.C. § 1227.

60. 8 U.S.C. § 1324b.

61. 8 U.S.C. § 1380.

62. 8 U.S.C. § 1324a.

63. 8 U.S.C. § 1621.

immigration law scholars frequently categorize immigration statutes into two broad and somewhat unwieldy subcategories for the purposes of discussing constitutional implications of various statutes.[64] The first category, sometimes referred to as selection rules, govern the rights of noncitizens to enter and remain within the United States.[65] These immigration selection laws are differentiated from the second category, alienage rules, which regulate the treatment of noncitizens inside the United States.[66] While some immigration scholars are critical of this schema for categorizing immigration laws, this dichotomy persists as an organizing principle in the academic literature[67] and in the jurisprudence.[68] Based on colloquial understandings of the terms, one can speculate that the term "immigration law" as used by empiricists includes both selection rules *and* alienage rules.[69]

An alternative model for analyzing immigration cases has emerged in recent years that focuses on the Court's deference jurisprudence to categorize immigration cases. In a 2019 article, Professor Michael Kagan proposed a framework for categorizing immigration cases premised on the physical liberty interest of the noncitizen at issue in the litigation.[70]

64. Kagan, *supra* note 13, at 512–13 ("Immigration law has long recognized a significant constitutional difference for noncitizens who are already in the United States and those who are trying to enter. When the government takes action against a person who is inside the country, the foreign policy implications are more attenuated.").

65. Matthew J. Lindsay, *Disaggregating "Immigration Law"*, 68 FLA. L. REV. 179, 193–94 (2016); Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 360–61 (2008).

66. Lindsay, *supra* note 65, at 193–94 (explaining alienage rules); Cox, *supra* note 65, at 351–53 (discussing the role of alienage rules); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 202–03 (1994) (highlighting the elusive line between alienage and immigration rules).

67. Cox, *supra* note 65, at 357 (2008) (challenging this distinction between immigrant-selecting rules and other rules); Motomura, *supra* note 66, at 202 ("The line between "immigration" and "alienage" is elusive . . . . One key reason is functional overlap. "Alienage" rules may be surrogates for "immigration" rules. Often, the intended and/or actual effect of an alienage rule is to affect immigration patterns.").

68. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2407, 2409–12, 2414–15 (2018) (discussing the president's authority to impose entry restrictions as an extension of the federal government's plenary power to exclude); Bernal v. Fainter, 467 U.S. 216, 228 (1984) (holding that a Texas statute violated the Equal Protection Clause of the Fourteenth Amendment by denying aliens the opportunity to become notaries public); Galvan v. Press, 347 U.S. 522, 531–32 (1954) (addressing the Court's limited role in reviewing statutes restricting entry of aliens and their right to remain in the United States); Truax v. Raich, 239 U.S. 33, 42 (1915) ("The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government."); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (extending the Fourteenth Amendment's Equal Protection Clause protections to a San Francisco ordinance that, although race-neutral on its face, discriminated against Chinese immigrant laborers in the United States).

69. *See, e.g.*, Raso & Eskridge Jr., *supra* note 23, at 1735–41 (using the term "immigration law" when talking about both selection and alienage rules); Eskridge Jr. & Baer, *supra* note 23, at 1098–1120 (analyzing both selection and alienage rules).

70. Kagan, *supra* note 13, at 532–34 (describing the categorization method).

Accordingly, Kagan reviewed thirty-five years of Supreme Court opinions and identified cases where *Chevron* was or should have been considered.[71] Once he identified these cases, he then organized them into four categories.[72] While not an empirical analysis, Kagan concluded that cases raising issues related to noncitizen's liberty interest, such as immigration detention and deportation cases,[73] are less likely to receive *Chevron* deference from the Court than immigration cases that do not raise these concerns, such as non-removal cases.[74] Kagan argues this tiered system for applying *Chevron* in immigration cases is due to the Court's historical devotion to protecting physical liberty as a sacrosanct constitutional value.[75]

Kagan's analytical framework plays a foundational role in this Article, as does the academic literature discussing the overlap between civil immigration and criminal statutes. In recent decades, courts have recognized the increasing incorporation of criminal law elements into ostensibly civil immigration statutes.[76] Noncitizens with criminal convictions, or, in some instances, merely suspected of certain criminal behavior,[77] may be found removable and barred from requesting various forms of relief in immigration proceedings.[78] Immigration remains primarily a civil body of law,[79] but the incorporation of these criminal

71. *Id.* at 512–43.

72. *Id.*

73. Removal proceedings in Immigration Court proceed in two stages: the first stage requires an immigration court to determine whether or not an individual is subject to removal. If the individual is found to be subject to removal, the immigration judge will then proceed to the second stage and consider possible forms of relief. *Id.* at 537. It appears that Kagan refers to primarily to the first stage in these proceedings when he discusses "deportation cases" where the Court is recalcitrant to apply *Chevron*. *See Id.* at 522–33 (discussing the first stage of cases). Later in his article, Kagan addresses the interpretations that arise in the second stage of these removal proceedings, where he finds that the court has compunction about applying *Chevron*. *Id.* at 537–39. While the label "deportation case" can arguably apply to both stages of these removal proceedings, it appears that Kagan limits this category to the first stage and not the latter.

74. *Id.* at 512–39 (describing non-removal cases). *See also* Das, *supra* note 13, at 180–91 (contending that nondelegation principles are strongest in cases that involve habeas review of immigration detention).

75. Kagan, *supra* note 13, at 532 ("Much like imprisonment, this kind of deprivation of physical liberty calls for strong checks and balances between the judiciary and the executive branches, which makes judicial deference to administrative interpretations of the law especially indefensible. As the Court has said in a different context, deprivation of physical liberty 'is a penalty different in kind.'") (quoting Scott v. Illinois, 440 U.S. 367, 373 (1979)).

76. Padilla v. Kentucky, 559 U.S. 356, 360–64 (2010) (reviewing the history of statutory immigration reforms over the last century).

77. *See* 8 U.S.C. § 1182 (a)(2)(C)–(I), (3) (outlining criminal convictions, including suspicion, and removal procedures).

78. *See* 8 U.S.C. §§ 1182, 1227 (outlining criminal convictions and removal procedures, including who can be deported).

79. Immigr. & Naturalization Servs. v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("A

elements into this body of law has, on occasion, caused the Supreme Court to qualify this treatment of immigration as civil.[80] This increasing interconnectedness between civil immigration and criminal statutes has led to the bleeding of legal conventions from one area into the other. One notable example of this exchange is the rule of lenity, a well-established canon of construction in the criminal law context, which requires a reviewing court resolve any statutory ambiguity in an immigration statute in favor of a noncitizen.[81] Since the government interest in adversarial removal hearings often runs counter to the interest of the noncitizen, the rule of lenity frequently applies the statutory interpretation disfavored by the government.[82] This canon of construction operates as a kind of anti-deference by requiring the reviewing court to interpret statutory ambiguity in the manner most favorable to the noncitizen.[83] The Court has yet to formally address how these two contradictory regimes can coexist within immigration law.[84]

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deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime.").

80. *See, e.g.*, *Padilla*, 559 U.S. at 365–66 ("Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context.") (internal citations omitted). *See also* Immigr. & Naturalization Servs. v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) ("We find these ordinary canons of statutory construction compelling, even without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."); Immigr. & Naturalization Servs. v. St. Cyr, 533 U.S. 289, 320 (2001), *superseded by statute*, Pub. L. No. 109–13, 119 Stat. 310 (2005), *as recognized in* Balogun v. U.S. Att'y Gen., 425 F.3d 1356 (11th Cir. 2005); Slocum, *supra* note 13, at 519–23 (discussing the Supreme Court's long history of construing immigration statutes narrowly in favor of noncitizens in certain circumstances); Rebecca Sharpless, *Zone of Nondeference:* Chevron *and Deportation for a Crime*, 9 DREXEL L. REV. 323, 350 (2018) (describing similarities between immigration and criminal cases).

81. *See* Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004) ("Even if § 16 lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute in petitioner's favor. Although here we deal with § 16 in the deportation context, § 16 is a criminal statute, and it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.").

82. Kagan, *supra* note 13, at 542–43 (discussing the preferences of the government versus citizens).

83. Slocum, *supra* note 13, at 517 ("Notwithstanding this recent reference, the role of the immigration rule of lenity in deportation proceedings is not clear due to the competing deference doctrine announced in the now-famous case *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*. . . . One important issue left unresolved by the Court is the role of canons of construction in the review of agency interpretations.").

84. Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1572 (2017) ("We have no need to resolve whether the rule of lenity or *Chevron* receives priority in this case because the statute, read in context, unambiguously forecloses the Board's interpretation. Therefore, neither the rule of lenity nor *Chevron* applies."). *See also* Family, *supra* note 13, at 118 (discussing the Supreme Court

Professor Kagan elaborates a framework for reviewing Supreme Court cases that turns on the liberty interest, if any, at issue in the litigation. For instance, *Zadvydas v. Davis* is one notable example of the Court's apprehension when reviewing cases where an individual's liberty interest is implicated. In *Zadvydas*, two immigrant detainees challenged the government's authority to detain them indefinitely after immigration officials were unable to deport them to their countries of citizenship during the statutory removal period.[85] At issue was whether the INA authorized the continued—and potentially indefinite—detention of an individual whose removal order the U.S. government could not effectuate.[86] The Court rejected the government's invocation of the plenary power doctrine and held that it did not authorize the indefinite detention of immigrants under order of deportation.[87] The Court declined the government's invitation to defer to its interpretation due to the constitutional concerns arising from indefinite detention.[88] In its reasoning, the Court distinguished between the government's authority to detain immigrants and its authority to regulate admission or removal from the country; protect national security; or determine foreign policy, for which the Court suggested deference was appropriate.[89] Noncitizens' prolonged detention, the Court concluded, was squarely within the realm of constitutionally protected areas where the judiciary did not defer to agency interpretations.[90] In *Zadvydas*, the Court appeared to invert the *Chevron* standard and apply a kind of anti-deference, despite the plenary powers issue in the case. Upon considering the statutory language of the statute, the Court found congressional intent ambiguous.[91] While a strict adherence to *Chevron* would dictate that the Court then defer to a reasonable agency interpretation of the statute in this situation, the Court instead applied the canon of constitutional avoidance.[92] During the 2018 term, the Court revisited the canon of constitutional avoidance in another immigration detention case, wherein the Court limited the circumstances

decision in *Esquival-Quintana*, 137 S. Ct. at 1562, wherein the Supreme Court side stepped any discussion of whether *Chevron* or the Rule of Lenity took priority).

85. Zadvydas v. Davis, 533 U.S. 678, 684–86 (2001).

86. *Id.* at 683.

87. *Id.* at 682 ("Based on our conclusion that indefinite detention of aliens in the former category would raise serious constitutional concerns, we construe the statute to contain an implicit "reasonable time" limitation, the application of which is subject to federal-court review.").

88. *Id.* at 696–97 (citing Miller v. French, 530 U.S. 327, 336 (2000)).

89. *Id.* at 695–96.

90. *Id.* at 696.

91. *Zadvydas*, 533 U.S. at 697.

92. *Id.* at 699 ("[I]nterpreting the statute to avoid a serious constitutional threat, we conclude that, once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute."). *See also* Das, *supra* note 13, at 155–56 (dissecting the Court's decision in *Zadvydas*).

under which the canon of constitutional avoidance can be applied.[93]

Immigration scholars have attempted to make sense of the Supreme Court's seemingly incongruous jurisprudence in a variety of ways. While the Supreme Court has not expressly articulated any one framework for delimiting *Chevron*'s role in immigration cases, unspoken elements of the Court's reasoning appear in the gaps left by the Court's decisions. Much like immigration scholars, courts of appeals judges have also attempted to read the Supreme Court tea leaves and developed a variety of approaches to incorporate these conflicting lessons into their own opinions.[94] These attempts to divine meaning have resulted in starkly different results across the circuits as well as across categories of immigration law.[95]

II. OVERVIEW OF EMPIRICAL STUDY

While the Supreme Court is certainly the final arbiter of these matters, courts of appeals play a central role in shaping the administrative landscape in which all administrative decisions are reviewed.[96] For this reason, this study analyzes courts of appeals' application of *Chevron* in immigration cases to examine how these appellate courts have attempted to discern the Supreme Court's seemingly discordant precedent on the matter. This Article adapts a data set of courts of appeals' decisions compiled by Professors Kent Barnett and Christopher Walker. In contrast with the original Barnett-Walker study, this study exclusively considers agency interpretations of immigration statutes in order to identify relevant variables that shape the courts' applications of *Chevron*. This Article groups the immigration cases collected in the Barnett-Walker study into subcategories and codes for additional variables unique to immigration cases that influence the courts' review.

A. Barnett-Walker Data Set of Chevron *in the Courts of Appeal*

In 2017, Professors Kent Barnett and Christopher Walker published a study examining courts of appeals' application of *Chevron* in immigration cases generally.[97] The data they compiled for this is one of

93. Jennings v. Rodriguez, 138 S. Ct. 830, 842–44 (2018).

94. *See* discussion *infra* Part III (discussing the findings of this empirical study).

95. *Id.*

96. Lawson & Kam, *supra* note 25, at 42–69 (describing the DC Circuit's embrace of *Chevron* as the catalyst for the precedent's emergence as a foundational precedent in the modern administrative state). *See also* Kagan, *supra* note 13, at 497 ("[T]here is a plausible case that we should really be talking about the *General Motors* Doctrine, in honor of the 1984 DC Circuit *en banc* decision that seems have been the first to cite and explain *Chevron* as a major change in administrative law.").

97. Chevron *in the Circuit Courts*, *supra* note 15, at 5 ("This article presents the findings of the

the most comprehensive data sets of *Chevron* precedent[98] and would serve as the basis for multiple subsequent studies by the duo.[99] The original Barnett-Walker data set identified 2,272 courts of appeals decisions, between January 1, 2003, and December 31, 2013, that discuss *Chevron* in the course of reviewing an agency interpretation.[100] These eleven years were chosen because they were far enough from the original *Chevron* decision and subsequent progeny that courts of appeals had become accustomed to the deference landscape.[101] In contrast to similar empirical studies, which have reviewed data sets limited to a single circuit court,[102] a particular agency,[103] or an abbreviated timeframe,[104] the Barnett-Walker study reviews appellate cases from across multiple circuits and agencies from an eleven-year period.[105]

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largest empirical study of Chevron in the circuit courts to determine how *Chevron* works outside the marbled enclave of One First Street.").

98. *Id.* at 5 ("This Article presents the findings of the largest empirical study of *Chevron* in the circuit courts to determine how *Chevron* works outside the marbled enclave of One First Street. Our database of 2,272 judicial decisions, collected with broad search parameters, attempts to cull all published decisions from the circuit courts over an eleven-year period (2003–2013) that refer to the Chevron doctrine.").

99. *See Administrative Law's Political Dynamics*, *supra* note 15, at 1486 (employing the original Barnett-Walker data set to evaluate the political dynamics of appellate panels on *Chevron*'s application); Chevron *Step Two's Domain*, *supra* note 15, at 1458 (employing the original Barnett-Walker data set to evaluate how circuit courts have applied Chevron step two to invalidate agency statutory interpretations).

100. Chevron *in the Circuit Courts*, *supra* note 15, at 5 ("Our database of 2,272 judicial decisions collected with broad search parameters, attempts to cull all published decisions from the circuit courts over an eleven-year period (2003–2013) that refer to the *Chevron* doctrine.").

101. Chevron *in the Circuit Courts*, *supra* note 15, at 21–22 (noting that the timing ensured that courts of appeals had time to incorporate *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) and *Barnhart v. Wilson*, 535 U.S. 212 (2002) into their jurisprudence).

102. *See, e.g.*, Richard L. Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L. REV. 1100, 1122–38 (2001) (reviewing DC Circuit decisions from 1970 to 1996); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2168–76 (1998) (reviewing over 200 opinions from the DC Circuit between 1991 and 1995 that cited *Chevron*); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 303–07 (surveying a set of administrative law cases in the DC Circuit).

103. *See, e.g.*, Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 825 (2006) (analyzing Supreme Court decisions regarding the NLRB and EPA from 1990 to 2004).

104. *See, e.g.*, Orin S. Kerr, *Shedding Light on* Chevron: *An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. REG. 1, 4 (1998) (considering cases from 1995 to 1996); Peter H. Schuck & E. Donald Elliott, *To The* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 989–90 (reviewing nearly 2,500 decisions, including those without published opinions, in six- or two-month periods during certain years to ascertain *Chevron*'s effect on judicial review).

105. Chevron *in the Circuit Courts*, *supra* note 15, at 21 (discussing the Barnett-Walker study's

In addition to advancing the study of courts of appeals' application of *Chevron*, generally, the breadth of the Barnett-Walker data set makes it a particularly useful resource to analyze courts of appeals' application of *Chevron* in immigration cases.[106] Immigration cases comprised nearly one-third (30.6%) of the total data set, by far the largest single legal area within the study.[107] The overrepresentation of immigration cases comes as little surprise since immigration law is one of the most litigated areas of administrative law.[108]

One notable finding in the Barnett-Walker studies is the idiosyncratic manner in which courts of appeals apply *Chevron* in immigration cases. Barnett and Walker note the distorting effect that these immigration cases have on the data overall. For instance, in the first article in their series, Barnett and Walker consider agency win rates when formal adjudications—a category that includes BIA decisions—produce the statutory interpretation at issue.[109] Barnett and Walker found that agency's interpretation succeeded in 74.7% of the entries that arose from these formal adjudications.[110] This overall rate of success, however, would increase ten percentage points when immigration cases were

methods and indicating the difference and thorough nature compared to previous studies); *see also Administrative Law's Political Dynamics*, *supra* note 15, at 1486–91 (detailing the thorough method and numerous variables used in the Barnett-Walker study).

106. One should note that the current study does not capture significant developments in immigration law after 2013. For instance, the Trump Administration engaged in a massive project of restructuring immigration agencies, regulations, and precedent. *See*, *e.g.*, *A-B-*, 27 I&N Dec. 316, 345–46 (A.G. 2018) (refusing to grant asylum to an alien who had suffered domestic abuse); *L-E-A*, 27 I&N Dec. 40, 47 (BIA 2017) (finding that membership of a social group comprised of the petitioner's father's family members was insufficient to grant asylum); Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,296–97 (Aug. 14, 2019) (proposing a change to the method by which DHS will determine whether to admit an alien to the United States). *See also* Lisa Riordan Seville & Adiel Kaplan, *AG Barr Using Unique Power to Block Migrants From U.S., Reshape Immigration Law*, NBC NEWS (July 31, 2019, 3:30 AM), www.nbcnewyork.com/news/national-international/ag-barr-using-unique-power-to-block-migrants-from-us-reshape-immigration-law/105391/ [https://perma.cc/ZQ3X-AP4T] (describing the unprecedented pace at which Attorneys General Sessions and Barr have certified immigration cases to themselves rather than relying on the administrative review of the BIA). Nevertheless, while the pace of these restructuring efforts has substantially increased in recent years, the deferential framework under which these court of appeals review these cases remains largely unchanged.

107. Chevron *in the Circuit Courts*, *supra* note 15, at 27 ("As for subject matter, 30.6% of interpretations concerned immigration, perhaps explaining in part the Ninth Circuit's disproportionate share of the interpretations in the dataset."); *see also Administrative Law's Political Dynamics*, *supra* note 15, at 1490 (finding 29% of entries were coded as "immigration" cases).

108. Schuck & Elliott, *supra* note 104, at 1015–16 (noting that in 1990 "immigration cases, which comprised only 5.4% of the [courts of appeals'] caseload in 1965, now account for 13.7% and comprise the third largest group of cases (after the NLRB and MSPB cases).").

109. Chevron *in the Circuit Courts*, *supra* note 15, at 36, 39 (comparing agency win rates by agency procedure).

110. *Id.*

omitted from the analysis.[111] The immigration cases' distorting effect was also observed in the rate at which courts concluded that *Chevron* controlled (i.e., passed *Chevron* step zero).[112] Agency interpretations arising from formal adjudications jumped from 76.7% to 85.2% when immigration adjudications were excluded.[113] In both instances, the authors excised these immigration cases in order to achieve "closer parity" with the remaining cases.[114]

In their attempt to catalog courts of appeals' application of *Chevron*, Barnett and Walker created a rich data set for considering *Chevron* jurisprudence holistically but did not examine the individual legal subject areas with equal depth. This is most notable in the immigration cases where the duo relied on a generalized category of "immigration" cases that omit key nuances and distinct characteristics of an area of administrative law that plays an outsized role in administrative decisions.[115] This study seeks to remedy that.

B. Study Design, Methodology, and Data Set

This section reviews the methodology used to compile the original Barnett-Walker data set and explains the additions made by this Article. Barnett and Walker identified all cases where *Chevron* was cited or discussed by the court of appeals panel, regardless of whether it actually applied the decision.[116] Given the sheer size of the endeavor, Barnett and

111. *Id.* (noting immigration interpretations arising from formal adjudications rose to 84.7% when immigration cases were omitted).

112. In *United States v. Mead Corp*., the Court held that *Chevron* was appropriate only in cases where "Congress delegated authority to the agency generally to make rules carrying the force of law . . . ." United States v. Mead Corp., 533 U.S. 218, 226–27 (2001). Following this decision, jurists and scholars referred to this initial inquiry into whether the *Chevron* framework applies in the case as "*Chevron* step zero." *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006) (defining "*Chevron* step zero" as the initial inquiry into whether the *Chevron* framework applies).

113. Chevron *in the Circuit Courts*, *supra* note 15, at 36, 39 (indicating *Chevron* deference rates for formal adjudication with and without immigration adjudications).

114. Chevron *in the Circuit Courts*, *supra* note 15, at 6–7 (discussing the differences in *Chevron* deference rates for different types of adjudication and what benefits arise when immigration adjudication is omitted).

115. "Immigration" cases constituted 462 out of the 1575 entries in the original Barnett-Walker data set. Chevron *in the Circuit Courts*, *supra* note 15, at 27 (Immigration cases comprised 30.6% of the Barnett-Walker data set, which is a notable feat given that immigration cases are entirely absent from the Federal Circuit cases and *almost* entirely absent from the DC Circuit cases included in the data set.). Int'l Internship Program v. Napolitano, 718 F.3d 986 (D.C. Cir. 2013) was the only DC Circuit case in the Barnett-Walker data set related to immigration. Kent Barnett, Christina Boyd & Christopher J. Walker, *Index of Barnett-Boyd-Walker Vanderbilt Law Review 2018* (Feb. 2, 2019), http://clboyd.net/BarnettBoydWalker_Vand2018/ [https://perma.cc/M5B3-KJZG].

116. Chevron *in the Circuit Courts*, *supra* note 15, at 22 n.140 ("[O]ther studies generally coded only cases that applied the *Chevron* framework, while we coded all cases that concerned statutory interpretation and referred to *Chevron*, whether or not the court applied the *Chevron* framework.").

Walker found that traditional methods of collecting relevant cases—such as searching for all instances of judicial review of agency statutory interpretations—were unfeasible.[117] Instead, Barnett and Walker collected cases through a series of keyword Westlaw searches that combined "Chevron" with a qualifying search term such as "agency," "ALJ," "order," "formal adjudication," "rule," or "interpretation."[118] These searches were coupled with additional searches for federal agencies they believed were most likely to engage in statutory interpretation.[119] The final Barnett-Walker database included data from cases that engaged in both direct *and* collateral review of agency interpretations.[120] Once the list of cases was compiled, researchers then reviewed the list to remove duplicates, unpublished decisions, and other irrelevant authorities.[121]

Once the data had been scraped, Professors Barnett and Walker coded thirty-seven distinct variables related to the nature of the decisions, including nature of the judicial decision, subject matter, political valence of the interpretation, and result for the agency.[122] They described this process as follows:

> Our research assistants initially reviewed the decisions, and we then completed a secondary review of every decision to increase uniformity and validity. In our secondary review, we divided the cases up randomly for one of us to review, and we flagged cases for a third-level review where the other then weighed in. One of us then conducted a more systemic review of the cases in preparing the data set for analysis in the IBM SPSS statistics software. For all decisions with at least one instance of an agency's statutory interpretation of a statute that it administers, we coded each instance of interpretation within one case as its own entry (as Kerr, Re, and Hickman and Krueger did, but Eskridge and Baer did not), meaning that one decision could have more than one entry in our data set. We had a total of 1,558 separate instances of statutory interpretation from 1,327 judicial opinions.[123]

While thorough, this approach is not without limitations, as both Barnett and Walker acknowledge. First, Barnett and Walker's strategy of using keyword searches to identify and filter cases relied on multiple layers of human review. Review of the data set for this Article uncovered a handful of cases that appeared to satisfy the researchers' parameters for inclusion but were nevertheless omitted from the ultimate Barnett-

117. *Id.* at 22.
118. *Id.*
119. *Id.*
120. *Id.* at 23.
121. Chevron *in the Circuit Courts*, *supra* note 15, at 23.
122. *Id.* at 24.
123. *Id.* at 23.

Walker data set.[124] While Barnett and Walker used multiple strategies for identifying published federal courts of appeals' decisions, the authors note that the data set is imperfect.[125]

A second limitation with Barnett and Walker's approach is a structural one related to the limitations of relying on a keyword search. By identifying cases using keyword searches that include "Chevron," this data set omits cases where appellate courts fail to include any reference to *Chevron*. This may occur in a number of situations. For instance, *Chevron* is well established precedent that has been formally accepted and applied in every circuit over the past thirty-five years. Given its longstanding tenure, courts of appeals have developed their own precedent and language for administering *Chevron* two-step deference standard within their own circuit. *Chevron* has become so enmeshed in the jurisprudence that courts may also cite *Chevron*'s Supreme Court or circuit court progeny in lieu of the eponymous case.[126] Conversely, the Barnett-Walker method of scraping data also omits cases where the courts silently omit any reference to *Chevron*, despite the precedent control.[127] Professor Michael Kagan observed that the Supreme Court frequently engaged in such omissions, which he labeled "soft" anti-*Chevron* decisions in his 2018 article reviewing the Supreme Court's application of *Chevron* in immigration cases.[128] These soft anti-*Chevron* decisions

124. Barnett, Boyd & Walker, supra note 115. The missing cases include *Singh v. Gonzales*, 432 F.3d 533 (3d Cir. 2006); *Rotimi v. Gonzales*, 473 F.3d 55 (2d Cir. 2007); *Guo Qi Wang v. Holder*, 583 F.3d 86 (2d Cir. 2009); *Ganzhi v. Holder*, 624 F.3d 23 (2d Cir. 2010); *Diouf v. Mukasey*, 542 F.3d 1222 (9th Cir. 2008) (subsequent appeal included in the original data set); and *Mei Juan Zheng v. Mukasey*, 514 F.3d 176 (2d Cir. 2008) (same). The total number of missing cases remains unclear; however, these omissions are not fatal for the purposes of this study.

125. Chevron *in the Circuit Courts*, *supra* note 15, at 22 ("Although our data set does not permit us to paint as complete a picture as to non-*Chevron* regimes as the Eskridge and Baer or Hickman and Krueger studies, we anticipated obtaining a sufficient number of applications to inform understandings of those doctrines.").

126. *See, e.g.*, Ortiz-Bouchet v. U.S. Att'y Gen., 714 F.3d 1353, 1355 (11th Cir. 2013) (citing Cadet v. Bulger, 377 F.3d 1173, 1185 (11th Cir. 2004) rather than *Chevron*); Duron-Ortiz v. Holder, 698 F.3d 523, 526 (7th Cir. 2012), *as amended* (Nov. 6, 2012) (citing Gattem v. Gonzales, 412 F.3d 758, 763 (7th Cir. 2005)); Sanchez v. Holder, 627 F.3d 226, 230 (6th Cir. 2010) (citing Immigr. & Naturalization Servs. v. Aguirre-Aguirre, 526 U.S. 415, 424–25 (1999)); Marroquin-Ochoma v. Holder, 574 F.3d 574, 577 (8th Cir. 2009) (citing De Brenner v. Ashcroft, 388 F.3d 629, 636 (8th Cir. 2004)); Sung v. Keisler, 505 F.3d 372, 375 (5th Cir. 2007) (citing White v. Immigr. & Naturalization Servs., 75 F.3d 213, 215 (5th Cir. 1996)). Barnett, Boyd & Walker, supra note 115.

127. Chevron *in the Circuit Courts*, *supra* note 15, at 48–52 (comparing outcomes of cases that use or do not use the Chevron framework).

128. *See, e.g.*, Immigr. & Naturalization Servs. v. Elias-Zacarias, 502 U.S. 478, 489–90 (1992) (providing an example of a case omitting any named reference to *Chevron*); *Anti*-Chevron *Decisions*, *supra* note 46, at 40 (defining "soft" anti-*Chevron* opinions as those cases where the Court either fails to apply the precedent when it ostensibly should have mattered or flippantly dismisses the precedent so as to render it irrelevant in the interpretation under consideration); *see also id.* (defining "loud" anti-*Chevron* opinions as those which explicitly address the precedent and articulate doctrinal justifications for not applying the precedent in the particular circumstances).

present a significant challenge for data collection related to the courts' application of, or failure to apply, *Chevron* in cases where it *should* apply. Barnett and Walker acknowledge this limitation in their methodology, which does not attempt to identify either category of these cases.[129] Thus, despite their careful attempts, the Barnett-Walker data set is an inherently imperfect one.

Nevertheless, the Barnett-Walker data set provides the most comprehensive accounting of courts of appeals *Chevron* decisions in recent years and captures an invaluable, though limited, snapshot of the immigration-*Chevron* precedent. The Barnett-Walker data set is especially valuable for this Article because it follows a period of significant restructuring of the U.S. immigration enforcement agencies. The Executive Office of Immigration Review (EOIR), which houses both the immigration courts and the BIA, adopted a series of structural reforms intended to reduce the backlog of immigration cases. Beginning in 1999, the EOIR changed its regulations to empower the BIA to issue single-line summary affirmances of immigration court decisions.[130] At the same time, the BIA drastically reduced the number of precedential decisions it issued in practice.[131] In 2002, the BIA continued to "streamline" its review procedures and edited case management regulations to expand the authority of individual board members. The new regulations reduced the number of cases requiring BIA panel review and expanded the authority of individual board members to summarily dispose of appeals.[132] Individual board members could now choose between two options to readily dispose of an appeal: (1) affirm immigration judge rulings without opinion;[133] or (2) issue brief, written opinions affirming, modifying, or

129. Chevron *in the Circuit Courts*, *supra* note 15, at 29 ("This study looked only at decisions in which courts cited *Chevron* deference, so it is no doubt far from a complete picture of the *Skidmore* and no-deference precedent in the circuit courts."); *id.* at 23 n.144 ("Similar to another study, we did not attempt to obtain decisions in which the courts should have applied *Chevron* but failed to do so or decisions that applied a *Chevron*-like review without citing *Chevron.*").

130. 8 C.F.R. § 1003.1(b)(4)–(5) (2020). *See also* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 7,309, 7,311 ("A single board member may summarily affirm without opinion under § 3.1(e)(4). . . ."); Rana, *supra* note 46, at 327 ([T]he immigration agency . . . implemented a series of streamlining regulations which allowed the appellate body at the agency, the Board of Immigration Appeals (BIA), to issue summary affirmances of an Immigration Judge's decision . . . .").

131. Rana, *supra* note 46, at 329 ("[A]s it increasingly issued affirmances without opinion, the Board also drastically reduced the number of precedential decisions it issued . . .").

132. *See* 8 C.F.R. § 1003.1(e)(6) (2020) (listing the criteria for immigration court appeals that warrant review by a BIA panel).

133. 8 C.F.R. § 1003.1(e)(4) ("The Board Member to whom a case is assigned shall affirm the decision of the Service or the immigration judge, without opinion, if the Board member determines that the result reached in the decision under review was correct . . . .").

remanding the lower court's orders.[134] These combined reforms at the turn of the twenty-first century had a profound effect on courts of appeals, which were then tasked with reviewing the BIA's decisions.

While the EOIR reforms had the desired effect of empowering the BIA to dispose of immigration cases more quickly, the quality of the BIA opinions suffered as a result. Courts of appeals noted this trend with frustration and frequently commented on these structural changes when reviewing BIA decisions under the streamlined process.[135] In addition to an expanding immigration docket, appellate courts had to contend with abbreviated immigration court decisions that were summarily affirmed or denied by BIA decisions that added little clarity or insight to the administrative record. These reforms also empowered the BIA to quickly dispose of a larger number of cases and thereby shifted the burden of reviewing immigration appeals to the courts of appeals, which experienced a 600 percent increase in the number of immigration appeals.[136] The metaphorical pump was primed by 2003 for the increased onslaught of immigration appeals.

Appellate courts initially expressed skepticism toward these new regulatory creations. In many cases the court's skepticism of the administrative review process prevented them from applying *Chevron* to the BIA's interpretation.[137] Many courts reviewing these immigration

134. 8 C.F.R. § 1003.1(e)(5) ("If the Board member to whom an appeal is assigned determines, upon consideration of the merits, that the decision is not appropriate for affirmance without opinion, the Board member shall issue a brief order affirming, modifying, or remanding the decision under review . . . .").

135. *See, e.g.*, Kadia v. Gonzales, 501 F.3d 817, 821 (7th Cir. 2007) ("Deference is earned; it is not a birthright. Repeated egregious failures of the Immigration Court and the Board to exercise care commensurate with the stakes in an asylum case can be understood, but not excused, as consequences of a crushing workload that the executive and legislative branches of the federal government have refused to alleviate."); Pasha v. Gonzales, 433 F.3d 530, 531 (7th Cir. 2005) ("At the risk of sounding like a broken record, we reiterate our oft-expressed concern with the adjudication of asylum claims by the Immigration Court and the Board of Immigration Appeals and with the defense of the BIA's asylum decisions in this court by the Justice Department's Office of Immigration Litigation . . . The performance of these federal agencies is too often inadequate. This case presents another depressing example."); Mei v. Ashcroft, 393 F.3d 737, 739 (7th Cir. 2004) ("It is not deploying any insights that it might have obtained from adjudicating immigration cases."). *See also* Rana, *supra* note 46, at 326 (quoting a federal judge as saying "[r]epeated egregious failures of the Immigration Court and Board to exercise care commensurate with the stakes in an asylum case can be understood, but not excused, as consequences of a crushing workload that the executive and legislative branches of the federal government have refused to alleviate.").

136. *Immigration Litigation Reduction: Hearing Before the Sen. Comm. on the Judiciary*, 109th Cong. 27 (2006) (statement of Jonathan Cohn, Deputy Assistant Att'y Gen., Civ. Div., U.S. Dep't Just.). *See also* Andrew Tae-Hyun Kim, *Rethinking Review Standards in Asylum*, 55 WM. & MARY L. REV. 581, 632–34 (2013) (discussing the effects of the streamlining reforms on courts of appeals' expertise in administering immigration laws at the expense of EOIR expertise).

137. *See, e.g.*, De Leon-Ochoa v. Att'y Gen. of U.S., 622 F.3d 341, 349 (3d Cir. 2010)

cases relied increasingly on the immigration judge's opinion rather than on the BIA's decisions as the final agency action.[138] Some courts have gone so far as to question whether any deference is appropriate in such cases,[139] or forwent explicitly endorsing a deference regime by reasoning that the ruling is unaffected by whichever deference standard applies.[140] A tenuous consensus eventually emerged that relied on the precedential

(cataloging circuit splits on this question). *See also* Quinchia v. U.S. Att'y Gen., 552 F.3d 1255, 1258 (11th Cir. 2008) (stating an unpublished BIA decision that does not rely on BIA or Court of Appeals precedent does not receive *Chevron* deference); Rotimi v. Gonzales, 473 F.3d 55, 57–58 (2d Cir. 2007) (holding an unpublished BIA decision that does not rely on precedent for its definition of a contested term does not receive *Chevron* deference, because it is not "promulgated under [the agency's] authority to make rules carrying the force of law") (internal quotation marks omitted); Garcia-Quintero v. Gonzales, 455 F.3d 1006, 1012–14 (9th Cir. 2006) (opining that an unpublished BIA decision does not have the force of law and therefore does not receive *Chevron* deference). *Contra* Gutnik v. Gonzales, 469 F.3d 683, 689–90 (7th Cir. 2006) (according *Chevron* deference to BIA's streamlined adoption of IJ decision); Fei Mei Cheng v. Att'y Gen. of U.S., 623 F.3d 175, 182 (3d Cir. 2010) (distinguishing between a BIA summary affirmance and a single member, nonprecedential difference and noting that *Chevron* deference applied in the latter circumstance); Dulal-Whiteway v. U.S. Dep't of Homeland Sec., 501 F.3d 116, 120 (2d Cir. 2007), *abrogated by*, Nijhawan v. Holder, 557 U.S. 29 (2009) ("Though we ordinarily grant deference . . . to the BIA's construction of the immigration laws, we do not extend *Chevron* deference to any statutory construction of the INA set forth in a summarily affirmed IJ opinion, like the one in this case.") (internal citations and quotation marks omitted).

138. *See, e.g.*, Mirzoyan v. Gonzales, 457 F.3d 217, 220 (2d Cir. 2006) ("When the BIA issues a short opinion adopting an IJ's decision, we review the two decisions together, including the portions [of the IJ's decision] not explicitly discussed by the BIA.") (internal quotations omitted); Kepilino v. Gonzales, 454 F.3d 1057, 1059 (9th Cir. 2006) ("When, as here, the BIA affirms the IJ's decision without opinion, we review the IJ's decision as the final agency action."); Yong Wong Park v. Att'y Gen. of U.S., 472 F.3d 66, 70 (3d Cir. 2006) ("[T]he BIA affirmed the IJ's decision without opinion, pursuant to its streamlining regulations, rendering the IJ's decision the final agency determination."); Markovski v. Gonzales, 486 F.3d 108, 109–10 (4th Cir. 2007) ("When the BIA affirms the IJ's decision without an opinion, as here, this court reviews the IJ's decision.").

139. *See, e.g.*, Barrios v. Holder, 581 F.3d 849, 859 (9th Cir. 2008) ("A single-member BIA panel affirmed the IJ's decision in an unpublished, nonprecedential decision. Such decisions are entitled to only *Skidmore*, rather than *Chevron*, deference."); Miranda Alvarado v. Gonzales, 449 F.3d 915, 922 (9th Cir. 2006) ("An individual IJ's statutory interpretation, summarily affirmed by the BIA under the streamlining procedure, does not, however, result in a statutory interpretation that carries the 'force of law.'").

140. Cervantes v. Holder, 597 F.3d 229, 233 n.5 (4th Cir. 2010) ("We need not resolve in this proceeding whether nonprecedential BIA decisions are entitled to *Chevron* deference, or merely to *Skidmore* deference. As explained below, we would deny the petition for review under the less deferential standard of *Skidmore.*"); Mushtaq v. Holder, 583 F.3d 875, 877 (5th Cir. 2009) ("We need not resolve this question, because Mushtaq's claim fails under either standard. Thus, we review it under the less-deferential *Skidmore* standard."); Guo Qi Wang v. Holder, 583 F.3d 86, 90 n.2 (2d Cir. 2009) ("While we have not yet decided whether unpublished, single-member BIA decisions are entitled to the lesser form of deference described in *Skidmore*, we need not consider the issue here as we would reach the same result reviewing this petition *de novo.*") (citations omitted); Godinez–Arroyo v. Mukasey, 540 F.3d 848, 851 (8th Cir. 2008) ("We need not address it here, as we hold that even applying the lesser *Skidmore* deference, we affirm the persuasive BIA decision."); De Leon-Ochoa v. Att'y Gen. of U.S., 622 F.3d 341, 351 (3d Cir. 2010) ("Because it was not briefed, barely argued, and is not dispositive for the issues before us, we decline to resolve this question. For the reasons that follow, we hold that under any standard of review, we cannot grant Petitioners relief.").

value ascribed to the BIA decisions; courts of appeals concluded that unpublished, single-member BIA opinions do not have precedential value and do not bind the BIA.[141] Conversely, published BIA opinions, whether from a single board member or panel, were deemed to constitute final agency actions entitled to deference. Regardless of how the BIA decision is produced, whether by a panel or by a single member, most circuits apply or withhold *Chevron* deference based on whether the BIA intended the decision to have precedential value.[142] The fact that a BIA opinion was issued by a single board member does not prevent the BIA decision from carrying the force of law.[143]

The Barnett-Walker data set presents a treasure trove of data about courts of appeals' decisions in immigration cases because it captures a period of rapid change in their immigration dockets. These structural reforms within the EOIR combined to create a new legal landscape in immigration law that significantly altered both the nature and volume of cases under review by courts of appeals. Given the judiciary's penchant for rewarding agency formality with deference, reforms that significantly altered the quality of the consideration of immigration cases had the potential to alter the court's application of *Chevron* deference in subsequent immigration cases.[144]

C. Capturing Emissions: Modifications to the Data Set

In order to test the courts' application of *Chevron* across various areas of immigration, this study adapted the categories used by Professor Kagan in his study of immigration cases before the Supreme Court.[145]

141. Garcia-Quintero v. Gonzales, 455 F.3d 1006, 1012 (9th Cir. 2006) ("In light of Mead, the 'essential factor' in determining whether an agency action warrants *Chevron* deference is its precedential value.").

142. *See, e.g.*, Marin-Rodriguez v. Holder, 710 F.3d 734, 737 (7th Cir. 2013) ("[W]e do not extend *Chevron* deference to non-precedential Board decisions that do not rely on binding board precedent . . . [R]ather, such Board decisions are entitled only to *Skidmore* deference.") (internal citations omitted); Guevara v. Holder, 649 F.3d 1086, 1089 (9th Cir. 2011) ("We apply *Chevron* deference to the Board's interpretations of ambiguous immigration statutes, if the Board's decision is a published decision.") (citing Marmolejo-Campos v. Holder, 558 F.3d 903, 909 (9th Cir. 2009)); Efagene v. Holder, 642 F.3d 918, 920 (10th Cir. 2011) ("It is undisputed that the BIA's unpublished decision in this case is not precedential within the agency. *See* 8 C.F.R. § 1003.1(g) (outlining the procedure for creating published BIA precedent). Nonetheless, *Chevron* deference may apply to a nonprecedential BIA decision if it relies on prior BIA precedent addressing the same question.") (citation omitted).

143. *See, e.g.*, Hoang v. Holder, 641 F.3d 1157, 1159 (9th Cir. 2011) (treating a single member BIA decision as decision by the board that is entitled to *Chevron* deference).

144. Chevron *in the Circuit Courts*, *supra* note 15, at 12–13 (discussing the role of formality in Supreme Court opinions from Christensen v. Harris County, 529 U.S. 576 (2000) through Barnhart v. Walton, 535 U.S. 212 (2002)); Schuck & Elliott, *supra* note 104, at 1021 (finding agencies that relied more heavily on adjudication had an affirmance rate of 80% whereas agencies that relied less heavily on adjudication had an affirmance rate of 86%).

145. Kagan, *supra* note 13, at 491 (showing the categories adapted for the study).

Kagan categorized immigration cases into four subcategories: non-removal, criminal grounds of removal, immigration detention, and relief from removal.[146] He concluded these variables influenced when and how the Court applied or failed to apply *Chevron* in immigration cases.[147] Kagan concluded Supreme Court justices appeared reticent to apply *Chevron* in cases that included issues related to the government's restriction of individuals' physical liberty, such as cases challenging immigration detention.[148] He also found that the Court was less likely to apply *Chevron* in cases challenging the criminal grounds of removal.[149] Conversely, he concluded that the Court was more willing to adopt *Chevron* in cases where there was no restriction on physical liberty at issue, such as in non-removal cases.[150]

This study applies similar categories to the immigration cases included in the Barnett-Walker data set in order to determine whether similar factors shaped courts of appeals' application of *Chevron*. To this end, this Article filtered the original Barnett-Walker data set by issue area to create a data set tracking solely the immigration cases collected in the original Barnett-Walker study. The immigration cases were then categorized and coded using the following variables:

- *Crimmigration*: Statutory interpretation in these cases concerns the immigration consequences of prior criminal conviction and requires the court to apply either the categorical or modified categorical approach. The categorical approach requires that courts consider the elements of a particular crime under federal law, and then compare these elements to those required for conviction under the criminal statute.[151] In instances where the

146. *Id.* at 517–31 (illustrating the four categories adapted for the study); *id.* at 533–39 (discussing immigration beyond deportation).

147. *Id.* at 519–20 (describing how the Court has grown to increasingly apply *Chevron* in non-removal cases after an initial "false start").

148. *Id.* at 533–35 (explaining the Supreme Court has heard fewer cases regarding the detention of immigrants than cases related to deportation of immigrants).

149. *Id.* at 522–31 (discussing the Supreme Court's handling of immigration cases concerning both immigration and criminal law).

150. Kagan, *supra* note 13, at 517–22 (explaining immigration cases that do not intersect with the criminal law were more likely to be heard by the Supreme Court). *Id.* at 537–539 (explaining that the Supreme Court has been more willing to apply *Chevron* in relief for removal cases). Kagan observes that "relief from removal" cases are treated by the Court as though they do not implicate a physical liberty interest—he attempts to articulate a reason for the Court's relative comfort in applying *Chevron* in these cases, but he is not convinced of his own suggested reasoning, at least as it applies to asylum cases. *Id.* at 539 ("I argue that the Supreme Court should treat the interpretation of asylum eligibility as it does grounds of removability."). It appears that the physical liberty framework does not adequately capture the dynamics at play in these cases.

151. Taylor v. United States, 495 U.S. 575, 588–89 (1990) ("Thus, Congress intended that the enhancement provision be triggered by crimes having certain specified elements, not by crimes that happened to be labeled 'robbery' or 'burglary' by the laws of the State of conviction.").

court reviews divisible criminal statutes, it applies what has been termed the "modified categorical approach," which is a variation on the categorical approach.[152] This category also includes cases where the court must determine the proper classification for a criminal statute under the "circumstance-specific" approach, articulated by the Court in *Nijhawan v. Holder*.[153] While this classification does *not* include other immigration cases with criminal elements, such as cases involving immigration statutes where no conviction is required,[154] it does include cases related to mandatory detention where the reviewing court must apply the categorical or modified categorical approach.[155]

- *Removal*: Statutory interpretation in these cases relates to an individual who was found removable in immigration proceedings and requested some form of relief. This does not include cases where the eligibility for relief is contingent on the court's application of the categorical or modified categorical approach.
  - Asylum Relief: Statutory interpretation in these cases relates to asylum claims. This includes cases where a reviewing court must determine whether a prior conviction qualifies as a "particularly serious crime[]" without applying the categorical or modified categorical approach.[156]
  - Non-Asylum Humanitarian Relief: Statutory interpretation in these cases relates to other forms of humanitarian relief including withholding of removal,[157] protection under the Convention Against Torture (CAT),[158] and the Nicaraguan Adjustment and Central American Relief Act (NACARA).[159] Much like asylum, these forms of humanitarian relief incorporate international obligations into U.S. domestic law.

152. *See* Descamps v. United States, 570 U.S. 254, 284 (2013) (explaining the "modified categorical approach" and how it is applied).

153. Nijhawan v. Holder, 557 U.S. 29, 34 (2009) (discussing the "circumstance-specific approach" and how it is applied).

154. *See, e.g.*, 8 U.S.C. § 1182(a)(2)(C) (discussing controlled substance traffickers).

155. 8 U.S.C. § 1226(c)(1) (establishing the categories of criminal convictions that trigger the mandatory detention provision).

156. *See, e.g.*, 8 U.S.C. § 1158(b)(2)(A)(ii) (establishing one of the exceptions to granting asylum to an immigrant).

157. 8 U.S.C. § 1231(b)(3) (explaining the Attorney General may not remove an immigrant to a country where their life would be threatened); 8 C.F.R § 208.16 (2020) (discussing withholding removal under the Convention Against Torture [CAT]).

158. 8 C.F.R §§ 208.16–208.18 (2020) (establishing the withholding of removal under the CAT); 8 C.F.R. §§ 1208.16–1208.18 (2020) (discussing withholding removal and the implementation of the CAT).

159. Pub. L. 105–100, 111 Stat. 2160 (1997) (establishing eligibility for relief from removal and deportation under the Nicaraguan Adjustment and Central American Relief Act).

Unlike asylum, however, these forms of relief are considered "broader" because they may remain available in instances when the individual is rendered ineligible for asylum.

  - Miscellaneous Relief: Statutory interpretation concerns any form of relief from removal not covered in Asylum Relief or Non-Asylum Humanitarian Relief. Such forms of relief include adjustment of status,[160] motions to reopen,[161] cancellation of removal,[162] and challenges to reinstatement of removal.[163]

- *Detention*: Statutory interpretation relates to statutes authorizing immigration detention.[164]
- *Non-Removal*: Statutory interpretation in these cases concerns legal issues arising in the context of affirmative immigration benefits. This category also includes other instances unrelated to either deportation or detention statutes.

Readers will note that the "Removal" category was further classified into three sub-subcategories: Asylum, Non-Asylum Humanitarian Relief, and Miscellaneous. The subsidiary categories were created to capture different outcomes within removal proceedings where the justifications for *Chevron* deference vary in strength. For example, scholars have been critical of the perceived "excessive judicial deference" to the BIA's interpretation of the INA provisions related to asylum.[165] Despite asylum law's unique ties to international and human rights law, scholars argue that *Chevron* deference has been applied in such a manner that courts merely view international law—the underpinning of U.S. asylum law—

160. 8 U.S.C. § 1255 (explaining how the status of a nonimmigrant can be adjusted to a person admitted for permanent residence).

161. 8 U.S.C. § 1229a(c)(7) (discussing that an immigrant may file to reopen proceedings).

162. 8 U.S.C. § 1229b (discussing when the Attorney General may cancel removal or adjust status for certain permanent and nonpermanent residents).

163. 8 U.S.C. § 1231(a)(5) (explaining that the Attorney General may reinstate a removal order if they discover an alien has illegally reentered the United States after previously being removed or deported).

164. *See, e.g.*, 8 U.S.C. § 1226(e) (repealed) (discussing judicial review of apprehension and detention of aliens); § 1231 (discussing provisions for detention and removal of aliens ordered to be removed); § 1226 (explaining provisions related to apprehension and detention of aliens).

165. *See, e.g.*, Kagan, *supra* note 13, at 539 ("I argue that the Supreme Court should treat the interpretation of asylum eligibility as it does grounds of removability."); Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond* Chevron, 60 DUKE L.J. 1059, 1064 (2011) ("Throughout the life of the Refugee Act, U.S. courts have been laboring under the mistaken perception that they are bound, under the *Chevron* doctrine, to defer to the BIA's construction of U.S. refugee statutes, regardless of whether that construction is consistent with international law. Accordingly, U.S. courts, if they reference it at all, regularly treat international law as a persuasive, nonbinding guide that is trumped by *Chevron* deference to a BIA interpretation, even if that interpretation is inconsistent with international law.").

as persuasive and the BIA's interpretation as binding.[166] While asylum claims frequently accompany claims for other forms of humanitarian relief, such as withholding of removal and protection from removal under the CAT, cases that raised multiple humanitarian relief claims were nevertheless categorized as "Asylum Relief" if the interpretation at issue was related to asylum, regardless of the presence of other claims.[167]

In addition to the subcategories listed above, I also coded the immigration cases for the following variables:

- *Country of citizenship*: Country where the individual is registered as a citizen.
- *Country of nationality*: Place or country of birth.
- *Procedural posture*: The individual's procedural posture with reference to immigration benefits or relief. The posture can be either "defensive" (cases where federal officials are attempting to effectuate a noncitizen's removal) or "affirmative" (where the initiated proceedings are seeking some immigration benefit).
- *Habeas*: The appeal arose from a habeas corpus petition filed in district court.

These latter variables are not analyzed in this Article as they will be explored further in future studies.

III. FINDINGS ON *CHEVRON* IN IMMIGRATION CASES

A. Overview of Findings

The revised data set consists of 473 separate instances of statutory interpretations by circuit courts over the eleven-year period (2003–2013). In contrast to the Barnett-Walker data set, which found that total instances of statutory interpretation remained largely consistent over this time frame, the immigration cases were significantly lower in 2003 and 2004, the first two years of this study, before swelling to a relatively static volume in the subsequent years. Overall, there was an average of forty-

166. Farbenblum, *supra* note 165, at 1064 ("Though deference to agency judgment is sensible in many areas of statutory interpretation, neither *Chevron* nor the policies underlying it compel the lockstep deference that courts afford the BIA's construction of asylum provisions.").

167. The decision to distinguish between these three forms of "removal" cases was motivated by the desire to see if different variables influence the courts' application of *Chevron* in these cases. For example, asylum was categorized separately from other forms of humanitarian relief because it is subject to the most requirements *and* disqualifying conditions. *See* 8 U.S.C. § 1158(a)–(b) (explaining the authority and conditions for granting asylum). By distinguishing between cases where asylum or some other form of humanitarian relief is available, I hoped to capture whether extraneous variables, such as prior conviction history or asylum filing deadlines, influence the court's application of *Chevron* in categories "Asylum Relief" and "Non-Asylum Humanitarian Relief," which frequently rely on similar facts and legal arguments to support their respective claims.

three immigration interpretations per year.[168] Despite a lower sampling at the beginning of the data set, courts of appeals' immigration dockets remained relatively consistent throughout the period under review.

Table 1: Immigration Interpretations Across Circuits

Circuit No.	Immigration Interpretations (n)	Immigration Interpretations (%)
1	25	5.29%
2	83	17.55%
3	81	17.12%
4	27	5.71%
5	34	7.19%
6	16	3.38%
7	34	7.19%
8	18	3.81%
9	111	23.47%
10	15	3.17%
11	28	5.92%
DC	1	0.21%
TOTAL	**473**	**100%**

While instances of judicial interpretation remained largely consistent over the eleven-year period, the instances of statutory interpretation were not as evenly distributed across immigration classification, formality of agency interpretation, or circuit. The disparity in review rates across circuits is quite vast. The Ninth Circuit (23.47%) alone comprises nearly a quarter of all the entries. When the Ninth Circuit is coupled with the Second Circuit (17.55%) and Third Circuit (17.12%)—the circuits with the second and third largest sampling of immigration interpretations in the data set—these three circuits make up 57.84% of the total data set. This accords with previous studies that have found the Second, Third, and

168. There were 20 interpretations in 2003, 32 in 2004, 41 in 2005, 52 in 2006, 44 in 2007, 50 in 2008, 45 in 2009, 43 in 2010, 55 in 2011, 47 in 2012, and 44 in 2013. Chevron *in the Circuit Courts*, *supra* note 15, at 27 n.158 ("There were 165 interpretations in 2003, 165 in 2004, 145 in 2005, 145 in 2006, 134 in 2007, 138 in 2008, 132 in 2009, 117 in 2010, 143 in 2011, 129 in 2012, and 145 in 2013. This does not necessarily mean that the use of *Chevron* deference has remained stable over time.").

Ninth Circuits hear the largest volume of immigration cases in the country.[169]

In contrast to the overall Barnett-Walker data set which included a sizable sample of DC and Federal Circuit opinions (19.7% and 7.9% of the Barnett-Walker data set, respectively), these circuits are almost entirely absent from the revised data set.[170] This is due to statutes circumscribing appellate review of orders of removal, which comprise a majority of the instances of statutory interpretation in the revised data set. The Federal Circuit lacks subject matter jurisdiction over immigration cases.[171] The remaining federal appellate courts have jurisdiction to review *only* those orders of removal that originated within the geographic confines of the Federal Circuit and became final.[172] Since there are no immigration courts in the District of Columbia,[173] the DC Circuit does not have jurisdiction to review appeals resulting from removal orders. For this reason, the only immigration-related entry from the DC Circuit in the Barnett-Walker data set was a case concerning the Q-1 cultural exchange program.[174]

169. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 362 tbl.2 (2007) (showing that between 2004 and 2005, the Ninth Circuit [2,097], Second Circuit [451] and Third Circuit [330] far outpaced other circuits in the number of merits decisions they handed down in asylum related appellate decisions).

170. Chevron *in the Circuit Courts*, *supra* note 15, at 27–28 (discussing an overview of the study's dataset).

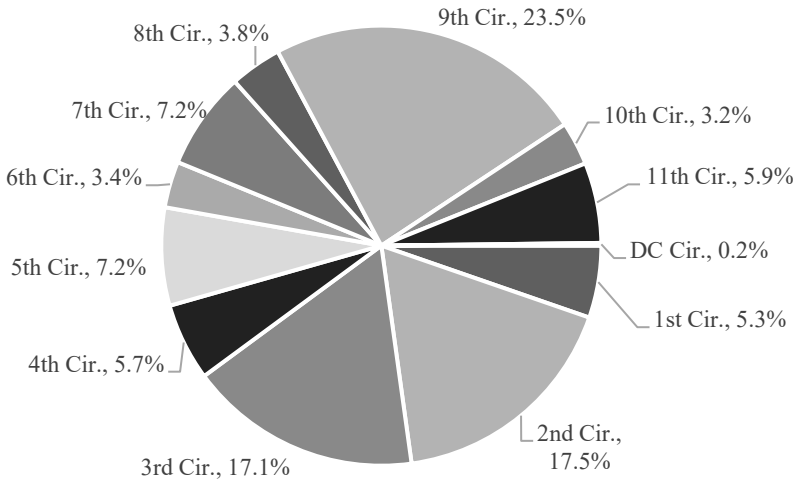
171. 28 U.S.C. § 1295 (explaining the jurisdiction of the United States Court of Appeals for the Federal Circuit).

172. 8 U.S.C. § 1252(b)(2) (explaining the venue and forms requirements to review orders of removal). *See also* John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 21 (2005) ("The current venue rule is that [an immigration] petition must be filed in the circuit in which the IJ completed proceedings. As a practical matter, this means that only the First through the Eleventh Circuits have jurisdiction over petitions for review, since there are no immigration courts located within the territory of the District of Columbia Circuit. Before April 1, 1997, a petition could be filed in either the circuit in which the IJ 'conducted [proceedings] in whole or in part' or the circuit in which the petitioner resided.").

173. *EOIR Immigration Court Listing*, U.S. DEP'T JUST., https://www.justice.gov/eoir/eoir-immigration-court-listing. [https://perma.cc/2BVR-3RTM] (last visited Aug. 3, 2020) (establishing a list of immigration courts in the United States).

174. *See* Int'l Internship Program v. Napolitano, 718 F.3d 986, 987 (D.C. Cir. 2013) (explaining that to participate in the cultural exchange program a foreign citizen must obtain an Q-1 visa).

Figure 1: Total Immigration Cases by Circuit



Just as the three circuits dominated the revised data set, a handful of immigration subcategories dominated the data set. As recorded in Table 2, Miscellaneous Relief (50.73%) alone comprises more than half of the total immigration interpretations contained in the revised data set. When coupled with the other Removal categories, this section makes up nearly three-quarters of the total data set (72.34%) and is by far the most common context in which immigration interpretations are produced. Since these cases all originate in immigration court and must be appealed to the BIA before they can be appealed to courts of appeals, the vast majority of statutory interpretation contained in the revised data set is the product of BIA adjudications. To this day, BIA adjudications account for more than eighty-five percent of administrative agency appeals.[175]

175. *U.S. Courts of Appeals – Judicial Business 2018*, U.S. CTS. (2018), https://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2018 [https://perma.cc/KS4H-8AM4] (last visited Aug. 22, 2019) (illustrating BIA adjudication comprised 86 and 85 percent of total administrative agency appeals in 2017 and 2018, respectively).

Table 2: Immigration Subcategories over Time

				Removal		
	Detention	Crimmigration	Non-Removal	Asylum Relief	Non-Asylulm Humanitarian Relief	Misc. Relief
2003	2	2	0	2	2	12
2004	0	8	3	4	4	16
2005	0	7	1	7	7	22
2006	0	4	7	11	11	27
2007	0	7	2	7	7	27
2008	4	7	6	10	10	22
2009	1	8	6	9	9	18
2010	0	8	1	7	7	22
2011	1	12	2	7	7	32
2012	1	12	1	9	9	23
2013	1	11	8	4	4	19
TOTAL	**10 (2.1%)**	**86 (18.2%)**	**37 (7.8%)**	**77 (16.3%)**	**23 (4.9%)**	**240 (50.7%)**
				340 (72.34%)		

Finally, the vast majority of the interpretations in the current data set are shaped by removal proceedings. Of the 473 interpretations, 436 (91.97%) arose from litigation where the noncitizen was or had been in removal proceedings, while only 37 (8.03%) arose when the noncitizen affirmatively initiated the litigation to pursue some immigration benefit.[176] Similarly, the vast majority of interpretations (81.82%) originated from formal adjudications by the BIA. This stands in stark contrast to Barnett and Walker's findings regarding the method by which agencies produced their interpretations. Barnett and Walker found that the agency formats were roughly equally distributed between notice-and-comment rulemaking (36.5%), formal adjudications (36.1%), and

176. Asylum presents a unique form of relief for these purposes. Petitioners may affirmatively apply for asylum or they may defensively apply for asylum once removal proceedings have commenced against the individual. 8 C.F.R. § 208.3(a)–(b) (2020). If an individual affirmatively applies for asylum but has their application denied by an asylum officer, the asylum officer will then refer the asylum application to an immigration judge for adjudication in removal proceedings. 8 C.F.R. § 208.14(c)(1) (2020). Thus, asylum applications have the potential to transform from affirmative to defensive applications. For the purposes of such studies, all cases are categorized based on the petitioner's posture at the time of the appellate review. Since denial of affirmative asylum applications trigger removal proceedings, such cases only result in appellate review *after* they have been transformed into removal proceedings.

informal interpretations (24.8%).[177] Federal immigration agencies are an outlier in their outsize reliance on administrative adjudication as a means of interpreting immigration statutes. [178]

These statistics highlight the idiosyncratic process by which the vast majority of immigration statutes are interpreted by the federal agencies. Given the potential adverse results for individuals who face forcible removal from the United States, it is perhaps of little surprise that individuals in removal proceedings avidly litigate their cases, which in turn creates a significant demand on the administrative mechanisms for adjudicating and reviewing removal cases. Rather than attempt to address the underlying causes of the ever-increasing volume of immigration cases, administrative reforms at the turn of the century streamlined the administrative review process in a way that shifted the burden of adjudicating these disputes from the agency to the courts of appeals.

B. Chevron *Application and Agency Win Rates*

Table 3: *Chevron* Application Rates

Immigration Category	**N**	***Chevron* application rate**
Detention	10	50.0% (5)
Crimmigration	86	51.16% (44)
Non-Removal	37	70.27% (26)
Removal	340	75.88% (258)
Asylum Relief	*77*	*75.32% (58)*
Non-Asylum Humanitarian Relief	*23*	*78.26% (18)*
Miscellaneous Relief	*240*	*75.83% (182)*
TOTAL	**473**	**70.4% (333)**

Once the cases were coded with their respective immigration classifications, the revised data set reveals stark patterns and practices in the courts of appeals' application of *Chevron* within the broader immigration context. To this end, the first measurement to consider is the frequency with which courts concluded that the statute under consideration was subject to *Chevron*.[179] Of the 473 immigration statute

177. Chevron *in the Circuit Courts*, *supra* note 15, at 28.

178. *See* Family, *supra* note 13, at 120 (discussing the BIA's reliance on adjudication and guidance documents rather than on agency rulemaking as well as practical obstacles to immigration agency's attempts to employ rulemaking).

179. A note of caution: just because a court finds that a statute is subject to *Chevron* does not mean that the court proceeded to apply *Chevron*. This rate of application captures instances where the court will apply *Chevron* if it satisfies the additional prerequisites of the opinion, namely that (1) the statutory language is ambiguous and (2) the agency's proposed interpretation is reasonable. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

interpretations studied, the circuit courts applied the *Chevron* framework in 333 of them (70.4%), a marked but not unprecedented departure from the Barnett-Walker study, which found that circuit courts applied the *Chevron* framework in 74.8% of the global data set.[180] If the analysis ended here, then there would be little reason to believe that courts of appeals apply *Chevron* differently in the immigration context than in other administrative law cases.

It becomes immediately apparent, however, that once the immigration interpretations are filtered into their respective subcategory, *Chevron* controls at wildly different rates. For example, courts of appeals hold that *Chevron* applies only in 50% and 51.16% of interpretations classified as "immigration detention" and "crimmigration," respectively. This significantly lowered rate of *Chevron* application accords with Kagan's general findings about the Supreme Court's hesitance to apply *Chevron* deference in these categories of cases.[181] Although the Court has yet to explicitly embrace Kagan's physical liberty framework for applying *Chevron*, courts of appeals appear to have gleaned similar lessons from the Supreme Court precedent.

The appellate courts' language reflects their recalcitrance to apply *Chevron* in cases involving crimmigration considerations by explicitly weighing anti-deference principles in their opinions. While most immigration statutes are considered civil in nature, immigration law in recent decades has become increasingly entangled with criminal laws, which frequently trigger removal proceedings or other immigration consequences. In the crimmigration cases—which require courts to review both criminal statutes *and* the immigration statute—courts frequently employ a rhetoric that is restrictive of any deference and apply de novo review.[182] Courts have also previously reasoned that *Chevron* deference does not apply in such cases involving categorical and modified categorical approaches because the interpretation of federal statutes is an area where the courts, not the attorney general, have the relative expertise.[183] This latter justification runs directly counter to *Chevron* because it draws no meaningful distinction between the attorney general, and by extension the Department of Justice, and other federal

180. Chevron *in the Circuit Courts*, *supra* note 15, at 32.

181. Kagan, *supra* note 13, at 522–35.

182. *See, e.g.*, Bobb v. Att'y Gen. of the United States, 458 F.3d 213, 217 (3d Cir. 2006) ("We exercise *de novo* review over the BIA's conclusion that Bobb's criminal conviction constitutes an aggravated felony.") (citing Ki Se Lee v. Ashcroft, 368 F.3d 218, 221 (3d Cir. 2004)).

183. *See, e.g.*, Yong Wong Park v. Att'y Gen. of the United States, 472 F.3d 66, 71 (3d Cir. 2006) ("[T]he Attorney General has no particular expertise in defining a term under federal law, yet it is "what federal courts do all the time.") (quoting Drakes v. Zimski, 240 F.3d 246, 251 (3d Cir. 2001)).

agencies tasked with interpreting federal statutes.[184] Nevertheless, courts frequently comment on the delicate task of teasing apart these varying and contradictory principles in their opinions.[185] For instance, in *Morales-Garcia v. Holder*,[186] a Ninth Circuit panel articulated perhaps the clearest position on how it understood *Chevron* to apply in cases that concerned the categorical or modified categorical approach. The panel partitioned their review of BIA categorical determinations into two parts. The first part required the appellate court to determine the offense the petitioner was convicted of committing, which involved interpreting either state or federal criminal statute.[187] Since the BIA has no special expertise interpreting such statutes, the court held that it is not entitled to any deference in this step.[188] Once the appellate court has determined the nature of the petitioner's prior conviction, it then proceeds to step two, wherein it must determine whether the conviction qualifies as either a "crime involving moral turpitude" or an "aggravated felony" under the INA.[189] In contrast to the first step, the Ninth Circuit held that the BIA is entitled to *Chevron* deference with respect to the latter step in the analysis.[190] This bifurcated analysis for categorical and modified categorical cases has similarly been adopted by the Fifth Circuit.[191] Other circuits, however, have flattened the deference analysis in categorical and modified categorical cases and omitted any discussion of the two-step inquiry articulated by the Ninth Circuit. The First, Third, and Seventh Circuits maintain that *Chevron* applies to a courts' review of the categorical and modified categorical cases generally without

184. *Chevron U.S.A., Inc.*, 467 U.S. at 858–59 (concerning the Environmental Protection Agency's interpretation of the Clean Air Act Amendments of 1977, specifically the portion codified in 42 U.S.C. §§ 7501–7508).

185. *See, e.g.*, Ng v. Att'y Gen. of the United States, 436 F.3d 392, 395 (3d Cir. 2006) ("[W]e exercise plenary review over Ng's legal contention that the use of interstate commerce facilities in the commission of a murder-for-hire in violation of 18 U.S.C. § 1958 is not an aggravated felony."); Singh v. Gonzales, 432 F.3d 533, 538 (3d Cir. 2006) ("The BIA's interpretation of 18 U.S.C. § 16 is not entitled to deference by this Court: as a federal provision outside the INA, it lies beyond the BIA's area of special expertise.").

186. *See generally* Morales-Garcia v. Holder, 567 F.3d 1058 (9th Cir. 2009).

187. *Id.* at 1061.

188. *Id.* ("Because the BIA has no special expertise by virtue of its statutory responsibilities in construing state or federal criminal statutes . . . we review the BIA's finding regarding the specific act for which the petitioner was convicted *de novo*.").

189. *Id. See also* 8 U.S.C. § 1101(43).

190. *Morales-Garciz*, 567 F.3d at 1061.

191. Nieto Hernandez v. Holder, 592 F.3d 681, 684 (5th Cir. 2009) ("In conducting our analysis, we first review the BIA's interpretation of the INA itself, including its definition of the INA's words and phrases. . . . We then review *de novo* whether a petitioner's conviction under a state statute constitutes an 'aggravated felony' and renders him ineligible for cancellation of removal.") (internal quotation and citations omitted).

distinguishing between the multiple steps in these analyses.[192]

Moreover, in addition to these considerations related to interpreting criminal statutes, these categorical and modified categorical cases also raised concerns about the existence of an immigration lenity rule. While the rule has been deployed by the Court in post-*Chevron* cases,[193] the immigration lenity rule functions as an anti-deference tool that does not fit comfortably within the *Chevron* deference regime.[194] Courts have grappled with this issue in their attempts to determine whether *Chevron* applies,[195] and the Supreme Court has yet to definitively rule on the matter.[196]

While courts of appeals are reluctant to find that *Chevron* applies in immigration detention and crimmigration cases, these concerns appear to dissipate in the remaining areas of immigration law—non-removal and all three subcategories of removal cases. In fact, the aggregated rate of *Chevron* application (75.88%) in removal cases is comparable with Barnett and Walker's finding.[197] Courts demonstrate a remarkable

192. *See, e.g.*, Soto-Hernandez v. Holder, 729 F.3d 1, 3 (1st Cir. 2013) (noting that *Chevron* deference applied in cases where the BIA interpreted the immigration ramifications of a criminal conviction); Totimeh v. Att'y Gen. of the United States, 666 F.3d 109, 113 (3d Cir. 2012) ("The BIA's determination of whether a specific crime involves moral turpitude qualifies for *Chevron* deference.") (citing Knapik v. Ashcroft, 384 F.3d 84, 87 n.3 (3d Cir. 2004)); Mata-Guerrero v. Holder, 627 F.3d 256, 259 (7th Cir. 2010) ("Our review of an agency's determination of whether a particular crime should be classified as a crime of moral turpitude ordinarily is deferential under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843–44 (1984) . . . ."). *Contra* Familia Rosario v. Holder, 655 F.3d 739, 743 (7th Cir. 2011) ("This court reviews de novo the legal question of whether a conviction constitutes an aggravated felony for purposes of eligibility for cancellation.") (citing Guerrero-Perez v. Immigr. & Naturalization Servs., 242 F.3d 727, 730 (7th Cir. 2001)).

193. Immigr. & Naturalization Servs. v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) ("We find these ordinary canons of statutory construction compelling, even without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."); Immig. & Naturalization Servs. v. St. Cyr, 533 U.S. 289, 320 (2001) (quoting Immig. & Naturalization Servs. v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987)).

194. *See* Slocum, *supra* note 13, at 517 ("Notwithstanding this recent reference, the role of the immigration rule of lenity in deportation proceedings is not clear due to the competing deference doctrine announced in the now-famous case *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*. . . . One important issue left unresolved by the Court is the role of canons of construction in the review of agency interpretations."); *see generally* David S. Rubenstein, *Putting the Immigration Rule of Lenity in Its Proper Place: A Tool of Last Resort After Chevron*, 59 ADMIN. L. REV. 479 (2007) (dissecting academic literature proposing the incorporation of the rule of lenity into *Chevron* Step 1 and arguing that the rule of lenity should be incorporated in *Chevron* Step 2 instead).

195. *See, e.g.*, *Soto-Hernandez*, 729 F.3d at 6 ("Ultimately, this case does not require us to confront whether (and if so, when) the rule of lenity applies in the immigration context . . . .").

196. Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1572 (2017) (finding the statutory language under consideration unambiguous and therefore sidestepping any need to address whether the rule of lenity or *Chevron* received priority).

197. Chevron *in the Circuit Courts*, *supra* note 15, at 32 (*Chevron* deemed to apply in 74.8% of the global data set).

consistency in all three subcategories of removal cases—Asylum Relief (75.32%), Non-Asylum Humanitarian Relief (78.26%), and Miscellaneous Relief (75.82%). Removal cases, as a subset of immigration cases, appear to comply with the general *Chevron* application rate and agency win rates observed by Barnett and Walker.[198] This finding accords with Kagan's analysis of *Chevron* in immigration cases before the Supreme Court where he found that "[s]ince *Aguirre-Aguirre*, the Court has more consistently deferred to the Attorney General in cases concerning eligibility for asylum. Even in cases where the government lost, the Court sometimes applied the ordinary remand rule to send the case back for administrative interpretation in the first instance."[199] Based on these findings, it does not appear that courts of appeals recognize any meaningful difference between humanitarian forms of relief and all the other forms of relief from removal. Courts also do not appear to recognize any heightened anti-deference considerations in these categories despite the humanitarian and international law considerations present in asylum cases.

Table 4: Agency Win Rates

Immigration Category	**N**	**Agency Win Rate**
Detention	10	50% (5)
Crimmigration	86	58.14% (50)
Non-Removal	37	62.16% (23)
Removal	340	70.59% (240)
Asylum Relief	*77*	*71.43% (55)*
Non-Asylum Humanitarian Relief	*23*	*65.22% (15)*
Miscellaneous Relief	*240*	*70.83% (170)*
TOTAL	**473**	**67.23% (318)**

198. *Id.* at 6 (noting that the overall agency win rates once *Chevron* deference was applied was 77.4%).

199. Kagan, *supra* note 13, at 518–19.

With regard to agency win rates,[200] Barnett and Walker found that federal agencies prevailed in 71.4% of interpretations overall.[201] Comparatively, this study found that immigration interpretations had an agency win rate of 67.23% overall. While somewhat lower than the overall agency win rate in the Barnett-Walker study, this lower win rate is not unprecedented in empirical legal research.[202] When we take a closer look, however, we see that there is significant variation within immigration cases. While agency interpretations experience high rates of success in removal cases (75.88% overall) and non-removal cases (70.27%), agency interpretations are significantly less successful in cases that implicate detention statutes (50%) or crimmigration (58.14%). This makes sense as a secondary result of the finding that Supreme Court justices were significantly less likely to apply *Chevron* in cases that implicated individuals "physical liberty" or criminal statutes since *Chevron* is a doctrine that favors the agency in these adjudications.[203] It appears that when the Supreme Court speaks, even in less than clear terms, the courts of appeals listen.

Table 5: Agency Win Rates Once *Chevron* Applies

Immigration Category	**N**	**Agency Interpretation Wins**	**Agency Interpretation Win Rate**
Detention	5	2	40.00%
Crimmigration	44	31	70.45%
Non-removal	26	18	69.23%
Removal	258	205	79.46%
Asylum Relief	*58*	*47*	*81.03%*
Non-Asylum Humanitarian Relief	*18*	*13*	*72.22%*
Miscellaneous Relief	*182*	*145*	*79.67%*
TOTAL	**333**	**256**	**76.88%**

In instances where the reviewing court finds that *Chevron* does apply, however, the agency success rates change dramatically. Once we consider cases where courts held that *Chevron* applied to the statutory

200. The "win rate," as used in the Barnett-Walker study, is the rate at which agency interpretations prevailed globally. This measure is not limited to agency success rates following the Court's application of *Chevron*. Chevron *in the Circuit Courts*, *supra* note 15, at 30.

201. *Id.* at 28.

202. *See* Eskridge, Jr. & Baer, *supra* note 20, at 1100 (finding that agency interpretations prevailed 68.3% of the time before the Supreme Court between 1984 and 2006).

203. Kagan, *supra* note 13, at 512–39; Das, *supra* note 13, at 180–91.

interpretation at issue, the agency win rate climbs to 76.88%. This higher agency win rate is seen in almost all the immigration categories with the exception of detention cases—which have been reduced to the point of near oblivion within these parameters. This finding accords with those of Barnett and Walker, who found that the agency win rate would climb to 77.4% when the court found that *Chevron* applied.[204] Thus, the application of *Chevron* appears to have real and dramatic effects on the agencies' win rates, generally, as well as in immigration cases, specifically.

C. Rulemaking Versus Adjudication

Table 6: *Chevron* Application and Success Rates Across Interpretation Methods

	***Chevron* Application**			**Agency Interpretation Wins**		
	# of Cases	**Rate**	**BW Rate**	**# of Cases**	**Rate**	**BW Rate**
Rulemaking (n=64)	54	84.38%	91.9%	41	64.06%	72.8%
Formal Adjudication (n=387)	277	22.73%	76.7%	271	70.03%	74.7%
Informal Interpretation (n=22)	5	71.04%	44.8%	9	40.91%	65.0%
TOTAL (n=473)	**336**	**71.04%**	(n/a)	**321**	**67.86%**	**84.7%**[205]

As discussed above, the BIA, an agency that relies exclusively on adjudications rather than rulemaking, dominates the immigration data set.[206] More than three-quarters (81.82%) of the 472 interpretations in this data set resulted from formal BIA adjudications.[207] This interpretive strategy was followed by rulemaking (13.53%), with a small remainder

204. Chevron *in the Circuit Courts*, *supra* note 15, at 30 ("The agency prevailed at a higher rate than the overall agency-win rate (77.4% to 71.4%) when the court determined that *Chevron* applied.").

205. This statistic is for the global data set once immigration interpretations are excluded.

206. *See* Family, *supra* note 13, at 117 ("The Board of Immigration Appeals interprets the INA through informal adjudication . . . .").

207. Although immigration adjudications are governed by the INA and not the Administrative Procedure Act, Barnett and Walker generally categorized immigration adjudications as "formal adjudications." Chevron *in the Circuit Courts*, *supra* note 15, at 35 n.189.

of the interpretations resulting from informal adjudications (4.65%). Overall, it appears that Barnett and Walker's conclusion that Supreme Court precedent prefers formality when conferring *Chevron* deference appears to hold true in the courts of appeals where rulemaking—the most formal method of interpretation—is the most likely to receive *Chevron* deference (84.38%), followed closely by formal adjudications (71.58%). Informal interpretations in immigration cases receive *Chevron* deference at a severely reduced rate (22.72%), which coincides with a similarly low success rate for informal interpretation (40.91%).

As part of their study, Barnett and Walker reviewed Supreme Court cases applying *Chevron*.[208] While they did not conduct an empirical review of these cases, they gleaned general principles that appear to influence Court's application of the *Chevron* precedent. Most notably, they observed a trend whereby the Court favored granting *Chevron* deference in cases where the agency arrived at its interpretation after methodically applying *Chevron* with heightened formality.[209] Overall, immigration interpretations appear to track with this preference for formality, but with a few key distinctions. As shown in Table 6, the rates at which courts of appeals apply *Chevron* and accept agency interpretations appear depressed when compared to the global averages observed by Barnett and Walker.[210] In fact, immigration adjudication figures appear so depressed that Barnett and Walker removed these results from the overall data as an outlier and found the overall agency win rate for adjudications rose ten percentage points from 74.7% with immigration included to 84.7% when immigration adjudication interpretations were removed.[211]

As detailed in Table 6, the downward pressure that immigration interpretation exerts on global agency win rates is replicated in rates at which courts apply *Chevron* in immigration cases. This trend holds for all three methods of statutory interpretation—rulemaking (84.38%), adjudication (71.58%), and informal interpretation (22.73)—but is the most pronounced in cases involving informal interpretations.[212]

What is interesting from this data is that adjudication, which comprises a substantial portion of the immigration interpretations in the Barnett-Walker data set, is the method of interpretation that tracks most closely

208. *Id.* at 12–15.

209. *Id.*

210. *Id.* at 36.

211. *Id.*

212. Chevron *in the Circuit Courts*, *supra* note 15, at 39 ("Again, however, if the 386 immigration adjudications were removed from the formal adjudication category, the frequency of applying *Chevron* deference to formal adjudications would rise nearly ten percentage points to 85.2% and bring the formal formats into closer parity.").

with the global trends. This holds true throughout the entire time frame of the study, as evidenced below. Figures 2 and 3 demonstrate that immigration adjudication closely tracks with both the global *Chevron* application rate and the agency win rate.

Figure 2: Rates of Applying *Chevron* in Adjudication over Time

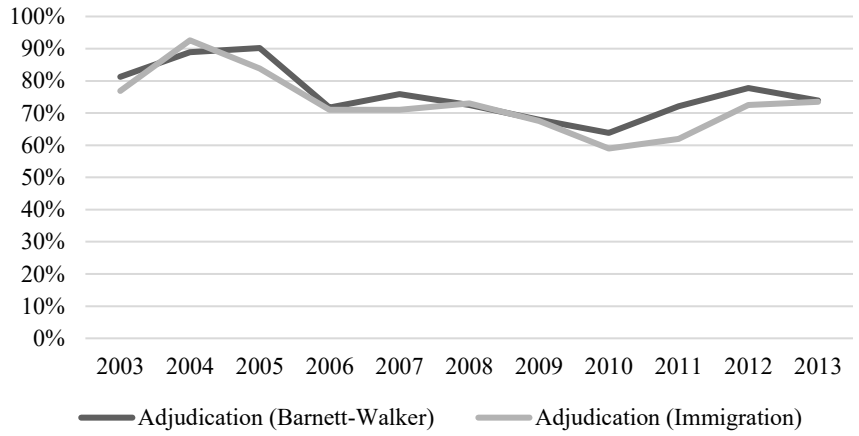
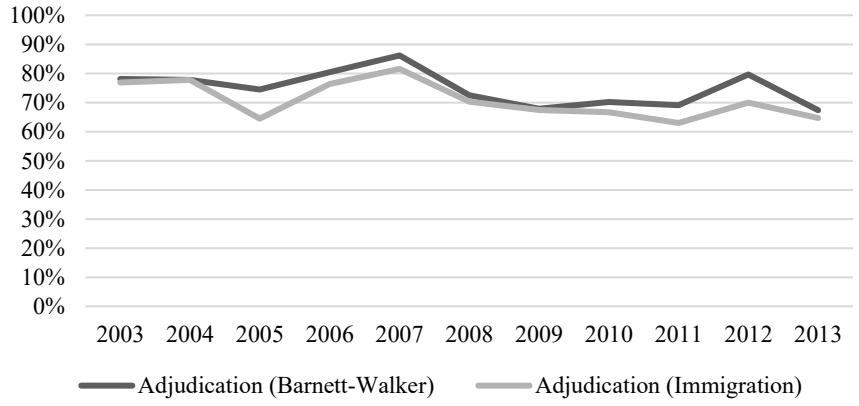


Figure 3: Agency Win Rates in Adjudication over Time



D. Disparities Across Federal Circuits

As previously discussed, there is a wide range of circuit court experience, and therefore expertise, in reviewing immigration interpretations. One possible explanation for the variations may be that the circuits' varied familiarity with immigration agencies and the contentious nature of the subject matter breeds contempt.[213] The Ninth, Second, and Third Circuits collectively reviewed more than half of *all* the immigration statutory interpretations in the revised data set. This divergence in immigration dockets of the various circuits appears, however, to have very little influence on a court of appeals' willingness to apply *Chevron* and accept agency interpretations outside of the Ninth Circuit.

Table 7: *Chevron* Application Rate by Circuit[214]

	***Chevron* Application**	***Chevron* Application Rate**		***Chevron* Application**	***Chevron* Application Rate**
First Cir. (n=25)	24	96.00%	**Seventh Cir. (n=34)**	19	55.88%
Second Cir. (n=83)	54	65.06%	**Eighth Cir. (n=18)**	17	94.44%
Third Cir. (n=81)	61	75.30%	**Ninth Cir. (n=111)**	61	54.95%
Fourth Cir. (n=27)	26	96.29%	**Tenth Cir. (n=61)**	13	86.66%
Fifth Cir. (n=34)	26	76.47%	**Eleventh Cir. (n=58)**	25	89.92%
Sixth Cir. (n=16)	9	56.25%			

As detailed in Table 6, the rates at which courts apply *Chevron* and accept agency interpretations tend to travel together. Thus, the greater the likelihood the circuit deems *Chevron* applicable, the greater the likelihood that it will accept the agency's interpretation. The rate at which courts deem *Chevron* applicable and accept the agency's interpretation, however, appears to travel independently of the volume of immigration

213. *See* David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 183–84 (2010) (finding that agencies that appeared more frequently before the DC Circuits had lower affirmance rates than those that did not).

214. The singular case considered by the DC Circuit was omitted from this chart.

cases the court reviews. For instance, the Ninth, Seventh, and Sixth Circuits experience starkly different volumes of immigration cases but both circuits apply *Chevron* at similar rates. Similarly, both the Second and Third Circuits review more than twice the volume of immigration cases than the Fifth Circuit, yet these three circuits applied *Chevron* at similar rates. Thus, while circuits demonstrate a wide range of approaches in their immigration cases, it does not appear that the volume of the cases plays a significant role in shaping their jurisprudence.

CONCLUSION

In his concurrence in *Pereira*, Justice Kennedy called on the Court to reconsider, in an appropriate future case, the premises that underlie *Chevron* and the manner in which courts have implemented the decision.[215] This Article engages in that type of reconsideration by using immigration law as a case study. As the Supreme Court continues to evaluate its treatment of *Chevron*, this Article attempts to disentangle the various threads implicit in courts of appeals' current application of *Chevron*. The goal of this study is to introduce nuance to the Barnett-Walker study's discussion of immigration cases as well as to attempt to answer some of the outstanding questions about immigration idiosyncrasies. While no area of immigration law is exempted entirely from the *Chevron* regime, courts of appeals apply this precedent in drastically different ways and at drastically different rates across these areas of immigration law.

While this study attempts to answer some of the questions left by the Barnett-Walker study, many more remain to be understood. The methods and tools of study could be honed in future endeavors. Moreover, the data considered is narrow in its focus; future studies may choose to explore how the courts' application of *Chevron* relates to subsequent deference regimes such as *Mead*[216] or *Auer*[217] deference. Alternatively, future studies may focus on discerning what other factors shape the circuit courts' discordant treatment of *Chevron* in immigration cases by considering variables such as political valence and panel effects in judicial decision-making.

The Supreme Court has concluded that *Chevron* applies in immigration cases, but it has yet to fully address how this deference regime interacts with anti-deference considerations that arise to varying degrees in immigration cases. Despite this omission, a series of patterns have emerged in these courts of appeals' application of *Chevron* within

215. Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring).
216. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).
217. Auer v. Robbins, 519 U.S. 452, 457–58 (1997).

various subcategories of immigration law. In order to more effectively categorize and discuss deference in immigration cases, empirical scholars must develop new and nuanced frameworks for evaluating data related to these cases. This study has shown that "immigration law" as a singular category of administrative law does little to further our understanding of courts' application of *Chevron*. Immigration law, as commonly understood, is a wide ranging and convoluted body of law. Rather than presume equal treatment across all areas of immigration law, scholars and courts should explicitly recognize the anti-deference considerations that currently shape their practice to create a more consistent *Chevron* standard.