UNSHACKLING HABEAS REVIEW: *CHEVRON* DEFERENCE AND STATUTORY INTERPRETATION IN IMMIGRATION DETENTION CASES

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This article questions the application of Chevron *deference in federal court habeas review of statutory immigration detention challenges. Since the enactment of a mandatory detention statute for immigrants facing deportation, the Board of Immigration Appeals—an administrative body within the U.S. Department of Justice—has played an increasingly important role in interpreting the scope of detention for thousands of immigrants each year. Federal courts have long served as an important check against executive detention through habeas review and have declined to accommodate other deference norms in the immigration detention context. Federal courts have nonetheless applied* Chevron *to immigration detention cases without questioning whether such deference to the agency is appropriate. This article explains why federal courts should reject the application of* Chevron *when exercising habeas review of statutory immigration detention challenges. This article further explains that federal courts, whether or not fettered by* Chevron*, should apply interpretive norms that properly account for the important physical liberty interest at stake.*

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INTRODUCTION

Mandatory detention in the civil immigration context—i.e., executive detention of noncitizens pending removal proceedings without any individualized assessment for bond—is an extraordinary aspect of the immigration system.[1] It has little basis in history and few parallels in the preventative detention context.[2] Under mandatory detention, hundreds of thousands of noncitizens are held in U.S. immigration detention facilities each year,[3] and judges are deprived of jurisdiction

[1] Federal immigration law mandates detention in several different contexts. *See* Faiza W. Sayed, *Challenging Detention: Why Immigrant Detainees Receive Less Process Than "Enemy Combatants" and Why They Deserve More*, 111 COLUM. L. REV. 1833, 1838–41 (2011) (describing five categories of noncitizens subject to mandatory detention under the Immigration and Nationality Act (INA)). For the purposes of this Article, I focus primarily on mandatory detention pending removal proceedings pursuant to INA § 236(c), 8 U.S.C. § 1226(c) (2012), which has sparked the most debate over its statutory meaning.

[2] Immigration officials have long had the discretionary authority to detain. *See* Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 140–41 (2013) (discussing the history of U.S. immigration detention policy). Mandatory detention—detention without bond—is a more recent development. *Id.* at 147–48. Compared to other preventative detention models, this feature of immigration detention is unusual. *See, e.g.*, Whitney Chelgren, *Preventive Detention Distorted: Why It Is Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 LOY. L.A. L. REV. 1477, 1490–93 (2011) (comparing the lack of procedural protections for detainees pending removal hearings with the relatively more robust protections for pretrial detainees in the criminal context).

[3] *See* DORA SCHRIRO, U.S. DEP'T OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2 (Oct. 6, 2009) (stating that, as of report's publication date, over 370,000 noncitizens had been detained in the preceding fiscal year and estimating that 66% of detained noncitizens are held pursuant to mandatory detention).

over bond hearings to assess the need for their detention.[4] Many of the noncitizens affected by mandatory detention have significant ties to the United States, having resided in the country with their families for years as lawful permanent residents, asylees and refugees, visa holders, or undocumented immigrants.[5] Many are eligible for discretionary relief from removal and may ultimately be permitted to remain in the United States.[6] When subjected to mandatory detention, however, these noncitizens may be deprived of their liberty in jails or prisons for days, months, or even years as they defend themselves in removal proceedings.[7]

Article III courts have long served as an important check on executive detention, for citizens and noncitizens alike.[8] Indeed, the Supreme Court has refused to defer to the executive in this context. In *Zadvydas v. Davis*, immigrant detainees challenged the government's authority to detain them indefinitely after immigration officials were unable to deport them to their countries of citizenship.[9] Invoking the "plenary power" doctrine, the government asserted that federal courts must accord substantial deference to the government's immigration policies, including its understanding of its authority to detain.[10] The Court rejected this argument, and affirmed the authority of federal courts to exercise their habeas corpus jurisdiction to review the law-

[4] *See* 8 C.F.R. § 1236.1 (2014) (depriving immigration judges of jurisdiction to hold bond hearings on release for noncitizens subject to mandatory detention under 8 U.S.C. § 1226(c)).

[5] *See* Sayed, *supra* note 1, at 1838–41 (describing categories of immigrants subject to mandatory detention).

[6] Almost fifty percent of people whose removal proceedings were completed in Fiscal Year 2014 were ultimately permitted to remain in the United States. *U.S. Deportation Outcomes By Charge, Completed Cases in Immigration Courts*, SYRACUSE U. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE http://trac.syr.edu/phptools/immigration/court_backlog/deport_outcome_charge.php (last visited Oct. 5, 2014).

[7] *See* Mark Noferi, *Cascading Constitutional Deprivation: The Right To Appointed Counsel For Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 80–82 (2012) (discussing how immigrants may face prolonged detention as average case processing times now exceed one year); Sayed, *supra* note 1, at 1843–44 (noting the average period of detention, prior to completion of removal proceedings, is 81 days, but hundreds of immigrants are detained for more than a year).

[8] *See* Jonathan L. Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2522–23 (1998) (tracing the availability of the writ of habeas corpus to review noncriminal confinement in common law since the early seventeenth century).

[9] Zadvydas v. Davis, 533 U.S. 678 (2001).

[10] *See id.* at 695 ("The Government also looks for support to cases holding that Congress has 'plenary power' to create immigration law, and that the Judicial Branch must defer to Executive and Legislative Branch decisionmaking in that area."); Brief for the Respondents at 17, Zadvydas v. INS, 533 U.S. 678 (2001) (No. 99-7791) ("The Attorney General's detention of an alien, pursuant to the statutory authority granted her by Congress, must be accorded substantial deference under the plenary power doctrine.").

fulness of the noncitizens' detention.[11] The Court explained that any government power—plenary or otherwise—is subject to constitutional limitations, and courts must therefore construe statutes to avoid constitutional concerns.[12] Moreover, the Court explained that deferring to the government's view of the reasonableness of detention would be "abdicating [its] legal responsibility to review the lawfulness of an alien's continued detention."[13] By conducting its own review of the reasonableness of detention through petition for a writ of habeas corpus, the Court explained that it was carrying out "the 'historic purpose of the writ,' namely, 'to relieve detention by executive authorities without judicial trial.'"[14] The Court interpreted the immigration detention statute to preclude indefinite detention and remanded the case.[15]

Lower courts have approached deference differently, however, where the executive has expressed its view of the immigration detention scheme through administrative decisions of the Board of Immigration Appeals (BIA), a division of the U.S. Department of Justice's Executive Office for Immigration Review.[16] Exercising the authority of the Attorney General, the BIA has issued scores of decisions expansively interpreting provisions of the mandatory immigration detention statute.[17] Under these interpretations, the U.S. Department of Homeland Security has subjected thousands of noncitizens each year to administrative detention without the possibility of release on bond.[18] In reviewing the propriety of such detention through habeas petitions, federal district courts and courts of appeals have applied the Supreme Court's analysis in *Chevron U.S.A. v.*

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[11] *Id.* at 699–700.

[12] *See Zadvydas*, 533 U.S. at 695 (explaining that plenary "power is subject to important constitutional limitations" and refusing to defer to the government's view).

[13] *Id.* at 700.

[14] *Id.* at 699 (quoting Brown v. Allen, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in result)).

[15] *Id.* at 702.

[16] U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: ORGANIZATION CHART (2013), http://www.justice.gov/eoir/sibpages/Organizationl.html.

[17] *See, e.g.*, Matter of Saysana, 24 I. & N. Dec. 602, 608 (BIA 2008) (interpreting mandatory detention statute to be triggered by a release from custody for any offense), *overruled by* Saysana v. Gillen, 590 F.3d 7, 9 (1st Cir. 2009); Matter of Kotliar, 24 I. & N. Dec. 124, 125 (BIA 2007) (interpreting the mandatory detention statute to be triggered by a release following an arrest rather than incarceration); Matter of Rojas, 23 I. & N. Dec. 117, 118 (BIA 2001) (interpreting the mandatory detention statute to permit individuals detained any time after their release from custody to be subject to mandatory detention).

[18] *See supra* note 3 and accompanying text (noting that 66% of the hundreds of thousands of immigrants who are detained each year are subjected to mandatory detention by the Department of Homeland Security).

Natural Res. Def. Council, which requires deference to an agency's interpretation of an ambiguous statute.[19]

The application of the *Chevron* framework presents a different set of choices to a habeas court than *Zadvydas* would suggest. In *Hosh v. Lucero*, for example, the Fourth Circuit reversed a district court decision granting a writ of habeas corpus for a longtime lawful permanent resident whom immigration officials detained without bond several years after a prior criminal offense.[20] Mr. Hosh argued that he was eligible for a bond hearing because his detention was authorized under a section of the immigration statute that provides federal immigration officials with the discretion to arrest, detain, and release noncitizens on bond at any time pending removal proceedings.[21] The only exception to this discretionary authority—a mandatory detention provision prohibiting release on bond—applies to noncitizens who are detained "when . . . released" from criminal incarceration.[22] Because Mr. Hosh was detained by immigration officials in his home four years after his release from criminal custody, a federal district court concluded that mandatory detention did not apply and therefore Mr. Hosh was eligible for a bond hearing.[23] The BIA, however, had issued a precedential decision that construed the language in the mandatory detention statute to apply broadly to anyone who had at any time been in criminal custody for a past removable offense.[24] The government therefore argued that the district court should have deferred to the BIA's interpretation under *Chevron.*[25]

The Fourth Circuit agreed with the government. The court concluded that the statute was subject to more than one plausible reading and was therefore ambiguous.[26] Refusing to apply "the rule of lenity" or other canons that would favor the detainee's reading of the statute, the court held that it was required to defer to the BIA's reasonable interpretation of the ambiguity under *Chevron*.[27] Rather than a robust, de novo review of the lawfulness of detention contemplated by *Zadvydas*—one that accounted for the liberty interests at stake—the

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

20 Hosh v. Lucero, 680 F.3d 375, 377–78 (4th Cir. 2012).

21 8 U.S.C. § 1226(a) (2011); Brief of Appellee at 21, Hosh v. Lucero, 680 F.3d 375 (4th Cir. 2012) (No. 11-1763).

22 8 U.S.C. § 1226(c) (2011).

23 Hosh v. Lucero, No. 11-cv-464, 2011 U.S. Dist. LEXIS 52040, at *8 (E.D. Va. May 16, 2011).

24 Matter of Rojas, 23 I. & N. Dec. 117, 124 (BIA 2001).

25 *Hosh*, No. 11-cv-464, at *5.

26 *Hosh*, 680 F.3d at 378.

27 *Id.* at 383–84.

legal inquiry in *Hosh* thus came down to the ambiguity of the statute and the plausibility of the BIA's interpretation.

In some respects, there is nothing particularly problematic about the difference in approaches. *Zadvydas*, while resolved on statutory grounds, involves a constitutional concern regarding the length of executive detention.[28] Specifically, the Supreme Court concluded that the constitutional concern trumped the executive's desire for deference in this context.[29] By contrast, the BIA's interpretation of the ambiguity in an immigration detention statute—short of raising a direct constitutional concern—is precisely the type of agency interpretation that ordinarily justifies *Chevron* deference.[30] This framework applies because, presumably, the agency is acting upon the broad immigration lawmaking authority delegated to it by Congress and no other countervailing deference norms apply. As scholars have noted, there is no inherent conflict between the application of *Chevron* deference and the duty of federal courts to review challenges to statutory interpretation, even ones raised in the context of habeas review.[31]

Yet, the result of accepting this distinction—that habeas courts must defer to the BIA's interpretation of an ambiguous statutory detention provision, absent a constitutional challenge—should be deeply troubling. It presumes a false dichotomy: that some cases are

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[28] Zadvydas v. Davis, 533 U.S. 678, 682 (2001).

[29] *Id.* at 695.

[30] *See Hosh*, 680 F.3d at 379–80 (deferring to the BIA's interpretation of an ambiguous immigration detention statute).

[31] In the context of statutory detention challenges, scholars have not questioned the applicability of the *Chevron* framework. *See* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 980 n.105 (1998) ("[T]his Article fully accepts that the methodology of judicial deference to administrative agencies' interpretation of statutes articulated in *Chevron* . . . can also be applied in interpreting statutes that authorize deprivations of liberty."); *see also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2102 (2007) (discussing the scope of habeas review over statutory questions in the executive detention context and explaining "[i]nsofar as *Chevron* is conceptualized as a form of delegation, we see no barrier to delegations to the President in this arena"). Outside the statutory interpretation context, there has been some debate as to whether deference to the agency's immigration detention decisions is appropriate. For example, Travis Silva has explored these tensions in the context of discretionary immigration detention decisions, arguing that deference should not apply to an agency's decision regarding whether to detain an individual based on his or her flight risk and dangerousness. *See* Travis Silva, *Toward a Constitutionalized Theory of Immigration Detention*, 31 YALE L. & POL'Y REV. 227, 262–66 (2012) (arguing that "the agency exhibits a systemic lack of institutional independence and an inability to apply the law in an even fashion" and that this, coupled with "the importance of the individual interest at stake," suggests that "Article III courts ought to make de novo findings as to risk of flight and public safety"). Scholars generally accept, however, that the *Chevron* framework would apply to the agency's interpretation of an ambiguity within the statute. Fallon & Meltzer, *supra*, at 2101 n.291.

about limitations on executive detention, while others are about the review of administrative immigration authority. Any habeas challenge to the scope of an immigration detention statute—whether it focuses primarily on constitutional concerns or involves broader tools of statutory construction—ultimately requires review of the lawfulness of the executive's deprivation of an immigrant's physical liberty. *Chevron* nonetheless carves out a category of these cases to require that, in the face of more than one plausible interpretation of an ambiguous statute, a federal court must defer to the agency's view—even where the court would otherwise choose a different interpretation.[32] Indeed, *Chevron* allows the agency to trump a prior federal court interpretation, so long as the statutory provision being interpreted is deemed ambiguous.[33] Once the agency weighs in, *Chevron* prevents the federal court from considering other options, including ones that could resolve the ambiguity in a reasonable manner while also preserving the physical liberty interests at stake. This comes at a high cost. In the context of immigration detention challenges, the interpretive choice is almost always between an agency view that would result in continuing detention and a countervailing interpretation that would result in the detainee's freedom or more robust procedural protections. The application of *Chevron* deference in immigration detention cases thus operates as a presumption in favor of detention, at least in the absence of countervailing norms that would give weight to the physical liberty interest at stake.

The question of whether *Chevron* should apply in the immigration detention context raises several concerns that loom large in the debate over *Chevron* deference generally. In *City of Arlington v. FCC*, the Supreme Court recently suggested that the reach of *Chevron* is wider, and the exceptions to its framework more limited, than scholars had previously surmised.[34] But to the extent that the legitimacy of *Chevron* is tied to principles of congressional delegation, does the physical liberty interest at stake in habeas review change the inquiry?

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[32] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.11 (1984) ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." (citations omitted)).

[33] Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005).

[34] City of Arlington v. FCC, 133 S. Ct. 1863, 1871–75 (2013) (rejecting a jurisdictional exception to applications of *Chevron* deference and concluding that *Chevron* applies whenever an agency has the power to administer an act of Congress and its interpretation was made in executing that authority).

Previous scholarship has not questioned the application of *Chevron* to habeas review of the BIA's interpretation of the immigration detention statute, or explored whether countervailing norms should apply. This article does both. In Part I, I describe the use of deference norms in the immigration context and the emergence of *Chevron* deference. As I explain, outside the *Chevron* context, the Supreme Court has expressed concerns about the tension between deference and the duty of habeas courts to review the lawfulness of executive detention. Yet, within the *Chevron* context, federal courts have applied *Chevron* deference without assessing whether its framework is appropriate in the context of immigration detention cases.

In Part II, I lay the groundwork for considering what limitations to *Chevron* may exist in light of its broad rationales and limited exceptions, particularly in light of *City of Arlington* and its emphasis on the importance of congressional delegation of lawmaking authority to the agency seeking deference. In Part III, I apply these limitations in the immigration detention context. I begin by questioning whether Congress actually intended to delegate its lawmaking authority on statutory detention questions to the BIA. I then turn to the question of whether Congress could have intended to delegate such authority, given the tension between habeas review and deference in the immigration detention context. Based on these concerns, I present a theory for why the *Chevron* framework should not apply to the BIA's interpretation of immigration detention provisions as reviewed through habeas petitions.

I end in Part IV by exploring sources for interpretive norms that should, within or outside of the *Chevron* test, guide habeas courts as they review immigrant detainees' challenges to the executive's authority to detain. In addition to long-standing constitutional avoidance and lenity doctrines, I present the possibility of applying a presumption in favor of physical liberty in the immigration detention context—one that recognizes that the relationship between habeas courts and the executive in habeas review calls for an anti-deference, pro-liberty interpretation of the detention statute.

I
Deference Norms and Detention Power in Immigration Law

Federal courts have long applied a "continuum of deference" in cases involving executive authority.[35] In the context of federal review

[35] William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 Geo.

of immigration detention authority, three deference norms have emerged: plenary power (a form of "super-deference"), anti-deference, and, more recently, *Chevron* deference. While the Supreme Court has articulated anti-deference norms in response to calls for super-deference to executive detention decisions under the plenary power doctrine,[36] the Court has not yet had occasion to address whether and when anti-deference norms should apply in the context of *Chevron* deference claims in immigration detention matters. In the absence of direction from the Court, lower federal courts have applied *Chevron* to immigration detention cases without addressing whether such a framework is appropriate given the liberty interest involved. This section provides an overview of deference norms in the immigration detention context.

A. Plenary Power, Anti-Deference, and Detention Review

As many scholars have observed, the powers of the legislative and executive branches are at their zenith in the field of immigration law. Under the longstanding "plenary power" doctrine, courts have given wide berth to decisions by Congress and the executive as to which individuals to admit and exclude from the United States.[37] To a lesser extent, this doctrine has also applied to deportation policies and other issues affecting the treatment of immigrants within the United States.[38]

L.J. 1083, 1098–1100 (2008) (analyzing the Supreme Court's approach to agency interpretation and finding seven discrete approaches distinct from *Chevron* deference: *Curtiss-Wright* "super-deference" in foreign affairs/national security; *Seminole Rock* "strong . . . deference" for an agency's interpretation of its own regulations; *Beth Israel* deference for agency elaboration of statutory schemes; *Skidmore* deference for expert agency judgments; consultative deference for agency inputs; "[a]nti-[d]eference"; and approaches where no deference regime is invoked); *see also* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 465–83 (2009) (describing the evolution of deference principles in federal immigration law).

[36] *See infra* notes 55, 57–78 and accompanying text (describing Supreme Court's rebuke of deference to the executive's view of the reasonableness of immigration detention in Zadvydas v. Davis, 533 U.S. 678 (2001)).

[37] *See, e.g.*, STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 177–222 (Clarendon Press 1987) (providing an in-depth history of the development of the plenary power doctrine and criticizing its expansive use by courts); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 256–60 (1984) (describing the courts' development of the plenary power doctrine); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power*: *Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990) (describing the plenary power doctrine).

[38] *See* LEGOMSKY, *supra* note 37, at 177–222 (explaining courts' expansion—and misapplication—of the plenary power doctrine beyond its origins in federalism cases); Motomura, *supra* note 37, at 560 (concluding that the location of the noncitizen—inside or

The question of how plenary powers relate to civil immigration detention is more complicated. The Supreme Court has long held that the federal government's authority to detain noncitizens is a necessary part of its authority to deport noncitizens.[39] Yet the Court has also recognized that administrative officers must ensure that a noncitizen has notice and an opportunity to be heard with respect to "the matters upon which that liberty depends."[40] The tension between the plenary powers doctrine and the judiciary's interest in safeguarding liberty from unauthorized executive intrusion exemplifies the Court's complicated view of deference in the detention context.

In *Carlson v. Landon*, for example, the Supreme Court recognized both principles in reviewing the government's authority to detain noncitizens pending their deportation from the U.S. as alleged communists.[41] It explained that "[t]he power to expel aliens, being essentially a power of the political branches of government, the legislative and executive, may be exercised entirely through executive officers, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit" but noted that "[t]his power is, of course, subject to judicial intervention under the paramount law of the Constitution."[42] While it ultimately rejected the noncitizens' arguments that they were entitled to bail pending their deportation proceedings, the Court examined the Attorney General's statutory authority to detain without bail at his discretion, and exercised judicial review of his decision under the standards articulated in the statute.[43] The Court's approach therefore highlighted the tension between plenary power and constitutional constraints.

In *Shaughnessy v. United States ex rel. Mezei*, however, the Supreme Court went much further in applying the plenary power doctrine in support of the exclusion and detention of a noncitizen seeking

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outside the U.S.—and the type of constitutional challenge influence the application of the plenary power doctrine).

[39] *See, e.g.*, Carlson v. Landon, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of . . . deportation procedure."); Wong Wing v. United States, 163 U.S. 228, 235 (1896) ("Proceedings to exclude or expel [aliens] would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation.").

[40] Kaoru Yamataya v. Fisher, The Japanese Immigrant Case, 189 U.S. 86, 101 (1903); *see also id.* at 100–01 (affirming that the Supreme Court has never held that administrative officers can disregard the fundamentals of due process of law when creating statutes concerning the liberty of individuals and noting that one such principle of due process is the opportunity to be heard upon being deprived of one's liberty).

[41] Carlson, 342 U.S. at 528–29.

[42] *Id.* at 537 (internal quotation marks omitted).

[43] *Id.* at 538–42.

to return to the United States after a trip abroad.[44] In part, the decision merely reiterated the longstanding application of super-deference to the federal government's decisions regarding whom to exclude as "a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."[45] Recognizing that Congress had "expressly authorized the President to impose additional restrictions on aliens entering or leaving the United States during periods of international tension and strife," the Court declined to disturb the Attorney General's decision to exclude the noncitizen from the United States.[46]

The Court's treatment of Mezei's detention as merely ancillary to his exclusion sets the case apart from *Carlson*.[47] Pending his attempt to seek reentry into the United States, where his wife still lived and where he had been a resident for twenty-five years, Mezei was detained on Ellis Island.[48] The primary question for the Court, however, was not whether Mezei's physical detention called for more searching review, but whether he had, at the time of his challenge, entered the United States.[49] Because he had not, his detention was incident to his exclusion.[50] The Court therefore concluded that the federal government had merely provided him with "harborage" and that his situation was no different, for purposes of judicial review, than had he been waiting to enter on a ship.[51] In the context of exclusion, even with respect to detention, the plenary power doctrine appeared to apply at full strength.

In the years following *Carlson* and *Mezei*, however, the plenary power doctrine has weakened considerably.[52] As Hiroshi Motomura has explained, over time the courts began to apply "phantom constitutional norms" to avoid or erode the dictates of the plenary power doctrine through statutory interpretation.[53] Without disavowing plenary

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[44] 345 U.S. 206 (1953).

[45] *Id.* at 210 (citations omitted).

[46] *Id.*

[47] *Id.* at 215–16 (distinguishing Carlson v. Landon, 342 U.S. 524, 524).

[48] United States *ex rel.* Mezei v. Shaughnessy, 101 F. Supp. 66, 67 (S.D.N.Y. 1951).

[49] *Mezei*, 345 U.S. at 213.

[50] *Id.*

[51] *Id.*; *see also* Motomura, *supra* note 37, at 558 (discussing the Supreme Court's rejection of Mezei's challenge to his detention).

[52] *See* LEGOMSKY, *supra* note 37, at 155–70 (describing the judiciary's role in eroding the plenary power doctrine through liberal statutory interpretation, "focusing on the pertinent policies and the presence of arbitrariness" affecting immigrants).

[53] Motomura, *supra* note 37, at 610–11 (noting that while plenary power doctrine has its roots in longstanding Supreme Court constitutional precedent, "courts will continue to avoid this directly applicable constitutional doctrine through subconstitutional decisions that rely on phantom constitutional norms much more favorable to aliens").

power as a governing doctrine, courts avoid the direct constitutional questions by construing statutes as failing to authorize the challenged government action.[54]

These norms extended to the detention context when, nearly fifty years after *Mezei*, the government once again sought super-deference to its detention decisions in *Zadvydas v. Davis*. *Zadvydas* involved a question about the interpretation of a provision in the modern-day Immigration and Nationality Act that authorizes detention for noncitizens who have a final order of deportation against them.[55] The statute mandates their detention during a 90-day "removal period" and then provides that "[a]n alien ordered removed who [fits under specified criteria] may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision . . . ."[56] The former Immigration and Naturalization Service (INS) issued regulations that provide for periodic review of such noncitizens' records to determine whether detention or release is warranted after the removal period.[57] The question presented to the Court in *Zadvydas* was whether the Immigration and Nationality Act authorizes indefinite detention.[58]

The petitioners in *Zadvydas* were two individuals for whom the INS could not obtain travel documents to secure their deportation.[59] One individual, Kestutis Zadvydas, was born to Lithuanian parents in a displaced persons camp in Germany, and neither Lithuania nor Germany recognized him as a citizen.[60] The other individual, Kim Ho Ma, was born in Cambodia, which at the time lacked a repatriation agreement with the United States.[61] As a result, the federal government was unable to find a country willing to take either detainee. Both filed habeas petitions, challenging their continued detention as unauthorized by the statute and in violation of their constitutional rights.[62]

In defending its view that the statute authorized these individuals' detention, the federal government argued for deference, both to its interpretation of the statute and the reasonableness of its application.

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54 *Id.*

55 Zadvydas v. Davis, 533 U.S. 678, 682 (2001).

56 8 U.S.C. § 1231(a)(6) (Supp. V. 1994).

57 *Zadvydas*, 533 U.S. at 683 (citing 8 C.F.R. §§ 241.4(c)(1), (h), (j)(1)(i) (2001)).

58 *Id.* at 682 (framing the question as whether the "statute authorizes the Attorney General to detain a removable alien *indefinitely* beyond the removal period or only for a period *reasonably necessary* to secure the alien's removal").

59 *Id.* at 684–86.

60 *Id.* at 684.

61 *Id.* at 685–86.

62 *Id.* at 684–86.

First, it argued that its interpretation of the statute, as authorizing detention even for a potentially indefinite period of time, must be accorded substantial deference under the plenary power doctrine, relying on *Mezei* and similar cases.[63] In its briefing, the government argued that "[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."[64] Such deference is grounded in the notion that the judicial branch should not interfere in "contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republic form of government."[65] While acknowledging that the doctrine originated in case law involving the government's wide latitude in deciding whom to exclude from entry to the United States, the federal government argued in *Zadvydas* that its interior detention policy towards noncitizens it was seeking to deport involved similar concerns, particularly since the government was negotiating repatriation with foreign nations.[66]

The Supreme Court rebuked the federal government's request for deference. As to the government's plenary power argument, the Court explained "that power is subject to important constitutional limitations."[67] The Court continued by stating that "an alien's liberty interest is, at the least, strong enough to raise a serious question as to whether, irrespective of the procedures used . . . the Constitution permits detention that is indefinite and potentially permanent."[68] The Court distinguished the issue at hand from *Mezei*, noting that the case concerned the control of entry into the U.S., and reserved the question of whether detention pursuant to terrorism charges or other special circumstances might justify heightened deference.[69]

After declining the government's invitation to defer to its interpretation of the statute at the outset, given the constitutional concerns arising from indefinite detention, the Supreme Court then went on to

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[63] Brief for the Respondents at 19–24, Zadvydas v. INS, 533 U.S. 678 (2001) (No. 99-7791).

[64] *Id.* at 20 (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953)).

[65] *Id.* at 20 (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1982)).

[66] *Id.* at 21–22 (describing its negotiations with receiving countries as "sensitive and difficult" and arguing that "[t]he judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions" (quoting INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999)).

[67] *Zadvydas*, 533 U.S. at 695; *see also id.* ("Congress must choose 'a constitutionally permissible means of implementing' that power." (quoting INS v. Chadha, 462 U.S. 919, 941–42 (1983))).

[68] *Id.* at 696.

[69] *Id.* at 695–96.

analyze the statute. It noted that if Congress unambiguously intended to authorize indefinite detention, the Court would have to give effect to that intent.[70] However, having found congressional intent ambiguous, the Court applied the doctrine of constitutional avoidance. "[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."[71] The Supreme Court held that six months of detention was a presumptively reasonable period, after which time if the noncitizen "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing."[72]

In arriving at this rule, the Court again rejected the government's arguments for deference, this time as to the government's "view about whether the implicit statutory limitation is satisfied in a particular case."[73] In doing so, the Court focused particularly on the nature of habeas corpus review:

> Whether a set of particular circumstances amounts to detention within, or beyond, a period reasonably necessary to secure removal is determinative of whether the detention is, or is not, pursuant to statutory authority. The basic federal habeas corpus statute grants the federal courts authority to answer that question. In doing so the courts carry out what this Court has described as the "historic purpose of the writ," namely "to relieve detention by executive authorities without judicial trial."[74]

In so holding, the Court acknowledged that courts "must take appropriate account of the greater immigration-related expertise of the Executive Branch, of the serious administrative needs and concerns inherent in the necessarily extensive INS efforts to enforce this complex statute, and the Nation's need to speak with one voice in immigration matters."[75] This means that courts must "listen with care" to the government's relevant foreign policy judgments, for example, as to the status of repatriation negotiations.[76] But the Court held that "courts can take appropriate account of such matters without abdi-

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[70] *Id.* at 696 (citing Miller v. French, 530 U.S. 327, 336 (2000)).

[71] *Id.* at 699.

[72] *Id.* at 701.

[73] *Id.* at 699.

[74] *Id.* at 699 (quoting Brown v. Allen, 344 U.S. 443, 533 (1953)) (internal citations omitted).

[75] *Id.* at 700 (internal quotation omitted).

[76] *Id.*

cating their legal responsibility to review the lawfulness of an alien's continued detention."[77]

Zadvydas marked a significant development in two respects. First, it directly framed the plenary power doctrine as limited by other constitutional constraints in the detention context, even for immigrants who had final orders of removal from the United States. Second, it suggested that deference to the executive's view of the reasonableness of detention would constitute an "abdicati[on]" of courts' "legal responsibility" to determine if executive detention is pursuant to statutory authority through habeas review.[78]

While many scholars point to *Zadvydas* as a rebuke against plenary power in the detention context, some argue that the Court retreated from this in *Demore v. Kim*, where the Court upheld the constitutionality of the mandatory detention of a noncitizen prior to the completion of removal proceedings.[79] In *Demore*, a noncitizen who conceded his removability challenged his mandatory detention pending removal proceedings as a violation of his due process rights.[80] In rejecting the noncitizen's argument, the Court relied on statistics that indicated removal proceedings were relatively brief and observed that the noncitizen had not challenged the application of the statute to his case.[81] While interpretive deference norms were therefore not squarely raised in the case, the Court nonetheless noted that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[82] Thus, the Court's treatment of the case may indicate that the Court has not really distanced itself from the plenary power doctrine.

In the wake of *Demore*, however, federal courts have applied the Supreme Court's decision narrowly. Several circuits have limited *Demore* to its facts and have applied the principles of *Zadvydas* to cases where noncitizens have challenged the unreasonableness of their

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[77] *Id.*

[78] *Id.*

[79] 538 U.S. 510 (2003). *Compare* Chelgren, *supra* note 2, at 1514–21 (arguing that *Zadvydas* and its progeny demonstrate a recognition of the limits of plenary power in the detention context) *with* Silva, *supra* note 24, at 241 (arguing that "[a]ny concern that the Court was drastically pruning the plenary power doctrine was extinguished . . . in *Demore v. Kim*").

[80] *Demore*, 538 U.S. at 513–14 (2003).

[81] *Id.* at 529–30 (discussing statistics regarding the length of detention); *id.* at 513–14 ("Respondent also did not dispute the INS' conclusion that he is subject to mandatory detention under § 1226(c).").

[82] *Id.* at 521 (quoting Mathews v. Diaz, 426 U.S. 67, 79–80 (1976)).

detention pending removal proceedings in recent years.[83] In doing so, these courts have applied constitutional avoidance principles to read the mandatory detention statute to permit bond hearings after a prolonged period of time.[84]

Zadvydas and its progeny have therefore surpassed *Demore* to dictate the reach of constitutional protections in the detention context. Through these cases, federal courts have heeded the Supreme Court's admonition to abide by their "legal responsibility" to review the lawfulness of executive detention without resort to the plenary power doctrine. While the Supreme Court has not addressed whether it would view a request for *Chevron* deference as equally problematic, these decisions suggest an underlying tension between deference norms and detention review.

B. Chevron *Deference and the Increasing Role of Agency Adjudication in Immigration Detention*

The question of the applicability of *Chevron* review in detention cases has become an important one. Over the years, administrative agencies have taken an increasing role in interpreting immigration detention statutes. In particular, the statutory advent of mandatory detention—the elimination of any discretionary authority to release immigrants pending their removal proceedings—has led to scores of administrative and federal court challenges. The result has been increasing attention to what level of deference to give to the Attorney General's adjudicatory decisions regarding the interpretation of the immigration detention provisions within the Immigration and Nationality Act. Contrary to the evolving consideration given to anti-deference norms in cases involving the government's invocation of

[83] Rodriguez v. Robbins, 715 F.3d 1127, 1138 (9th Cir. 2013) ("[W]e have consistently held that *Demore*'s holding is limited to detentions of brief duration."); Diop v. ICE/Homeland Sec., 656 F.3d 221, 232 (3d Cir. 2011) ("At a certain point, continued detention becomes unreasonable and the Executive Branch's implementation of § 1226(c) becomes unconstitutional unless the Government has justified its actions at a hearing inquiring into whether continued detention is consistent with the law's purposes of preventing flight and dangers to the community."); Ly v. Hansen, 351 F.3d 263, 271 (6th Cir. 2003) ("[T]he Court's discussion in [*Demore v. Kim*] is undergirded by reasoning relying on the fact that Kim, and persons like him, will normally have their proceedings completed within . . . a short period of time and will actually be deported, or will be released. That is not the case here.").

[84] *See Rodriguez*, 715 F.3d at 1133 ("[T]he canon of constitutional avoidance requires us to construe the government's statutory mandatory detention authority . . . as limited to a six-month period, subject to a finding of flight risk or dangerousness."); *Diop*, 656 F.3d at 231 (reading § 1226(c) as implicitly authorizing detention for a "reasonable amount of time," after which the authorities "must make an individualized inquiry into whether detention is still necessary to fulfill the statute's purposes"); *Ly*, 351 F.3d at 267–68 (construing the statute to avoid constitutional concerns).

plenary power, however, federal courts have simply assumed that *Chevron* deference applies.

1. *The Role of Agency Interpretation in the Expansion of the Modern-Day Immigration Detention Scheme*

Since the early days of immigration law, Congress has authorized and the agency has exercised executive authority to detain and release immigrants on an individualized basis pending decisions on their deportation. In 1988, however, Congress enacted its first mandatory detention legislation for noncitizens in removal proceedings. This legislation directed the Attorney General to detain, without bond, noncitizens with "aggravated felony" convictions upon completion of their criminal sentences for those offenses, pending their removal proceedings.[85] Further legislation expanded the criminal grounds triggering mandatory detention,[86] and created mandatory detention schemes for "arriving aliens"[87] and individuals who have final orders of removal but have not yet been deported.[88] Under the current statute, the Bureau of Immigration and Customs Enforcement within the U.S. Department of Homeland Security (DHS) may subject a noncitizen to mandatory detention under these provisions based solely on a paper record.[89] Noncitizens in pending removal proceedings may challenge the application of the mandatory detention statute through a special

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[85] Anti-Drug Abuse Act of 1988, § 7343(a)(4), Pub. L. No. 100-690, 102 Stat. 4181, 4470 (1988) (codified at 8 U.S.C. § 1252(a)(2) (1989)).

[86] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 303(a), 110 Stat. 3009, 3009-585–86 (Sept. 30, 1996) (codified in 8 U.S.C. § 1226) (defining current mandatory detention scheme); Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(c), 110 Stat. 1214, 1277 (Apr. 24, 1996).

[87] 8 C.F.R. § 1.2 (defining an "arriving alien" as "an applicant for admission coming or attempting to come into the United States at a port-of-entry"). "Arriving aliens" may be released on parole, but denials of parole are not reviewable by Immigration Judges. 8 C.F.R. § 1003.19(h)(2)(i)(B).

[88] For a 90-day removal period following a final removal order, the government must detain a noncitizen. 8 U.S.C. § 1231(a)(2). If a noncitizen has not yet been deported within six months of a final removal order, the agency is required to conduct post-order custody reviews to determine if continued detention is justified. *Zadvydas*, 533 U.S. at 701. The custody review process has been criticized as ineffective. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-434, BETTER DATA AND CONTROLS ARE NEEDED TO ASSURE CONSISTENCY WITH THE SUPREME COURT DECISION ON LONG-TERM ALIEN DETENTION 3–5 (2004) (describing delays or the outright failure to conduct custody reviews in *Zadvydas* cases due to an outdated case management system for tracking custody reviews, inadequate staffing, and other institutional barriers).

[89] *See* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1731 (2011) (describing immigration officers' reliance on paper records to make mandatory detention assessments (citing 8 C.F.R. § 1003.19 (2010))).

hearing in immigration court, raising their claims to an administrative immigration judge employed by the Executive Office of Immigration Review (EOIR) within the U.S. Department of Justice.[90] In such cases, the losing party may appeal the immigration judge's decision to the Board of Immigration Appeals (BIA), another division of the EOIR.[91] As has historically been the case, a detainee's only route to judicial review by an independent tribunal is through a petition for writ of habeas corpus.[92]

Since Congress first enacted mandatory detention provisions, the BIA and DHS (and its predecessor, INS) have played a significant role in shaping the application of the statute. As the prosecuting arm of the executive branch, INS/DHS issued memoranda and developed administrative and litigation positions regarding which noncitizens were subject to mandatory detention.[93] As an adjudicatory arm of the executive branch, the BIA issued several precedential decisions regarding the application and scope of mandatory detention.[94] Many

[90] *See* Matter of Joseph, 22 I. & N. Dec. 799, 800 (1999) (describing the process by which noncitizens may argue they are not properly included under the mandatory detention statute).

[91] *See* 8 C.F.R. § 1236.1(d)(3) (providing that either party may seek review of an Immigration Judge decision regarding custody before the Board of Immigration Appeals).

[92] *See* Neuman, *supra* note 31, at 987–1020 (tracing the historical use of habeas corpus by immigrants challenging executive detention).

[93] *See* Matter of Adeniji, 22 I. & N. Dec. 1102, 1108-10 (BIA 1999) (describing prior position of then-INS applying pre-final order mandatory detention to anyone in their custody at the expiration of transitional rules); *see also* Memorandum from Michael J. Creppy, Chief Immigration Judge, Operating Policies and Procedures Memorandum 01-03: Continued Detention Review Hearings (Nov. 19, 2001) (interpreting post-*Zadvydas* regulations governing post-final order custody reviews); Memorandum from Michael A. Pearson, INS Executive Associate Commissioner, Office of Field Operations, to Regional Directors, Field Guidelines for Applying Revised Interpretation of Mandatory Custody Provisions (Jul. 12, 1999) (interpreting pre-final order mandatory detention statute).

[94] *See, e.g.*, Matter of Garcia-Arreola, 25 I. & N. Dec. 267, 271 (BIA 2010) (interpreting "released" in 8 U.S.C. § 1226(c)(1) in relation to the effective date of the statute); Matter of Aguilar-Aquino, 24 I. & N. Dec. 747, 752 (BIA 2009) (interpreting "custody" in 8 U.S.C. § 1226 and regulation 8 C.F.R. § 1236.1(d)(1)); Matter of Saysana, 24 I. & N. Dec. 602, 604 (BIA 2008) (interpreting "when the alien is released" in § 1226(c)(1) in relation to the effective date of the statute), *overruled by* Saysana v. Gillen, 590 F.3d 7 (1st Cir. 2009); Matter of Kotliar, 24 I. & N. Dec. 124, 125–26 (BIA 2007) (interpreting the terms "when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation" and "is deportable" in U.S.C. § 1226(c)(1) (internal quotation marks omitted)); Matter of Rojas, 23 I. & N. Dec. 117, 118–19 (BIA 2001) (interpreting "when the alien is released" in 8 U.S.C. § 1226(c)(1) and "described in paragraph (1)" in 8 U.S.C. § 1226(c)(2)); Matter of West, 22 I. & N. Dec. 1405, 1407–08 (BIA 2000) (interpreting "released after" in section 303(b)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)), Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-586; *Adeniji*, 22 I. & N. Dec. at 1108-10 (interpreting "released after" in section 303(b)(2) of IIRIRA); Matter of Eden, 20 I. & N. Dec. 209, 211 (BIA 1990) (interpreting "upon completion of the alien's sentence for such conviction" in 8 U.S.C. § 1252(a)(2)).

of these agency positions and decisions have led to extensive federal court litigation and, unsurprising, changes in policy and legislation.[95]

As a result of these processes, the BIA has played a significant role in determining who is subject to mandatory detention, primarily through agency decisions interpreting 8 U.S.C. § 1226(c), the mandatory detention statute for individuals pending their removal proceedings. The current version of the statute predicates mandatory detention on a person's criminal history and whether they were detained by immigration officials when they were released from custody for a relevant offense. It states that the Attorney General "shall take into custody any alien who . . . is inadmissible . . . [or] deportable . . . [for an enumerated offense] when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense."[96] It further provides that the Attorney General may not release anyone "described in" this provision except under narrow circumstances.[97]

Several BIA decisions have adopted the most expansive reading of those provisions—construing terms like "custody," "released," "when . . . released," "described in" and other terms broadly.[98] For example, in 2001, the BIA issued *Matter of Rojas*, which rejected a narrow—and arguably more natural—reading of the "when . . . released" clause and whether it was part of the description of immigrants subject to mandatory detention.[99] Detainees who were taken into custody long after they served time for any past removable offense argued that Congress intended mandatory detention to apply only to immigrants who were detained when they were released from criminal incarceration, and that discretionary detention (with the possibility of a bond hearing) applied to immigrants who had already returned to their homes and communities following release from cus-

[95] In *Matter of Eden*, for example, the BIA interpreted the phrase "upon completion of the alien's sentence for such conviction" in 8 U.S.C. § 1252(a)(2), the mandatory detention provision at the time, to refer to the completion of incarceration even if a person was still serving a noncustodial portion of his or her sentence on parole, probation or supervised released. 20 I. & N. Dec. at 211–14. Following *Matter of Eden*, Congress codified the BIA's holding by revising the mandatory detention statute to refer to a person's release "regardless of whether or not such release is on parole, supervised release, or probation . . . ." Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5049 ("1990 Act").

[96] 8 U.S.C. § 1226(c)(1) (2013).

[97] 8 U.S.C. § 1226(c)(2) (2013).

[98] *See supra* note 94 (detailing key BIA cases).

[99] *See Rojas*, 23 I. & N. Dec. at 125 (holding that the phrase "alien described in paragraph 1," defining which immigrants are subject to mandatory detention under the statute, does not include the "when . . . released" clause in paragraph 1).

tody for a past conviction.[100] In reviewing this claim in the context of a noncitizen who had been detained after his release from incarceration, the BIA agreed that Congress intended for DHS to detain noncitizens immediately upon their release from criminal custody and hold them without bond.[101] However, in that same decision, the BIA construed the statute to also permit mandatory detention to apply to individuals who were released from criminal custody months or years prior to their removal proceedings—in other words, denying a bond hearing to individuals who had long since returned to their communities in the U.S.[102] It based its decision on a reading of the statute that construed the "when . . . released" clause to be unrelated to the "description" of immigrants whom the Attorney General was not authorized to release. As a result, the reach of mandatory detention was expanded to anyone who had been in custody for an enumerated offense at any time since the enactment of the statute.

The majority of BIA decisions have similarly opted for an expansive reading of the mandatory detention statute as other challenges have arisen. For example, parties have litigated the meaning of the term "released," which triggers immigration officials' duty to detain a noncitizen under the mandatory detention statute.[103] Detainees have argued that Congress intended "release" to mean release from criminal incarceration pursuant to a conviction for an enumerated offense.[104] Thus pre-conviction custody—such as an initial arrest, for example—would not suffice to trigger mandatory detention. Detainees argued that this interpretation made sense in light of the statute's requirement of a conviction to trigger many, if not all, of the provisions in the mandatory detention statute, the text of the released

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100 *See id.* at 118 (summarizing detainee's argument).

101 *See id.* at 122 ("The statute does direct the Attorney General to take custody of aliens immediately upon their release from criminal confinement.").

102 *See id.* ("Congress was not simply concerned with detaining and removing aliens coming directly out of criminal custody; it was concerned with detaining and removing *all* criminal aliens."). Notably, the detainee in *Rojas* was detained only two days after his release from criminal incarceration. *Id.* at 118. The BIA did not limit its holding to those facts, however. Rather it interpreted the statute to apply regardless of the length of time between one's release from incarceration and one's subsequent detention by immigration authorities. *Id.* at 122.

103 8 U.S.C. § 1226(c)(1) (requiring the Attorney General to detain individuals when they are "released, without regard to whether the alien is released on parole, supervised release, or probation . . . ").

104 *See, e.g.*, Straker v. Jones, 986 F. Supp. 2d 345, 356–63 (S.D.N.Y. 2013) (explaining in detail the various arguments regarding the scope of the term "released"); *see also* Matter of Kotliar, 24 I. & N. Dec. 124, 125–26 (BIA 2007) (noting and rejecting detainee's argument regarding the term "released").

clause, and the statute's legislative history.[105] With little analysis, the BIA rejected that argument in *Matter of Kotliar*, concluding that any physical custody associated with an enumerated offense would be a sufficient "release" triggering the mandatory detention statute.[106] Thus, an individual who was never sentenced to any time in jail for his or her conviction would be considered to have been "released" from custody because he or she had been arrested, however briefly, at the initiation of the criminal case. The BIA took the interpretation one step further in a 2008 case, *Matter of Saysana.*[107] In this case, the BIA interpreted mandatory detention to apply whenever a person who was removable for grounds listed in the mandatory statute was "released" from custody, even if the release from custody was for an offense that was not listed in the statute.[108] In other words, even if an individual were released from custody for an offense prior to the effective date of the mandatory detention statute, a subsequent arrest for any other offense—even if the case were dismissed—would trigger mandatory detention. The combination of these decisions and others has had the effect of expanding mandatory detention to countless individuals who would not otherwise fit under a more strict reading of the statute.

These BIA decisions have generated significant controversy. For instance, just two years after *Matter of Saysana*, the BIA retreated from its former position. Following numerous federal courts that had issued contrary decisions, the BIA partially reversed its position on whether "release" had to be connected to the offense triggering mandatory detention.[109] Other decisions, however, have remained on the books. Noncitizens have accordingly challenged such decisions through petitions for writs of habeas corpus to federal district courts. As discussed below, many of these federal courts have applied a *Chevron* framework in assessing the agency's statutory interpretations—and in some cases, have deferred to the BIA even in light of a more reasonable interpretation.

2. *Judicial Review and* Chevron *in Immigration Detention Cases*

In defending the BIA decisions interpreting the detention statute in federal courts, the government has not invoked the plenary power

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[105] *See, e.g.*, *Straker*, 986 F. Supp. 2d at 356 (describing petitioner's arguments why "released" refers only to releases from post-conviction sentences of incarceration).

[106] *See Kotliar*, 24 I. & N. Dec. at 125 (stating that a release from "an arrest preceding a conviction" may trigger mandatory detention).

[107] Matter of Saysana, 24 I. & N. Dec. 602 (BIA 2008).

[108] *Id.* at 605–06 (finding that § 236(c)(1)'s application was not limited to "criminal custody that is related to, or that arises from, the basis for detention under that section").

[109] *See* Matter of Garcia-Arreola, 25 I. & N. Dec. 267, 271 (BIA 2010) (overruling *Saysana*, but refusing to retreat from *Rojas*).

doctrine but has instead relied on *Chevron*. To date, no court has questioned the applicability of *Chevron* in this context. Instead, they have proceeded by applying the traditional two-step test. To determine whether it owes deference to an agency's interpretation of an ambiguous statute under *Chevron*, a court first must analyze the plain language of the statute and apply the "traditional tools of statutory construction" to determine if the intent of Congress is clear.[110] "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[111] If the intent of Congress is not clear, however, courts must proceed to the second step of *Chevron*. Under step two, courts owe deference to an agency's interpretation of an ambiguous statute if that interpretation is reasonable.[112]

As the BIA has taken a larger role in interpreting the scope of immigration detention, detainees have increasingly taken their challenges to federal court through habeas petitions. In these cases, federal courts have universally presumed the applicability of *Chevron*'s two-step test when the government relies on the BIA's interpretation. In applying this test, many federal courts have stopped at step one, finding the statute unambiguous and rejecting the BIA's interpretation.[113] But others have proceeded to step two, deferring to the agency upon finding the relevant statutory provisions ambiguous.[114]

The cases in which courts apply *Chevron* step two look remarkably different from prior cases where courts weighed their duty to serve as a check on unlawful detention against plenary power norms. In the prior cases, courts engaged in rigorous statutory analysis—coming to their own conclusions about the scope of lawful detention without deferring to the agency's view. However, in a post-*Chevron* world, federal courts interpreting ambiguous detention statutes *must* choose the agency's plausible interpretation, even if the court would

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110 Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

111 *Id.* at 842–43.

112 *Id.* at 843 (holding that, in such cases, courts must defer when agencies base decisions on a "permissible construction of the statute").

113 *E.g.*, Nabi v. Terry, 934 F. Supp. 2d 1245, 1248 (D.N.M. 2012); Valdez v. Terry, 874 F. Supp. 2d 1262, 1275 (D.N.M. 2012); Louisaire v. Muller, 758 F. Supp. 2d 229, 238 (S.D.N.Y. 2010); Khodr v. Adduci, 697 F. Supp. 2d 774, 778 (E.D. Mich. 2010); Scarlett v. U.S. Dep't of Homeland Sec., 632 F. Supp. 2d 214, 219 (W.D.N.Y. 2009); Quezada-Bucio v. Ridge, 317 F. Supp. 2d 1221, 1230 (W.D. Wash. 2004).

114 *See*, *e.g.*, Desrosiers v. Hendricks, 532 F. App'x 283, 285–86 (3d Cir. 2013) (deferring to *Matter of West*); Sylvain v. Attorney Gen., 714 F.3d 150, 161 (3d Cir. 2013) (deferring to *Matter of Kotliar*); Hosh v. Lucero, 680 F.3d 375, 378 (4th Cir. 2012) (deferring to *Matter of Rojas*); Straker v. Jones, 986 F. Supp. 2d 345, 356 (S.D.N.Y. 2013) (same); Johnson v. Orsino, 942 F. Supp. 2d 396, 405 (S.D.N.Y. 2013) (same).

craft a different, equally plausible interpretation on its own reading of the statute.

In *Hosh v. Lucero*, for example, the Fourth Circuit deferred to the BIA's decision in *Matter of Rojas* and overturned the federal district court's grant of a writ of habeas corpus.[115] The case involved a longtime lawful permanent resident who was arrested by immigration officials in his community four years after having been released from custody for a removable offense.[116] He filed a habeas petition seeking a bond hearing under the discretionary authority of the agency, contending that his mandatory detention without a bond hearing violated the statute because he was not detained when he was released from custody.[117] The Fourth Circuit began its analysis by examining the meaning of the word "when" in the mandatory detention provision, and concluding that its meaning is ambiguous given differing dictionary definitions of the term.[118] Observing that Congress had repeatedly expressed a general intent to expand deportation and detention, the court concluded that the BIA's interpretation—to deprive a bond hearing to anyone with a past enumerated offense, even one that happened years ago—was a reasonable reading of the statute.[119] In doing so, it declined to apply other canons of construction, including the "rule of lenity," which would have construed any ambiguities in favor of the immigrant.[120]

In *Sylvain v. Attorney General* and *Desrosiers v. Hendricks*, the Third Circuit deferred to the BIA's interpretation of "released" in *Matter of Kotliar* and *Matter of West*.[121] Both cases involved longtime lawful permanent residents who had not been sentenced to any period of incarceration for the offense that later triggered their mandatory detention. They argued that they had not therefore been "released" from custody for their convictions. In both cases, the Third Circuit rejected the petitioners' arguments by deferring to the BIA's interpretation that release from an initial arrest prior to conviction constituted

115 *Hosh*, 680 F.3d at 377.

116 *Id.* at 377–78.

117 *Id.* at 378.

118 *Id.* at 379–80.

119 *See id.* at 380–81 (describing Congress's desire to detain and deport removable immigrants with criminal convictions).

120 *See id.* at 383 ("Although . . . some ambiguity exists in § 1226(c) . . . such ambiguity does not rise to the level of grievousness that would require us to call upon the rule of lenity.").

121 *See* Desrosiers v. Hendricks, 532 F. App'x 283, 285–86 (3d Cir. 2013) (deferring to *Matter of West*); Sylvain v. Attorney Gen., 714 F.3d 150, 161 (3d Cir. 2013) (holding that the argument was not properly raised below but also rejecting its basis under *Matter of Kotliar* and *Matter of West*).

a release under the statute at *Chevron* step two—with little to no analysis under *Chevron* step one.[122]

Once a minority, a growing number of federal courts have reached *Chevron* step two, deferring to the agency even where the detainee's reading of the statute is also plausible.[123] While these cases may be faulted for an inadequate *Chevron* step one analysis—for failing to consider the various interpretive rules and canons that would demonstrate the unambiguous nature of Congress's intent—they also demonstrate a new deference norm that has overtaken plenary power to tip the scales in favor of the executive's detention authority. None have questioned whether the *Chevron* framework is applicable in this context at all.

II
REVISITING *CHEVRON*'S LIMITATIONS

The failure of courts to question *Chevron*'s applicability to agency interpretation of immigration detention statutes is troubling. As this section explains, the scope of *Chevron* is expansive, but it is not without limits. Its rationales point to a more nuanced set of questions that courts must engage in before applying *Chevron*—questions that courts have skipped over in the immigration detention context.

Chevron came at a time when courts were grappling with the question of how much, if any, deference to give to an administrative agency's interpretation of a federal statute. Among the three branches of government, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[124] Nonetheless, as the administrative state has grown, agencies themselves have become a "fourth branch" of government, applying their expertise to interpret the complex statutes that Congress has charged them to execute.[125] In exercising judicial review over agency interpretations, courts have responded with varying degrees of deference—balancing the desira-

[122] *See Desrosiers*, 532 F. App'x at 285–86 (deferring to *Matter of West* without independently applying the ordinary tools of statutory construction to assess the meaning of the term "released"); *Sylvain*, 714 F.3d at 161 (citing *Matter of Kotliar* and *Matter of West* without engaging in a separate analysis of the statute).

[123] *See supra* note 114 (citing cases in which courts have deferred to agency interpretations of the detention statute).

[124] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[125] *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984) (arguing that the administrative state has outgrown a formalistic separation-of-powers analysis and should now be subject to analysis in terms of separation of functions and checks and balances).

bility of the streamlined administration of law with the need for checks and balances.[126]

The Supreme Court responded to these issues by adopting its two-step framework for determining whether a court must defer to an agency interpretation of law.[127] The inquiry revolves around determining whether Congress, through its legislative powers, left ambiguities for the agency to resolve. In *Chevron*, the Supreme Court applied this test to address a dispute between the Natural Resources Defense Council and industrial corporations over the meaning of the term "stationary source" in the Clean Air Act Amendments of 1977.[128] The Environmental Protection Agency promulgated regulations to define the term in a way that, according to the Natural Resources Defense Council, ran contrary to the statute's purpose of improving air quality.[129] In applying its two-step test, the Supreme Court first examined the plain statutory language and applied canons of statutory construction to determine whether Congress's intent behind the term "stationary source" was clear.[130] Concluding that Congress had not unambiguously expressed its intent, the Court then examined the agency's regulatory definition, and determined that it was a reasonable interpretation of the definitional gap left by Congress in the statute.[131]

The two-step test has been applied in many cases without controversy. In terms of its scope and rationales, however, *Chevron* left its

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[126] *See, e.g.*, Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 363 (1986) (internal quotations omitted) (discussing conflicting themes within the debate over the administrative state: "the need for regulation" versus "the need for checks and controls").

[127] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). Scholars debate the proper framing of the steps of the *Chevron* test. *Compare* Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611, 611 (2009) ("[*Chevron*] separates questions of statutory implementation assigned to independent judicial judgment (Step One) from questions regarding which the courts' role is limited to oversight of agency decisionmaking (Step Two)."), *with* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 599 (2009) ("The single question is whether the agency's construction is permissible as a matter of statutory interpretation; the two *Chevron* steps both ask this question, just in different ways.").

[128] *Chevron*, 467 U.S. at 840.

[129] *See id.* at 842 n.7 ("Respondents argued below that EPA's plantwide definition of 'stationary source' is contrary to the . . . purposes of the amended Clear Air Act.").

[130] *Id.* at 861–62. The Court specifically looked to the text of the statute, its plain language, and the statutory context. *See id.* at 859–62 (examining the statutory term and its surrounding text, noting that "the meaning of a word must be ascertained in the context of achieving particular objectives, and the words associated with it may indicate that the true meaning of the series is to convey a common idea"). The Court also examined legislative history. *Id.* at 862.

[131] *See id.* at 866 (concluding that the agency's definition was "a permissible construction of the statute").

own gaps to fill. The Court provided a limited explanation within the decision, providing multiple, overlapping rationales.[132] One rationale appears premised on the understanding that deference must apply where Congress has shifted, through an express or implied delegation, its legislative responsibility to the agency charged with applying a particular statute.[133] A second, related rationale is grounded in political accountability and the separation of powers—that the courts should not tread on an agency's policy choices, as the executive branch is more politically accountable than the courts.[134] A third rationale stems from principles of relative expertise—that agencies have a particular expertise in the statutes they are charged with administering, which courts lack.[135]

Scholars have debated the primacy of these and other overlapping rationales in explaining the basis for *Chevron*.[136] Most scholars now agree that *Chevron* deference, while shaped by notions of political accountability and agency expertise, depends primarily on an express or implied delegation rationale. In other words, *Chevron* deference is appropriate where one knows or may assume that Congress intended for the agency to fill the particular statutory gap in question.

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[132] *Id.* at 865–66; *see also* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 195–97 (2006) (noting that *Chevron* "announced its two-step approach without giving a clear sense of the theory that justified it" and describing several rationales suggested by the opinion).

[133] *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 870 (2000) ("The *Chevron* decision itself rests on a finding of an implicit delegation from Congress." (internal quotation marks omitted) (citing *Chevron*, 467 U.S. at 843–44)). "Subsequent decisions have affirmed that '[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority.'" *Id.* (alteration in original) (quoting Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990)).

[134] *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 626–27 (1996) ("*Chevron* . . . [presumes] that Congress has selected agencies rather than courts to resolve serious ambiguities in agency-administered statutes. . . . It is more consistent with the assumptions of our constitutional system to vest discretion in more expert, representative, and accountable administrative agencies."); Mark Seidenfeld, Chevron*'s Foundation*, 86 NOTRE DAME L. REV. 273, 288–94 (2011) (arguing that "*Chevron* is a doctrine of judicial self-restraint" grounded in an Article III separation of powers rationale).

[135] *See* Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1286 (2008) (discussing the merits of "[a]dministrative agencies' superior experience and expertise in particular regulatory fields" as a rationale for *Chevron* deference); Ronald J. Krotoszynski, Jr., *Why Deference? Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 737 (2002) (arguing that administrative expertise is a more persuasive rationale for *Chevron* deference than implied delegation); Note, *The Two Faces of* Chevron, 120 HARV. L. REV. 1562, 1574 (2007) (noting that federal courts of appeal place greater emphasis on the administrative expertise rationale in applying *Chevron* than the Supreme Court does).

[136] *See* Criddle, *supra* note 135, at 1273 & n.3 (describing the scholarly debate over various rationales for *Chevron* deference).

Decisions following *Chevron* seem to adopt this as the primary rationale, although *Chevron*'s progeny are hardly a model of clarity.

Rather than a pedantic exercise, the exploration of these rationales has proved crucial in addressing two related questions: When is *Chevron* inapplicable and what is applied in its stead? Prior to *Chevron*, courts generally deferred to an agency interpretation only where there was express congressional delegation of authority to an agency, requiring the agency itself to define terms or promulgate rules to carry out a statutory provision.[137] In the absence of an express delegation, courts generally would apply a much looser standard of deference, giving the appropriate weight to agency interpretations according to the thoroughness, validity, consistency, and overall persuasiveness of its reasoning.[138] The agency interpretation would not have a trump card over the court's reasoned judgment. In some cases, courts need not apply any deference at all.[139] While *Chevron* changed the landscape of administrative law by making deference more pervasive, it did not eliminate this more-context specific deference analysis or longstanding exceptions that permit de novo review.[140]

After *Chevron*, courts continue to apply varying types of deference, and in some cases, still choose not to defer.[141] In Chevron*'s Domain*, Thomas Merrill and Kristin Hickman outlined several possible exceptions to *Chevron* deference.[142] They noted that, at least in some cases, the Supreme Court had refused to apply deference to agency interpretations that delve into matters traditionally determined by courts (such as questions regarding judicial private rights of

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137 *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1032 (1992) (explaining that courts pre-*Chevron* viewed themselves as compelled to defer in cases of express delegation).

138 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *see also* Merrill, *supra* note 137, at 1032 (noting that "in the absence of an express delegation" courts would "examin[e] various contextual factors" in determining how much, if any, weight to afford an agency interpretation).

139 *See* Merrill, *supra* note 137, at 972 (noting that pre-*Chevron* courts sometimes ignored the agency view in their analysis of a statutory term); *see also* Eskridge & Baer, *supra* note 35, at 1117 (noting that in some instances post-*Chevron* courts applied no deference to agency determinations).

140 *See* Merrill, *supra* note 133, at 1032 (explaining that earlier approaches continue to survive "in the shadows of *Chevron*, and in considerable tension with its expanded delegation theory").

141 *See* Eskridge & Baer, *supra* note 35, at 1099–100 (describing seven discrete approaches distinct from *Chevron* deference itself that the Supreme Court has applied in the post-*Chevron* era, including approaches where no deference regime is invoked); *see also* Merrill & Hickman, *supra* note 133, at 839 (discussing the scope of *Chevron* and examples where *Chevron* deference does not apply); Sunstein, *supra* note 132, at 193 (discussing instances where courts need not defer to the agency).

142 Merrill & Hickman, *supra* note 133.

action or the scope of criminal liability);[143] questions that Congress would not have left to the agency regarding its scope of authority or issues beyond agency expertise (such as the extent of an agency's jurisdiction or constitutional concerns);[144] and interpretations that lack the trappings of rulemaking or adjudication (such as "*post-hoc* rationalizations" of agency positions made by counsel during litigation).[145] Given these exceptions and others, Merrill and Hickman argue that courts must engage in an initial analysis prior to applying *Chevron*'s two-step test to determine if *Chevron* applies at all—an analysis which they coined *Chevron* "step zero."[146]

In *City of Arlington v. FCC*, the Supreme Court rejected one of these potential carve-outs: the jurisdictional exception.[147] The jurisdictional exception posits that courts should not defer to an agency's interpretation of the scope of its own authority under a particular statute it administers; rather, courts should decide jurisdictional questions de novo and defer only to the agency's interpretation of nonjurisdictional ambiguities.[148] Writing for the majority, Justice Scalia rejected any such distinction between jurisdictional and nonjurisdictional questions.[149] As the Court explained, "[n]o matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*."[150] In fleshing out this reasoning, the Court acknowledged that, under its precedent, "for *Chevron* deference to apply, the agency must have

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143 *Id.* at 839 (citing Adams Fruit Co. v. Barrett, 494 U.S. 638, 649–50 (1990)); Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (arguing that courts should not defer to interpretations of criminal law by an agency).

144 *See id.* at 844–45 (discussing the unresolved question of whether courts should defer to agencies on the scope of the agency's regulatory jurisdiction); *see also* Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1533 (2009) ("The existence of agency jurisdiction is a precondition of *Chevron* deference, and *Chevron* therefore has no bearing on how that threshold question should be resolved."). *Contra* City of Arlington v. FCC, 133 S. Ct. 1863 (2013) (rejecting a jurisdictional exception to *Chevron* deference).

145 *See* Merrill & Hickman, *supra* note 133, at 839 (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212–13 (1988)) (citing Gregory v. Ashcroft, 501 U.S. 452, 485 n.3 (1991) (White, J., concurring) (declining to defer to a position taken up by the Equal Employment Opportunity Commission during litigation); Pub. Employees Ret. Sys. v. Betts, 492 U.S. 158, 174–75 (1989) (refusing to defer to an agency litigation position that did not appear in the underlying regulation)).

146 Merrill & Hickman, *supra* note 133, at 836.

147 *City of Arlington*, 133 S. Ct. at 1868.

148 *See* Sales & Adler, *supra* note 144, at 1532–33 (describing the analytical basis for a jurisdictional exception to *Chevron* deference).

149 *City of Arlington*, 133 S. Ct. at 1868 ("[T]he distinction between 'jurisdiction' and 'nonjurisdictional' interpretations is a mirage.").

150 *Id.*

received congressional authority to determine the particular matter at issue in the particular manner adopted."[151] However, the Court indicated that the "general conferral of rulemaking or adjudicative authority" is usually sufficient to determine that the agency has the authority to interpret the statute it is charged with administering, including questions relating to the scope of its regulatory authority.[152]

In a concurring opinion, Justice Breyer agreed that there is no jurisdictional exception to *Chevron* deference. However, he wrote separately to explain how federal courts must answer the threshold question acknowledged by the majority; that is "whether Congress delegated authority to the agency to provide interpretations of, or to enact rules pursuant to, the statute at issue—interpretations or rules that carry with them 'the force of law.'"[153] He pointed to a number of factors that assist in answering this threshold question, including "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time."[154] He also noted that "[t]he subject matter of the relevant provision—for instance, its distance from the agency's ordinary statutory duties or its falling within the scope of another agency's authority—has also proved relevant."[155] Finally, he observed that "the statute's text, its context, the structure of the statutory scheme, and canons of textual construction . . . can be equally helpful in determining whether such ambiguity comes accompanied with agency authority to fill a gap with an interpretation that carries the force of law."[156]

Justice Breyer's reiteration of a more robust test aligns with prior cases where the Court rejected *Chevron* deference. In *United States v. Mead Corp.*, the Court declined to apply *Chevron* deference to a tariff classification ruling by the U.S. Customs Service, concluding that there was little indication that Congress had intended to delegate its lawmaking authority to the agency through the nonbinding process

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151 *Id.* at 1874.

152 *Id.*; *see also id.* ("It suffices to decide this case that the preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority.").

153 *Id.* at 1875 (Breyer, J., concurring in part and concurring in judgment) (quoting United States v. Mead Corp., 533 U.S. 218, 229 (2001)).

154 *Id.* (quoting Barnhart v. Walton, 535 U.S. 212, 222 (2002)).

155 *Id.* (citing Gonzales v. Oregon, 545 U.S. 243, 265–66 (2006)).

156 *Id.* at 1876 (citations omitted).

that resulted in the agency decision at issue.[157] Similarly, in *Adams Fruit Co. v. Barrett*, the Court declined to defer to the Secretary of Labor's interpretation of enforcement provisions in the Migrant and Seasonal Agricultural Worker Protection Act, because such agency determinations fell outside the scope of Congress's delegation to promulgate standards under specific provisions of the Act.[158] The Court exercised a similar inquiry in *Gonzales v. Oregon*, observing that the Attorney General's issuance of an interpretive ruling regarding a provision in the Controlled Substances Act went beyond the authority Congress carefully delegated to him to act with the force of law, a power that was also shared with the Secretary of Health and Human Services.[159] These cases suggest that, in many contexts, the threshold analysis of whether *Chevron* deference applies is not an empty exercise, even if the jurisdictional exception itself is no longer valid.

Prior to *City of Arlington*, the list of possible *Chevron* deference trump cards—whether at step zero or step one—had been growing: Constitutional avoidance/clear statement rules,[160] major questions doctrine,[161] the rule of lenity,[162] and the criminal enforcement exception[163] had all been applied in cases where deference to the agency

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157 *Mead*, 533 U.S. at 224, 229–30 (holding that there is no *Chevron* deference to agency guidelines where congressional delegation did not include the power to promulgate rules or regulations (citation omitted)); *see also* Christensen v. Harris Cnty., 529 U.S. 576, 596–97 (2000) (Breyer, J., dissenting) (holding that *Chevron* deference is "inapplicable" where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency).

158 Adams Fruit Co. v. Barrett, 494 U.S. 638, 649–50 (1990).

159 Gonzales v. Oregon, 546 U.S. 243, 265, 268 (2006).

160 *See* Merrill & Hickman, *supra* note 133, at 914–15 (describing how constitutional avoidance operates as a step-zero canon displacing *Chevron*); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000) ("So long as the statute is unclear, and the constitutional question serious, Congress must decide to raise that question via explicit statement. This idea trumps *Chevron* for that very reason.").

161 *See* Merrill & Hickman, *supra* note 133, at 881 (describing the major questions doctrine as a form of step-zero analysis); Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference (or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN. L. REV. 593, 598 (2008) (describing the major questions doctrine); *see also* Breyer, *supra* note 126, at 370 (arguing in support of a multi-factor test for determining whether deference to agency interpretations is appropriate and providing the basis for the major questions doctrine).

162 *See* Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 GEO. IMMIGR. L.J. 515, 575 (2002) (arguing that the immigration rule of lenity should apply at step two). *But see* 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, 517–19 (2007) (stating that "the rule of lenity has no place within *Chevron's* two-step framework" and that courts should apply the rule of lenity after finding that an agency's interpretation is unreasonable in *Chevron* step two).

163 *See infra* note 246 and accompanying text (discussing the criminal enforcement exception to *Chevron* deference).

would otherwise be the norm. Some, if not all, of these exceptions may survive the Supreme Court's decision, reframed as an interpretive norm relevant to the factors Justice Breyer described and those found in the rest of *Chevron*'s progeny, or insofar as they may continue to operate as "traditional tools of statutory construction."[164]

Perhaps it is best to frame the inquiry following *City of Arlington* as a two-sided question regarding both delegation and nondelegation. First, are there reasons to think that Congress intended to delegate its lawmaking authority to the agency on the statutory question at issue? Second, are there reasons to think that Congress would not—or could not—delegate its lawmaking authority to the agency on the statutory question at issue? The delegation questions go towards the pull factors for *Chevron* deference—exploring Congress's own choices in creating the agency and providing it with lawmaking authority. The nondelegation inquiry probes into the factors that push against *Chevron* deference, such as the need for checks and balances or the doctrines that might suggest a more robust role for federal courts in exercising review.

III
Assessing *Chevron* Deference in the Context of Agency Interpretation of Immigration Detention Statutes

As explained above, the Supreme Court has acknowledged a tension between deference norms and habeas review of immigration detention challenges in the context of plenary power.[165] In the context of *Chevron*, however, courts have not yet questioned the framework's applicability to habeas review of agency interpretations of immigration detention statutes. In this Part, I explore this question from the two sides I articulated above: delegation and nondelegation. First, is there reason to think that Congress intended to delegate its lawmaking authority to the BIA on statutory detention questions? Second, is there cause to believe that Congress would not—or could not—delegate its lawmaking authority to the BIA on statutory detention questions? As I describe below, the typical indicia of statutory delegation found in the laws governing immigration expulsion and exclusion are missing, in part, from the laws governing immigration detention. It is therefore questionable whether Congress actually sought to confer interpretive authority to the BIA on statutory detention questions. Perhaps more importantly, however, there are

164 *Chevron*, 467 U.S. at 843 n.9.
165 *Supra* Part I.A.

nondelegation principles that suggest that Congress would or could not delegate lawmaking authority over detention to an agency. These principles are strongest in the habeas context, where federal courts themselves have particular reason to ensure that Congress, rather than the executive, defines detention authority.

A. Congressional Delegation

As the Supreme Court reiterated in *City of Arlington*, "for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted."[166] A "general conferral of rulemaking or adjudicative authority" from Congress to the agency to interpret the relevant statute is often enough to meet this test.[167] The question here is therefore whether Congress conferred its lawmaking authority to the BIA on statutory detention issues.

At first blush, it may appear the Supreme Court has already addressed this question. While it has not examined the applicability of *Chevron* in immigration detention cases, it has applied *Chevron* in the context of deportation challenges. In *INS v. Aguirre-Aguirre*, the Supreme Court held that *Chevron* applied to the BIA's interpretation of a provision within the Immigration and Nationality Act that governs eligibility for withholding of removal a form of relief that applies when an individual's life or freedom would be threatened on account of one of several specified reasons if deported to a particular country.[168] The statute provides an exception to withholding if the Attorney General "determines 'there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States.'"[169] Aguirre-Aguirre admitted that he had been involved in bus burnings, vandalism, and physical assault as part of his protests against the government of Guatemala, the country to which he would be deported.[170] The BIA held that this constituted a "serious nonpolit-

166 City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013).

167 *Id.*

168 INS v. Aguirre-Aguirre, 526 U.S. 415, 419 (1999); *see also id.* at 425 ("[T]he BIA should be accorded *Chevron* deference."); 8 U.S.C. § 1253(h)(1) (1994 ed.) ("[T]he Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.") (recodified as amended at 8 U.S.C. § 1231(b)(3) (2012)).

169 *Aguirre-Aguirre*, 526 U.S. at 420 (quoting 8 U.S.C. § 1158(b)(2)(A)(iii) (1994 ed., Supp. III).

170 *Id.* at 421–22.

ical crime" that barred him from receiving withholding of removal.[171] The Ninth Circuit, on review, reversed the BIA's decision, concluding that the BIA had incorrectly interpreted the statute by failing to consider relevant factors.[172] The Supreme Court reversed the decision of the Ninth Circuit, holding that the federal court failed to accord proper deference under *Chevron* to the BIA's decision.

In so holding, the Supreme Court observed that Congress had delegated lawmaking authority to the Attorney General to decide questions of this nature. The INA provides general authority to the Attorney General, specifying that "'[t]he Attorney General shall be charged with the administration and enforcement' of the statute," and that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling."[173] The Court further noted that the statutory provision governing withholding of removal expressly confers decisionmaking authority to the Attorney General by noting that withholding is barred if the Attorney General concludes that the basis for the bar has occurred.[174] The Court also invoked a separate deference norm noting 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.'"[175] The Court observed that the Attorney General's decision has "diplomatic repercussions" because it requires him "to deem certain violent offenses committed in another country as political in nature, and to allow the perpetrators to remain in the United States."[176] For these reasons, the Court concluded that deference to the Attorney General's decisionmaking is appropriate.

The Court went on to specify that such deference would therefore extend to the BIA's decision in the case. It explained that the Attorney General had issued regulations that have "vested the BIA with power to exercise the 'discretion and authority conferred upon the Attorney General by law' in the course of 'considering and determining cases before it.'"[177] Thus, at least with respect to the BIA's

171 *Id.* at 418.

172 *Id.* at 423 (citing INS v. Aguirre-Aguirre, 121 F.3d 521, 523–24 (9th Cir. 1997)).

173 *Id.* at 424 (quoting 8 U.S.C. § 1103(a)(1) (1994 ed., Supp. II)).

174 *See id.* at 424–25 ("Section 1253(h), moreover, in express terms confers decisionmaking authority on the Attorney General, making an alien's entitlement to withholding turn on the Attorney General's 'determin[ation]' whether the statutory conditions for withholding have been met." (quoting 8 U.S.C. §§ 1253(h)(1), (2) (1994)) (alteration in original)).

175 *Id.* at 425 (citing INS v. Abudu, 485 U.S. 94, 110 (1988)).

176 *Id*.

177 *Id.* (quoting 8 C.F.R. § 3.1(d)(1)(1998)).

interpretation of ambiguous statutory terms to which it gives "'concrete meaning through a process of case-by-case adjudication,'" *Chevron* deference is required.[178]

From this case, one may discern three sources by which the Court concluded that Congress had, indeed, delegated its lawmaking authority to the BIA. First, the general interpretive authority that the INA vests in the Attorney General, which has in turn been vested in the BIA; second, the specific authority over the statutory provision at issue given to the Attorney General's determination; and third, the nature of the BIA's adjudication as resolving a statutory term through case-by-case adjudication. Considering this case law and the Court's longstanding jurisprudence on *Chevron* together, however, it is not clear that courts should apply *Chevron* deference to the BIA's interpretation of any ambiguity in detention provisions.[179]

First, the general conferral of lawmaking authority to the Attorney General does not resolve the question. The INA vests its authority in multiple agencies, in addition to the Attorney General, which each play a role in detention decisions. After the creation of the U.S. Department of Homeland Security, the INA was amended to specify that

> The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws related to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers . . . .[180]

In the context of detention decisions, initial decisions are made by officials with the U.S. Department of Homeland Security, including

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[178] *Id.* (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 448–49 (1987)).

[179] There may be reasons to question the applicability of *Chevron* deference to the BIA's interpretations of other provisions of the INA, which are beyond the scope of this article. *See, e.g.*, Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond* Chevron, 60 DUKE L. J. 1059, 1096–1103 (2011) (presenting two paths by which courts may reject agency interpretations of the asylum statute that conflict with international law, including one that limits the applicability of *Chevron* in the context of asylum); Mary Holper, *The New Moral Turpitude Test: Failing* Chevron *Step Zero*, 76 BROOK. L. REV. 1241, 1242 (2011) (arguing that the Attorney General's decision in *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (Att'y Gen. 2008), was issued without "law-like procedures" and thus is due no deference under *Chevron* and *Mead* principles); Shruti Rana, Chevron *Without the Courts?: The Supreme Court's Recent* Chevron *Jurisprudence Through an Immigration Lens*, 26 GEO. IMMIGR. L.J. 313, 331 (2012) (describing the dangers of extending *Chevron* deference to BIA decisions in light of the BIA's flawed decisionmaking process and apparent bias); *see also infra* notes 202–08 and accompanying text.

[180] 8 U.S.C. § 1103(a)(1).

decisions regarding whether an individual is subject to mandatory versus discretionary detention as a matter of law.[181] As the Supreme Court explained in *Gonzales v. Oregon*, where multiple agencies have the power to interpret a statute, deference to one agency's decision is not necessarily warranted under *Chevron*.[182]

However, the INA may have resolved the issue with more clarity than the statute in *Gonzales* provided, as it continues to include the language providing that "determination and ruling by the Attorney General with respect to all questions of law shall be controlling."[183] Thus, unlike the statute at issue in *Gonzales*, the Attorney General is not required to defer to another agency—in this case, DHS—as to its determinations and rulings regarding questions of law. Accordingly, some scholars have noted that this provision may be read as an explicit delegation of interpretive authority to the Attorney General.[184] Such an argument would weigh strongly in favor of deference to interpretations of law by the BIA, to which the Attorney General has delegated his adjudicatory authority.[185] To assess the validity of that argument, however, one must examine what adjudicatory authority over detention the statute actually contemplates.

The INA creates a complex statutory scheme for the adjudication of removal proceedings. With some exceptions, immigrants facing removal charges have the right to an adversarial hearing before an Immigration Judge, who is an employee of the U.S. Department of Justice.[186] Congress specified the rules governing these adjudications in the INA, outlining the burdens and rights of the parties in the adjudication and the nature of judicial review.[187]

By contrast, there is no similar statutory scheme for the adjudication of detention decisions. The INA specifies the circumstances under which the Attorney General may exercise authority to detain and

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[181] 8 C.F.R. § 1003.19 (establishing the procedure for review of custody and bond determinations).

[182] *See* Gonzales v. Oregon, 546 U.S. 243, 274 (2006) ("[T]he Attorney General is an unlikely recipient of such broad authority, given the Secretary [of Health and Human Services]'s primacy in shaping medical policy.").

[183] 8 U.S.C. § 1103(a)(1).

[184] *See* Merrill & Hickman, *supra* note 133, at 841–43 (analyzing INS v. Aguirre-Aguirre, 526 U.S. 415 (1999), in which the Supreme Court held that the federal court should have deferred to a decision of the Board of Immigration Appeals).

[185] The Attorney General created the BIA through his regulatory powers in 1940. Regulations Governing Departmental Organization and Authority, 5 Fed. Reg. 3502 (Sept. 4, 1940).

[186] *See* 8 U.S.C. § 1229 (2012) (describing notice requirements); 8 U.S.C. § 1229a (describing removal proceedings).

[187] *See* 8 U.S.C. § 1229a (describing requirements for removal proceedings in immigration court).

release noncitizens in his or her discretion and when he or she must detain noncitizens without exercising discretion.[188] It curtails judicial review of the Attorney General's discretionary decisions.[189] But nowhere does the statute provide for a process of adjudication for legal determinations. It neither provides nor forecloses an adjudicatory process for the interpretation of the detention provisions and neither provides nor forecloses judicial review of any such adjudications. It simply does not specify what role, if any, the agency should play in determining the lawful scope of detention authority. Instead, the Attorney General has promulgated regulations, over time, to create an adjudicatory scheme for custody determinations. The regulations specify the burdens of proof between the detainee and DHS and provide for review before an Immigration Judge in some cases, with further review by the BIA.[190] This system of adjudication is a creation of the agency rather than a creation of Congress.

There is some reason to think that this distinction does not matter. A general conferral of lawmaking authority may indeed be enough in many cases to decide that *Chevron* applies and that Congress intended for the agency to fill the ensuing gaps in the statute. Still, the Court has repeatedly recognized that general lawmaking authority is not always enough. As Justice Breyer observed in his concurrence in *City of Arlington*, "[t]he subject matter of the relevant provision—for instance, its distance from the agency's ordinary statutory duties or its falling within the scope of another agency's authority—has . . . proved relevant" to the question of whether *Chevron* applies.[191] Even in *Aguirre-Aguirre*, the Court looked beyond the general conferral of authority to the specific immigration provision at issue, observing that Congress had expressly given weight to the Attorney General's determination.[192] In the detention context, Congress gave no such similar indication that it contemplated the

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[188] *See* 8 U.S.C. § 1226 (2012) (authorizing the Attorney General's detention of immigrants in removal proceedings); 8 U.S.C. § 1231(a) (2012) (authorizing the Attorney General's detention of immigrants with final orders of removal).

[189] 8 U.S.C. § 1226(e) ("The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review.").

[190] *See* 8 C.F.R. § 1003.19 (2014) (discussing the role of immigration judges in custody and bond determinations and appeals to the BIA); 8 C.F.R. § 1236.1 (2014) (discussing arrest and custody decisions by immigration officials and appeals to immigration judges).

[191] City of Arlington v. FCC, 133 S. Ct. 1863, 1875 (2013) (Breyer, J., concurring in part and concurring in judgment) (citing Gonzales v. Oregon, 546 U.S. 243, 265–66 (2006)).

[192] *See supra* note 174 and accompanying text (discussing the Supreme Court's analysis in *Aguirre-Aguirre*).

Attorney General's adjudication of the scope of its detention power, much less deference to such legal determinations.[193]

Moreover, even assuming the general authority that Congress provides to the Attorney General to interpret the statute overall is enough to suggest that deference to the BIA in some detention decisions may be appropriate, it is not clear that courts should be deferring to the BIA's interpretation of the scope of its detention authority. As Bassina Farbenblum has observed, the Supreme Court's initial application of *Chevron* deference in the immigration context has created a tension between agency decisions that address a "pure question of statutory construction for the courts to decide"[194] and those that result from the "process of case-by-case adjudication,"[195] such as where the agency develops a standard by applying the statute to various sets of facts.[196] The latter has merited deference while the former has not. As scholars have noted, however, this distinction lacks clarity and coherence, as it tells courts little about whether the *Chevron* framework applies given the uncertainty about what constitutes a "pure" question.[197] It does demonstrate that the Supreme Court, at least in its early view of the application of *Chevron* to immigration law, acknowledged that deference does not apply to all questions that the agency might be inclined to address.[198] Under this

[193] *Compare* 8 U.S.C. § 1253(h)(1) (1994 ed.) (expressly predicating eligibility for withholding of removal on the Attorney General's determination of whether a statutory bar applies), *with* 8 U.S.C. § 1226(c) (requiring the Attorney General to detain certain classes of immigrants facing removal proceedings without specifying what role the Attorney General plays in determining whether an immigrant falls into the specified class).

[194] INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987).

[195] INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999).

[196] Farbenblum, *supra* note 179, at 1085 (describing the tension between the Supreme Court's approaches in *Cardoza-Fonseca* and *Aguirre-Aguirre*); *see also* Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 736–37 (1997) (discussing *Cardoza-Fonseca* and the inconsistent application of *Chevron* deference).

[197] *See* Farbenblum, *supra* note 179, at 1089, 1097 (discussing the incoherence of this distinction); *see also* Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187, 224 (1992) (arguing that a "pure question" is simply a question that is resolvable under *Chevron* step one because Congress has provided the answer).

[198] *See Cardoza-Fonseca*, 480 U.S. at 444–46 (declining to defer to the agency on a "pure question of statutory construction" presented in the immigration case). The difference in approach might best be explained by an inquiry into the scope of implicit delegation. As some scholars have argued, not every ambiguity or silence in a statute is evidence of implicit delegation. *See* Kevin W. Saunders, *Interpretive Rules with Legislative Effect: An Analysis and a Proposal for Public Participation*, 1986 DUKE L.J. 346, 360–67. For example, delegation may be implied where an ambiguity or silence in the statute (1) evinces an uncertainty about competing policies and/or (2) relates to a technical issue on which the agency might lend its expertise. *Id.* Otherwise, "[w]hen Congress has attempted to be precise in enunciating the standard and the standard is not so technical that it

theory, questions of how a legal standard should be applied to a set of facts might call for deference to the agency, which must adjudicate such standards in thousands of cases each year and will develop expertise on the issue over time. The types of questions that the BIA has resolved in its detention case law, however, involve the meaning of terms that conceivably may be divorced from facts—the meanings of "custody," "release," and "when."[199] In any event, there is nothing about the terms of the statutory detention provisions that suggest that they fall into a particularly deference-appropriate category, assuming such distinctions are relevant.

The absence of affirmative indicia of congressional delegation should give federal courts pause in applying *Chevron* in immigration detention cases. If *Chevron* is to have any limiting principles, evidence of delegation should be required. Yet nothing suggests that Congress contemplated that the BIA would be answering these questions, given its failure to provide any such mechanism for such adjudications in the detention context.

B. Nondelegation Principles

In addition to the lack of indicia of an affirmative congressional delegation of lawmaking authority to the BIA on detention, there are indicia of delegation constraints—i.e., reasons why Congress would not or could not delegate its lawmaking authority to the BIA on detention. This draws upon the vast literature on *Chevron* step zero and the notion that "courts today sometimes restrict delegation by refusing to apply standard deference doctrines in situations where there is reason to think that Congress, rather than an administrative agency, should be forced to make a particular policy choice."[200]

The first subsection below addresses the *Chevron* step zero arguments that focus on the agency's relative expertise or lack thereof. This includes the potential applicability of the "major questions doctrine" and criticism of the BIA's institutional competency to make such decisions. While I believe these perspectives cast doubt on why

requires expertise in application, Congress may have implicitly deemed the courts competent to interpret the standard." *Id.* at 363. This may explain the reasoning in *Cardoza-Fonsenca*, where the Court saw no reason to apply deference principles to the statutory interpretation question at issue.

199 *See supra* note 94 (collecting cases).

200 Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1674 (2007) (citing Sunstein, *supra* note 160, at 316). In this Part, I stop short of applying nondelegation canons, which courts apply in individual cases to make deference decisions, and focus on the bigger picture question of whether the interpretation of detention provisions as a whole falls outside the *Chevron* framework. I turn to nondelegation canons in Part IV.

Congress would want to delegate lawmaking power to the agency in this context, I conclude that the explanations they provide are incomplete and may be of limited import following *City of Arlington*. In the second subsection below, I change the focus from the agency and its limitations to consider instead the federal court and its particular role in exercising habeas review over executive detention. This builds on the concerns expressed in *Zadvydas*—that there is something about the exercise of habeas corpus review over executive detention cases that creates, in and of itself, an exception to *Chevron* deference. This explanation, I argue, provides a stronger basis for concluding that Congress did not intend to delegate its lawmaking authority on detention to the BIA.

1. Step Zero Revisited: The Agency's Limitations

Chevron step zero asks courts to question the underlying assumptions upon which deference is premised—including whether it is correct to assume that the agency, rather than the court, is in a better position to address the question at issue.[201] The answer may be no if either the question itself is one that courts are better equipped to address or the agency is particularly ill-equipped to handle.

In the context of the immigration detention issues, both concerns are present. First, scholars and courts alike have questioned the prudence of deference to the BIA on any immigration matter given concerns regarding the agency's institutional incompetence, politicization, and bias. Shruti Rana has noted that *Chevron* deference presumes that the agency seeking deference possesses some specialized expertise, political accountability, and an ability to achieve uniformity in interpretation.[202] She concludes that "the immigration agency cannot fulfill any of the responsibilities that deference doctrine assumes" given the courts' overwhelming caseload, inconsistent and irrational decision-making, and politicization.[203] Travis Silva similarly criticizes deference to the agency given evidence of political pressure, bias, and uneven decision-making.[204] These scholars point to numerous court decisions where judges have reprimanded the BIA for "egregious"

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[201] *See supra* notes 142–46 and accompanying text (describing *Chevron* step zero).

[202] Shruti Rana, Chevron *Without the Courts?: The Supreme Court's Recent* Chevron *Jurisprudence Through an Immigration Lens*, 26 GEO. IMMIGR. L.J. 313, 324 (2012) (noting that agencies are expected to have "special expertise" that "generalist courts" do not possess, to be "more politically accountable than judges," and to achieve greater uniformity through individual case-by-case adjudication).

[203] *Id.* at 324.

[204] *See* Silva, *supra* note 31, at 264–66 (critiquing agency decision-making processes).

failures in decision making,[205] and note the recent controversies over political appointments[206] and agency "streamlining"[207] that have resulted in arbitrary and inconsistent decision making. These failings set the BIA apart from other agencies whose technical sophistication and expertise may have motivated *Chevron* in the first place.[208]

Nonetheless, it is unclear whether these institutional competency concerns are relevant to the applicability of *Chevron* following *City of Arlington*. *City of Arlington* emphasizes the question of congressional intent to delegate authority.[209] Indicia of the BIA's incompetence tell us nothing about what Congress might have intended when it enacted the statutory provisions at issue, since Congress had little reason to think that the BIA would prove to be so dysfunctional as a result of subsequent political developments. So while the BIA's institutional incompetence may explain why courts have searched for reasons not to defer, it does not necessary follow that Congress sought to avoid delegation to the agency as a whole.

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[205] Kadia v. Gonzales, 501 F.3d 817, 821 (7th Cir. 2007) (noting "[r]epeated egregious failures of the Immigration Court and the Board to exercise care commensurate with the stakes in an asylum case"); *see also* Cox, *supra* note 200, at 1679–81 (describing several notable decisions by Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit criticizing BIA decision-making); Rana, *supra* note 202, at 326 & n.64 (collecting cases where judges have criticized the BIA).

[206] *See* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1666 (2010) (describing past illegal hiring practices and observing that "hiring procedures continue to favor the appointment of immigration judges and BIA members whose work experiences incline them to prioritize immigration enforcement"); Silva, *supra* note 31, at 264–65 (observing that the Executive Office for Immigration Review (EOIR) hiring process "has been criticized as biased and partisan" and noting criticism of EOIR adjudicators' engagement in ex parte communications with DHS officials and their lack of protection from politically-motivated reassignment or demotion (citations omitted)).

[207] Rana, *supra* note 202, at 327–38 (describing policy changes and "streamlining" regulations that decreased the number of BIA members and permitted the BIA to issue affirmances without explanation of their reasoning); Silva *supra* note 31, at 264 ("EOIR personnel are subject to summary removal by the Attorney General—a power Attorney General John Ashcroft utilized to undermine the independence of immigration judges. Attorney General Ashcroft also altered BIA procedures, a move widely viewed . . . as an attempt to prohibit EOIR adjudicators from issuing pro-immigrant decisions." (citations omitted)); *see also* Shruti Rana, *Streamlining the Rule of Law: How the Department of Justice Is Undermining Judicial Review of Agency Action*, 2009 U. ILL. L. REV. 829, 839–59 (2009) (discussing streamlining policies and their impact on the immigration system).

[208] Rana, *supra* note 202, at 323 (comparing the BIA to other agencies like the Federal Communications Commission, the Food and Drug Administration, and the Environmental Protection Agency, which are "generally well-regarded for their technical sophistication and presumably bring that expertise to bear when attempting to discern what federal statutes are most likely to mean").

[209] *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013) ("[F]or *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted.").

The failings of the first inquiry leads us to a second *Chevron* step zero inquiry, one that may provide a better explanation for why Congress would not have delegated detention questions to the agency even assuming the agency's competence. Under the "major questions" doctrine, courts and scholars question whether Congress would ever seek to delegate lawmaking authority to an agency over major statutory questions that pose significant decisions.[210] This inquiry more closely relates to the congressional delegation rationale that undergirds *Chevron* deference today. As Justice Breyer explained, "the larger the question, the more its answer is likely to clarify or stabilize a broad area of law, the more likely Congress intended the courts to decide the question themselves."[211] Justice Breyer echoes this view in his concurrence in *City of Arlington*, describing a case-by-case approach to determine whether one may assume—based on the nature of the issue to be interpreted—that Congress impliedly delegated its authority to agencies.[212] In prior cases, the Supreme Court seems to have acknowledged this view, declining to defer where it seems likely that Congress would not have delegated a question of such significance to the agency.[213] Applying this inquiry to the immigration detention statutory provisions, one may easily argue that the scope of detention authority is a major question, and thus deference is inappropriate.

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[210] *See supra* note 161 (describing scholarship on the major questions doctrine); *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) (questioning whether Congress intended to delegate significant decisions in an implicit fashion).

[211] Mayburg v. Sec. of Health & Human Srvs., 740 F.2d 100, 106 (1st Cir. 1984).

[212] City of Arlington, 133 S. Ct. at 1875 (Breyer, J., concurring in part and concurring in judgment) (finding relevant "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time") (quoting Barnhart v. Walton, 535 U.S. 212, 222 (2002)); *see also* Sunstein, *supra* note 132, at 198–99 (discussing Justice Breyer's view of *Chevron*'s scope).

[213] For example, in *MCI Telecomm. Corp. v. AT&T*, the Court refused to defer to the Federal Communications Commission's regulation specifying which telecommunications carriers must file tariffs under the 1934 Communications Act. 512 U.S. 218, 231–32 (1994). In refusing to defer, the Court noted that the case involved a question of "enormous importance to the statutory scheme" and concluded that it "is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion." *Id.* Similarly, in *FDA v. Brown & Williamson Tobacco Corp.*, the Court refused to defer to a federal agency's interpretation based in part on the nature of the statutory issue. 529 U.S. at 159–60. Specifically, it stated, "[a]s in *MCI*, we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* These holdings—resolving both cases at *Chevron* step one—nevertheless emphasized the inappropriateness of *Chevron* deference to questions involving economic and political significance.

The viability of this explanation is also limited, however. Notably, the majority decision in *City of Arlington* rejects the distinction between major and minor questions in dicta,[214] and scholars have shared this skepticism. For example, Cass Sunstein points out that the distinction between major and interstitial issues is open to interpretation; therefore, any such major questions exception to *Chevron* deference would be extremely difficult to administer.[215] Moreover, he notes that there is no good reason to assume that the judicial branch is better able to resolve major questions than the executive.[216] The first point is surely correct, and underscored by *City of Arlington*: By drawing the line at whether a question is major, the major questions doctrine creates an undoubtedly gray area. The second point is also valid, although limited by the different roles that courts and the agency play. The court is charged with determining what Congress has intended, whereas an agency may exercise its delegated lawmaking authority based on its own policy choices.[217] An agency certainly has policy expertise—but the court has its own expertise in analyzing congressional intent. Perhaps for these reasons, Sunstein acknowledges that the major questions doctrine may be better understood as a *Chevron* step one device.[218]

Alternatively, other scholars see a place for the major questions doctrine as a limitation on deference at step zero. Abigail Moncrieff has argued that the doctrine is best understood as one of "noninterference"—that where Congress and an agency both are actively engaging in policy change within a statutory scheme, courts should not defer to the agency.[219] Rather, courts should restrain the agency from disrupting the status quo while Congress decides how to approach the key issues.[220] Sunstein has also suggested this potential role for the major questions doctrine (albeit as part of *Chevron* step one), proposing that the doctrine take "the form of a background principle to the effect that in the face of ambiguity, agencies will be denied the

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214 *City of Arlington*, 133 S. Ct. at 1868 (claiming a false distinction between "big, important" interpretations and "humdrum, run-of-the-mill stuff" in rejecting the distinction between jurisdictional and nonjurisdictional questions for purposes of *Chevron* deference).

215 Sunstein, *supra* note 132, at 233.

216 *Id.*

217 *See generally* Herz, *supra* note 197 (arguing that interpretation and lawmaking are separate roles).

218 *See, e.g.*, Sunstein, *supra* note 132, at 247 (concluding that "*MCI* and *Brown & Williamson* are best read as Step One decisions").

219 Moncrieff, *supra* note 161, at 596–97.

220 *Id.*

power to interpret ambiguous provisions in a way that would massively alter the preexisting statutory scheme."[221]

But given the uncertainty of the viability of the major questions doctrine and the recency of the BIA's more egregious failings, these factors provide only a weak doctrinal explanation for why courts should not defer in the statutory immigration detention context. In addition to the concerns about agency inadequacy and the importance of the question, the one factor not being discussed is the impact of the role of the federal court. This is where a habeas exception to deference comes in. Examined through the lens of habeas corpus, these explanations take on more significant weight.

2. The Habeas Court

Constitutional allocation of power may shed light on the appropriate role of deference on immigration issues. In examining courts' growing reluctance to defer to agency decisions in the immigration context generally, Adam Cox notes that courts may be applying nondelegation norms in immigration cases to reinforce Congress's role in "democratic processes" given the importance of immigration questions, which address "sensitive membership judgments."[222] However, he notes that, even in light of nondelegation principles, it is difficult to defend the courts' preference for Congress over the agency from a separation of powers perspective.[223] This is because "[c]onstitutional immigration law provides little guidance about the distribution of immigration authority between Congress and the executive."[224] To the extent that the Constitution allows for the executive to engage actively in policymaking in the immigration law arena, deference to its view may be entirely appropriate.

In the detention context, however, separation of powers may be exactly what explains why a habeas court should not defer to the agency. As Stephen Vladeck argues, the Constitution vests detention power exclusively with Congress, not the executive.[225] Executive usurpation of this power treads on "two of our most basic constitutional precepts: the proper separation of powers between the executive and the legislature, and the individual right not to be deprived of personal

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221 Sunstein, *supra* note 132, at 244.

222 Cox, *supra* note 200, at 1676.

223 *Id.* at 1677.

224 *Id.* at 1673; *see also* Cox & Rodríguez, *supra* note 35, at 510–11 (exploring the complex allocation of immigration power between the legislative and executive branches with respect to core immigration policymaking).

225 Stephen I. Vladeck, Note, *The Detention Power*, 22 YALE L. & POL'Y REV. 153, 157 (2004).

liberty without due process of law."[226] While the executive branch may administer detention statutes, a serious separation of powers issue arises when the executive may define the scope of detention power as well.[227]

From this perspective, there is a strong separation of powers rationale for why a federal court should prefer its own view over the agency's in interpreting detention authority. This is particularly true in light of the historical role of habeas courts in protecting the separation of powers. As the Supreme Court explained in *Boumediene v. Bush*, "protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights."[228] Its inclusion in the Constitution, through the Suspension Clause, demonstrates that "the Framers considered the writ a vital instrument for the protection of individual liberty."[229] As a check on executive tyranny, "the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers."[230] It serves the twin purposes behind the Framers' choice to allocate power among three branches of government in the first place: to hold government accountable and to protect individual liberty.[231]

One might argue that these rationales weaken in the context of immigration detention, which has long been recognized as incident to the government's vast powers over immigration generally.[232] However, the Supreme Court has recognized that "[b]ecause the Constitution's separation-of-powers structure . . . protects persons as well as citizens, foreign nationals who have the privilege of litigating

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226 *Id.* at 157–58.

227 In the context of enemy combatant detention, the federal government has argued that Article II of the Constitution vests the executive branch with plenary authority to detain as part of its war powers. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 516–17 (2004) (noting the government's argument but declining to reach the question because Congress authorized the detention in question). In the context of immigration detention, the federal government has invoked the plenary powers doctrine as a source for its authority to detain immigrants, but the Supreme Court rejected this argument as a basis for deference in *Zadvydas*. *See supra* notes 9–15 and accompanying text.

228 Boumediene v. Bush, 553 U.S. 723, 739 (2008). The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

229 *Boumediene*, 553 U.S. at 743.

230 *Id.* at 765–66.

231 *See id.* at 742 ("The Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty.").

232 *See* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 28–30 (1984) (describing the role of detention in "classical immigration law" as "a programmatic resource, ancillary to the power to exclude and deport" in addition to "an awesome power in its own right").

in our courts can seek to enforce separation-of-powers principles."[233] Tracing back the history of habeas corpus, the Court has repeatedly recognized that noncitizens were protected by habeas corpus at common law.[234] As the Court explained in *INS v. St. Cyr*, "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."[235]

Given the allocation of detention power to Congress and the historical role of habeas courts in protecting against unlawful executive detention, it is difficult to defend courts' deference to an agency's interpretation of lawful detention authority. In *Zadvydas v. Davis*, as discussed *supra*, the Supreme Court recognized this tension in refusing to defer to the executive branch's view of the reasonableness of Zadvydas's indefinite detention.[236] In *Hamdi v. Rumsfeld*, a case involving alleged enemy combatants, the Court declined to defer to the government's view on the availability of judicial process as well as the factual allegations which were used to justify detention in Hamdi's case.[237] Such deference, in both cases, was antithetical to the core role of the habeas court.

Of course, these cases could be distinguished on the theory that courts deemed deference inappropriate in light of the due process issues that were raised in these cases. Under the traditional test for due process, courts already engage in analysis of state interests.[238] In

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[233] *Boumediene*, 553 U.S. at 743 (citing INS v. Chadha, 462 U.S. 919, 958–59 (1983); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886)).

[234] *Id.* at 747 ("We know that at common law a petitioner's status as an alien was not a categorical bar to habeas corpus relief."); Rasul v. Bush, 542 U.S. 466, 481 (2004) (explaining that "the statute [28 U.S.C. § 2241] draws no distinction between Americans and aliens held in federal custody").

[235] INS v. St. Cyr, 533 U.S. 289, 301 (2001). *St. Cyr* addressed the use of habeas corpus to review executive removal decisions. *Id.* at 304–08. Its tenets are even stronger in the context of review over executive detention. *See id.* at 301 (noting that habeas corpus protections have been strongest in the detention context) (citing Swain v. Pressley, 430 U.S. 372, 380 n.13 (1977); Brown v. Allen, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in result)); *see also* Hafetz, *supra* note 8, at 2525 (tracing the historical use of the writ and explaining that "[e]xecutive detention implicated the core function of the writ of habeas corpus, and the writ entered its most important phase when it began to be used to challenge executive commitments in the late sixteenth century").

[236] *See* Zadvydas v. Davis, 533 U.S. 678, 692 (2001) ("[T]he Constitution may well preclude granting 'an administrative body the unreviewable authority to make determinations implicating fundamental rights.'") (citation omitted)).

[237] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 525–27 (2004) (refusing to adopt the government's characterization of Hamdi's circumstances).

[238] The Supreme Court in *Zadvydas* and *Demore* assessed the state's interest inherent in the respective detention schemes as part of its due process analysis. *See* Demore v. Kim, 538 U.S. 510, 528, 531 (2003) (upholding mandatory detention pending removal proceedings, explaining that "[s]uch detention necessarily serves the purpose of preventing

this context, courts may accommodate for deference norms through their review of the state interests. In a *Chevron* deference context—at least where no due process question is raised—there is nothing that inherently requires courts to scrutinize the government interests and therefore one could argue that *Chevron* deference is less objectionable.

This may explain why some scholars, while concerned by the automatic application of deference in the detention context, see no inherent problem with a congressional delegation of interpretive detention authority to an agency, so long as Congress expressly mandates it.[239] In the context of national security cases, for example, Richard H. Fallon, Jr. and Daniel Meltzer accept that *Chevron* deference may apply if Congress explicitly delegates lawmaking authority on detention to the executive.[240] However, they too recognize a tension between the role of the habeas court and "ordinary administrative law doctrines."[241] As they explain,

> [T]he core concern of habeas corpus—to protect the right to freedom from bodily restraint—differs not only from the concerns applicable to routine administrative law cases, but also from those relevant to the great bulk of foreign affairs matters in which courts often defer. To put the point bluntly, the values that underlie habeas corpus jurisdiction are both more venerable and more vulnerable than those that operate in routine administrative law cases, and courts should not subordinate the former to the latter in the absence of a plain legislative mandate.[242]

Under their theory, courts must adopt a clear statement rule to find evidence of an express delegation before assuming *Chevron* applies.

Applying such a rule to federal immigration law reveals no such clear statement with respect to detention decisions by the Attorney General, as noted above. But it is not entirely clear that even an explicit delegation to the agency would or should support the application of *Chevron* deference in the habeas context. The explanation of the role of habeas corpus—both by scholars and courts—points to a

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deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed"); *Zadvydas*, 533 U.S. at 690 (holding that there was no "special justification" that "outweighs the individual's constitutionally protected interest" triggered by indefinite detention following a removal order (internal quotation marks and citations omitted)).

[239] *See, e.g.*, Fallon & Meltzer, *supra* note 31, at 2102 ("Insofar as *Chevron* is conceptualized as a form of delegation, we see no barrier to delegations to the President in this arena.").

[240] *Id.*

[241] *Id.* at 2101.

[242] *Id.*

form of "habeas exceptionalism."[243] In reviewing executive detention, the role of habeas is so uniquely critical to the "delicate balance of governance"[244] enshrined in the Constitution that it serves as its own basis for enforcing nondelegation principles.

This concept draws some force from at least one context in which the Supreme Court has rejected *Chevron* in light of separation of power concerns, involving the prosecutorial interpretation. In *Crandon v. United States*, the Supreme Court explained that the courts do not defer to prosecutors' interpretation of criminal statutes.[245] As Justice Scalia explained in his concurrence,

> The law in question, a criminal statute, is not administered by any agency but by the courts. It is entirely reasonable and understandable that federal officials should make available to their employees legal advice regarding its interpretation; and in a general way all agencies of the Government must interpret it in order to assure that the behavior of their employees is lawful—just as they must interpret innumerable other civil and criminal provisions in order to operate lawfully; but that is not the sort of specific responsibility for administering the law that triggers *Chevron*. The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.[246]

As Justice Scalia observed, prosecutors have an incentive to "err in the direction of inclusion rather than exclusion—assuming, to be on the safe side, that the statute may cover more than is entirely apparent."[247] Therefore, deference in this context would effectively force courts to apply "rule of severity" to the interpretation of criminal statutes, reading the statutes in question in their harshest light.[248]

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[243] Scholars have pointed out forms of "habeas exceptionalism" in criminal law jurisprudence. *See, e.g.*, Jordan Steiker, *Habeas Exceptionalism*, 78 TEX. L. REV. 1703, 1707 (2000) (describing "the extent to which habeas law is deemed importantly different from other areas of federal jurisdiction" in the context of post-conviction review).

[244] Hamdi v. Rumsfeld, 542 U.S. 507, 536; *see also id.* ("[The Constitution] most assuredly envisions a role for all three branches when individual liberties are at stake. . . . [H]abeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion . . . .").

[245] Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring).

[246] *Id.*

[247] *Id.* at 177–78.

[248] *Id.* at 178.

For these reasons, deference in the criminal context is inappropriate.[249]

These concerns similarly arise in the interpretation of immigration detention statutes. Of course, one could attempt to distinguish the immigration detention context because the Department of Homeland Security is the prosecutor, while the Attorney General, through the BIA, functions in a role similar to the court. However, in habeas review, the Department of Justice becomes the prosecutor, in defending the agency's decision, and the court becomes the safeguard of physical liberty. The Department's interest, at that stage, is no different than a criminal prosecutor: to "err in the direction of inclusion rather than exclusion" and taking a broad view of the scope of the statute.[250] To defer to the agency on its interpretation of its detention authority would similarly result in the application of an interpretive "rule of severity" antithetical to the role that courts have traditionally played in reviewing executive detention.[251]

Taken together, the lack of a clear statutory indication that Congress delegated its lawmaking authority on detention to the immigration agency, along with serious doubt as to Congress's ability or desire to do so for such an important issue, should lead courts to find the *Chevron* framework inapplicable in these cases. The BIA may continue to issue decisions on the statutory scope of the Attorney General's detention authority, but courts should never be compelled to defer.[252]

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[249] At least one scholar has criticized this reasoning, arguing that *Chevron* deference principles should extend to the criminal context. *See* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 470 (1996) (arguing that federal criminal law "is best conceptualized as a regime of delegated common law-making" and that *Chevron* deference to executive interpretive lawmaking in the criminal law context would improve consistency in interpretation, benefit from agency expertise, and better reflect public opinion in light of the executive branch's greater accountability as compared to federal courts).

[250] *Crandon*, 494 U.S. at 177–78 (Scalia, J., concurring in judgment).

[251] The same could be said for the review of deportation decisions, as the federal government plays the same prosecutorial role and has the same interest in over-inclusion. As noted above, however, Congress's statutory delegation with respect to the administration and adjudication of the deportation process is far more clear, however, than it is in the detention context.

[252] If *Chevron* does not apply, one may ask whether some lesser form of deference, such as *Skidmore* deference, should apply instead. *See* Gonzales v. Oregon, 546 U.S. 243, 268 (2006) (rejecting the application of *Chevron* but remanding for consideration under the *Skidmore* framework). Under *Skidmore v. Swift & Co.*, well-reasoned agency decisions may persuade but not compel courts to adopt the agency's reading. 323 U.S. 134, 140 (1944). However, the concerns that counsel against *Chevron* deference may counsel against *Skidmore* deference as well. In *Crandon*, for example, Justice Scalia explained that courts should decline to give even persuasive effect to prosecutors' interpretation of criminal statutes given prosecutorial interest in interpreting criminal statutes overbroadly. 494 U.S.

IV
Deprivation of Physical Liberty and Interpretive Norms

The concerns I raise above are not fully alleviated by extracting habeas review of immigration detention decisions from the *Chevron* framework. Creating a habeas exception to *Chevron* removes the presumption against physical liberty that such a deference framework otherwise creates. But it does not, in and of itself, ensure the courts will enforce pro-liberty norms in the cases that involve the deprivation of physical liberty. With or without *Chevron*, there are nondelegation canons that could account for the physical liberty interests at stake in detention.[253] Here I argue that these resolving canons should guide courts' interpretation.

A. Constitutional Avoidance

As noted earlier, the one canon of statutory interpretation that courts have regularly applied to reject the application of deference norms in the detention context is constitutional avoidance. Surprisingly, however, this canon is seldom invoked in cases involving the review of the BIA's interpretation of the immigration detentions statute. A more rigorous application would help ensure that immigrant detainees' liberty interests are protected in this context.

As an initial matter, there is little doubt that, where applicable, constitutional avoidance operates to trump *Chevron* deference. As noted above, *Chevron* deference is primarily based on an implied delegation theory: courts should defer to agency interpretations of ambiguous provisions because the existence of such ambiguity implies that Congress delegated its interpretive authority to the agency.[254] Constitutional avoidance constrains this assumption by countering it with a more fundamental principle: that Congress should not delegate constitutional questions to an agency through ambiguious language.[255] In this way, the canon operates as a clear statement rule, requiring that Congress speak more clearly before a court addresses a serious

at 177–78 (Scalia, J., concurring in judgment). Any deference, it would seem, would raise the specter of adopting an interpretive "rule of severity" in this context. *Id.* at 178. This of course does not prevent courts from assessing any special expertise the agency may be utilizing in its analysis. *See Zadvydas*, 533 U.S. 678, 700 (declining to defer to the agency while recognizing that courts should "take appropriate account" of agency expertise).

253 *See generally* Sunstein, *supra* note 160, at 316 (discussing nondelegation canons).

254 *See supra* note 133 and accompanying text (discussing the delegation rationale underlying *Chevron*).

255 *See* Sunstein, *supra* note 160, at 331 (arguing that the avoidance canon trumps *Chevron* analysis because "[e]xecutive interpretation of a vague statute is not enough when the purpose of the canon is to require Congress to make its instructions clear").

constitutional question.[256] In its most robust form, the constitutional avoidance canon operates to require greater democratic deliberation of significant constitutional questions and preserves normative values by protecting constitutional rights from encroachment.[257] The canon thus blocks deference to an agency interpretation that raises serious constitutional concerns.

As described above, in *Zadvydas v. Davis*, the Supreme Court applied the constitutional avoidance canon to overcome the plenary power doctrine in the immigration detention context. While it has not applied the canon to overcome *Chevron* deference in an immigration detention case, it has done so in other cases where *Chevron* deference would otherwise apply. For example, in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, the Court applied the avoidance canon to trump *Chevron* analysis in a case involving possible concerns under the First Amendment.[258] The National Labor Relations Board interpreted a provision of the National Labor Relations Act as prohibiting certain types of peaceful leafleting.[259] The Court expressed concern about the constitutional implications of such a prohibition and declined to defer to the agency's interpretation. As the Court explained, "[e]ven if [the agency's] construction of the Act were thought to be a permissible one, . . . we must independently inquire whether there is another interpretation, not raising these serious constitutional concerns, that may fairly be ascribed to [the Act]."[260]

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[256] *See* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1214–15 (2006) (discussing scholars' and courts' descriptions of the canon of constitutional avoidance as a clear statement rule).

[257] *See* Sunstein, *supra* note 160, at 317 ("The nondelegation canons represent a salutary kind of democracy-forcing minimalism, designed to ensure that certain choices are made by an institution with a superior democratic pedigree."); *see also* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1598 (2000) (describing the constitutional avoidance canon as a "resistance norm" that "protects the constitutional values associated with non-deferential Article III review by ensuring that Congress can restrict those values only if the proponents of such restrictions can amass sufficient political support to enact clear restrictions").

[258] *See, e.g.*, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575–77 (1988) (displacing *Chevron* analysis with the constitutional avoidance canon); *c.f.* Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 160 (2001) ("Even if [the statute] were not clear, this Court would not extend deference to the [agency interpretation] under *Chevron* . . . . Where an administrative interpretation of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless the construction is plainly contrary to Congress' intent." (internal citations omitted)).

[259] *Edward J. DeBartolo Corp.*, 485 U.S. at 575–77.

[260] *Id.* at 577.

In the context of immigration detention review, lower courts have applied the doctrine, at least with respect to their review of agency regulations.[261] In *Diouf v. Napolitano*, the Ninth Circuit held that noncitizens who are detained more than six months following an order of removal are entitled to a bond hearing where the government must establish that their continued detention is justified.[262] In so holding, the Ninth Circuit refused to defer to post-*Zadvydas* regulations by DHS that provided for paper custody reviews rather than bond hearings for immigrant detainees with a final order of removal. As the Ninth Circuit explained, courts "may not defer to DHS regulations interpreting [the post-removal order detention statute] . . . if they raise grave constitutional doubts."[263]

With respect to federal court review of BIA decisions on detention, however, lower courts' approaches to constitutional avoidance have varied. This variation may be explained in part by courts' divergent views on the scope of the constitutional avoidance canon. One might assume that constitutional avoidance principles would always apply in the immigration detention context, given the physical liberty interest at stake. However, courts have indicated that the constitutional avoidance canon trumps *Chevron* deference only when an interpretation raises serious constitutional concerns—not merely when a constitutional right is implicated.[264] Thus, the applicability of this *Chevron* exception may turn on how directly constitutional concerns are raised by an agency's interpretation. Detention cases that raise serious issues of due process (prolonged detention claims, claims involving substantial challenges to removability),[265] equal protection, or excessive bail clause cases,[266] fall within this category. This includes

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[261] Diouf v. Napolitano, 634 F.3d 1081, 1090 (9th Cir. 2011); *see also* Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1249 (10th Cir. 2008) ("It is well established that the canon of constitutional avoidance does constrain an agency's discretion to interpret statutory ambiguities, even when *Chevron* deference would otherwise be due."). Courts in other contexts have also held that the constitutional avoidance canon trumps *Chevron* deference. *See, e.g.*, Nat'l Mining Ass'n v. Kempthorne, 512 F.3d 702, 711 (D.C. Cir. 2008) ("This canon of constitutional avoidance trumps *Chevron* deference, and we will not submit to an agency's interpretation of a statute if it presents serious constitutional difficulties." (internal citations and quotation marks omitted)).

[262] *Diouf*, 634 F.3d at 1092.

[263] *Id.* at 1090.

[264] *See* Sunstein, *supra* note 160, at 331 (explaining that under the constitutional avoidance canon, "the constitutional doubts must be serious and substantial, and that the statute must be fairly capable of an interpretation contrary to the agency's own").

[265] *See supra* note 8384 and accompanying text (detailing detention cases with due process concerns).

[266] The Eighth Amendment requires that "[e]xcessive bail shall not be required." U.S. Const. amend. VIII. Kayla Gassman argues that this clause "protects against arbitrary detention by requiring that individuals being detained for further proceedings, whether in

cases like *Diouf*, where petitioners have challenged the constitutionality of their prolonged detention.

Outside the context of prolonged detention and similar frontal due process claims, however, courts have narrowly construed constitutional challenges, particularly in the aftermath of the Supreme Court's decision to uphold the constitutionality of mandatory detention pending removal proceedings in *Demore v. Kim*.[267] Since *Demore*, courts have seldom identified constitutional concerns underlying the question of whether the mandatory detention statute properly applies to an individual via its statutory terms—an issue raised in petitioners' challenges to the BIA's expansive interpretation of terms like "custody," "when," or "described."[268]

Part of courts' reluctance to recognize constitutional concerns in statutory interpretation cases may be a result of an overly expansive reading of the holding in *Demore*, however. While *Demore* did uphold the constitutionality of mandatory detention, *Demore* did not address questions of statutory interpretation regarding the contested scope of mandatory detention. Rather, the immigrant challenging his detention in *Demore* had conceded that he was subject to the terms of the statute.[269] The Court's holding thus was predicated on the notion that the petitioner's detention was aligned with congressional intent, and its review was therefore limited to determining whether Congress's manifestation of that intent—to deny bond hearings to removable noncitizens coming out of criminal custody, based on their presumptive flight risk and dangerousness, for the brief period of time necessary to complete removal proceedings—complied with due process.[270] The Court thus did not have cause to address the myriad of BIA cases involving statutory interpretation—some of which arguably expand mandatory detention beyond its constitutionally permissible purpose.[271] Rather, the Court acknowledged that there could be circumstances in which congressional intent would not be served by

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the criminal or civil context, be released on bail, unless the denial of bail is reasonable and justified." Kayla Gassman, *Unjustified Detention: The Excessive Bail Clause in Removal Proceedings*, 4 CRIM. L. BRIEF 35, 35 (2009).

267 Demore v. Kim, 538 U.S. 510, 531 (2003).

268 The majority of courts that have addressed statutory questions regarding the scope of mandatory detention make no mention of constitutional concerns. *See, e.g.*, Sylvain v. Att'y Gen., 714 F.3d 150 (3d Cir. 2013); Hosh v. Lucero, 680 F.3d 375 (4th Cir. 2012).

269 *Demore*, 538 U.S. at 513–14 ("Respondent . . . did not dispute the INS' conclusion that he is subject to mandatory detention under § 1226(c).").

270 *See id.* at 531 (holding that mandatory detention incident to removal proceedings is constitutionally permissible for "a criminal alien who has conceded that he is deportable, for the limited period of his removal proceedings"); *see also supra* notes 80–84 (discussing *Demore* and the limitations of its holding).

271 *See supra* note 94 (describing BIA cases).

mandatory detention, because detention without bond was no longer geared towards individuals who were categorically flight risks and dangers to the community.[272] Moreover, the Court did not disturb its previous holding in *Zadvydas* that applied constitutional avoidance in light of similar concerns in the context of indefinite detention.[273]

Nonetheless, many lower courts appear to have missed the important constraints limiting *Demore* and preserving the possibility of constitutional challenges to the agency's interpretations of the mandatory detention statute. This oversight may be a result of framing choices in litigation over the construction of the statute. For example, challenges over the meaning of the "when . . . released" clause in mandatory detention cases have traditionally been framed as a statutory question divorced from the constitutional issues raised in *Zadvydas*, *Demore*, and their progeny.[274] Thus, in resolving this statutory question, most courts have turned to the plain language of the statute—including the dictionary definition of "when"—along with other tools of statutory construction, as the rule against surplusage, the rule of the last antecedent, legislative history, and the rule against absurd results, to determine whether Congress's intent was unambiguous.[275] With no frontal constitutional challenge explicitly raised, the federal circuit courts that have declined to disturb the BIA's interpretation have made no reference to constitutional concerns and thus have not considered the application of the canon of constitutional avoidance.[276]

Construing the mandatory detention statute while ignoring possible constitutional concerns with the BIA's interpretation of the statute, however, is a mistake. For example, deferring to the BIA's

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[272] Justice Kennedy provided the fifth vote for the holding in *Demore*, and explained that "since the Due Process Clause prohibits arbitrary deprivations of liberty, a lawful permanent resident alien such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." *Demore*, 538 U.S. at 532 (Kennedy, J., concurring) ("Were there to be an unreasonable delay by [ICE] in pursuing . . . deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons"); *see also* Castañeda v. Souza, 769 F.3d 32, 38–39 (1st Cir. 2014) (discussing the binding nature of Justice Kennedy's concurrence and applying his due process analysis), pet'n for reh'g granted, Nos. 13-1994, 13-2509 (1st Cir. Jan. 23, 2015).

[273] *Demore*, 510 U.S. at 527–31 (distinguishing rather than overruling *Zadvydas*).

[274] *See supra* note 268 (noting lack of discussion of constitutional issues in key cases).

[275] *See, e.g.*, Sylvain v. Attorney Gen., 714 F.3d 150 (3d Cir. 2013) (examining plain language and discussing some tools of statutory interpretation).

[276] *See, e.g.*, *id*. (failing to consider constitutional concerns); Hosh v. Lucero, 680 F.3d 375, 383 (4th Cir. 2012) (examining the dictionary definition of "when" without applying tools of statutory construction to the "when . . . released" clause or considering constitutional concerns).

interpretation of the "when . . . released" clause to permit the categorical denial of bond hearings regardless of delays in the commencement of removal proceedings means that immigrants may be subject to mandatory detention five, ten, or even fifteen years after their release for a triggering offense under the statute. As observed in *Demore*, Congress may have reasonably considered some immigrants to be categorical bail risks, such as those who are about to be released from criminal incarceration for their removable offenses.[277] Yet, the reasonableness of that view is significantly diminished in the context of an immigrant who is detained by immigration officials after living in the community for several years without committing any additional removable offenses.[278]

In light of these serious concerns, a small but growing number of courts have applied the canon of constitutional avoidance in rejecting the BIA's interpretation.[279] For example, in its initial panel decision in *Castañeda v. Souza*, the First Circuit considered the constitutional implications of the government's interpretation of the "when . . . released" clause.[280] The court observed that "[a]s a constitutional matter, mandatory detention can only be justified by the presumption

[277] *Demore*, 510 U.S. at 518–20 (discussing congressional intent in light of immigration officials' failure to identify and locate noncitizens once they are released from criminal custody for a removable offense).

[278] *See*, *e.g.*, Araujo-Cortes v. Shanahan, No. 14 Civ. 4231(AKH), 2014 WL 3843862, at *14 (S.D.N.Y. Aug. 5, 2014) (holding that a petitioner who has returned to his family and community is "differently situated from the criminal aliens who are taken into custody 'when . . . released' considered by the Supreme Court in *Demore*" and therefore "Congress' concerns about whether those criminal aliens pose a flight risk or danger to the community, do not justify . . . continued detention"); Monestime v. Reilly, 704 F. Supp. 2d 453, 458 (S.D.N.Y. 2010) (concluding that, given the length of time that has passed since the immigrant detainee's last removable offense, "DHS can only determine whether [the petitioner] poses a risk of flight or danger to the community through an individualized bond hearing").

[279] Castañeda v. Souza, 769 F.3d 32, 46 (1st Cir. 2014) ("In determining the congressional purpose behind § 1226(c) we must consider not only the provision's legislative history . . . but also constitutional considerations. We think the 'when . . . released' clause must be construed as benefitting aliens detained years after release in order to avoid constitutional doubts."), pet'n for reh'g granted, Nos. 13-1994, 13-2509 (1st Cir. Jan. 23, 2015); Martinez Done v. McConnell, No. 14 Civ. 3071 (SAS), 2014 U.S. Dist. LEXIS 143453, at *32 (S.D.N.Y. Oct. 8, 2014) ("[T]he government's construction of section 236(c) would confer limitless authority on the Attorney General to pluck immigrants from their families and communities with no hope of release pending removal—even decades after criminal confinement. This construction threatens immigrants' statutory and constitutional rights."); Espinoza v. Aitken, No. 5:13-cv-00512 EJD, 2013 U.S. Dist. LEXIS 34919, *19–20 (N.D. Cal. Mar. 13, 2013) ("[T]he liberty interest implicated by any civil detention statute, especially one which calls for imprisonment without review, makes it unsurprising why Congress would want to limit its application to a particular class of individuals detained at a particular time.").

[280] *Castañeda*, 769 F.3d at 39, 46–48.

of dangerousness and flight risk posed by newly released criminal defendants" and that "those who have resided in the community for years after release cannot reasonably be presumed either to be dangerous or flight risks."[281] Thus, an "unreasonable delay by [ICE] in pursuing and completing deportation proceedings" raises due process concerns.[282] In light of those concerns, the court construed the mandatory detention statute to deny bond hearings only to those immigrants who are timely detained following their release from criminal custody.[283]

As litigants increasingly frame their statutory arguments in the context of constitutional violations, courts should account for these types of concerns as part of their habeas review. The BIA's interpretations of the mandatory detention statute directly affect—and typically expand—its scope, often far beyond the circumstances addressed in *Demore*.[284] Given the physical liberty interest at stake in statutory immigration detention cases, courts should apply the constitutional avoidance canon more robustly. This would help protect against unlawful executive detention by releasing courts from the constitutionally problematic implications of deferring to agency interpretations in this context.

B. Rule of Lenity

A second anti-deference norm that federal courts should apply in the immigration detention context is the rule of lenity. Few courts have addressed how this rule applies in the immigration detention context, and the scope of the rule in the context of *Chevron* has been subject to considerable scholarly debate.[285] A strong application of the rule could address the serious physical liberty interest in mandatory detention cases by obviating the need for deference.

As a tool of statutory interpretation, the rule of lenity has historically applied in two contexts: criminal law and immigration law. The criminal rule of lenity counsels courts to construe ambiguous criminal statutes in favor of the defendant.[286] Courts apply this rule to ensure

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[281] *Id.* at 47.

[282] *Id.* (quoting Demore v. Kim, 538 U.S. 510, 532 (2003) (Kennedy, J., concurring)).

[283] *Id.* at 45–49.

[284] *See supra* notes 93–94 and accompanying text (describing BIA cases that have interpreted the immigration detention statute).

[285] *See infra* notes 293–303 and accompanying text (describing scholarly debate over the rule of lenity).

[286] *See, e.g.*, United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820) (applying the "rule that penal laws are to be construed strictly"); United States v. Bass, 404 U.S. 336, 347 (1971) ("Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.") (quoting Rewis v. United States, 401 U.S. 808, 812 (1971)).

that individuals have a "fair warning" of what constitutes a crime, and in a manner that confirms that the legislative branch maintains primary responsibility for defining crime.[287] The immigration rule of lenity, on the other hand, operates similarly but for different reasons. Under this rule, courts construe ambiguous deportation statutes in favor of the noncitizen.[288] As the Supreme Court explained in *Fong Haw Tan v. Phelan*, courts apply this rule because "deportation is a drastic measure and at times the equivalent of banishment or exile" and thus courts "will not assume that Congress meant to trench on [an individual's] freedom beyond that which is required by the narrowest of several possible means of the words used."[289] Thus, while the rule of lenity is used in multiple contexts, its application in the immigration context is primarily centered on the underlying liberty interest at stake.

Courts have taken diverging views on the relationship between the rule of lenity and *Chevron* deference and the scope of the rule's application. While the Supreme Court has not addressed the rule of lenity in the immigration detention context, it has applied the immigration rule of lenity in narrowly interpreting various provisions in the immigration statute in favor of the noncitizen.[290] However, courts

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[287] Elliot Greenfield, *A Lenity Exception to* Chevron *Deference*, 58 BAYLOR L. REV. 1, 12 (2006). The rule has longstanding application. *See* Wiltberger, 18 U.S. (5 Wheat.) at 95 (explaining that the strict construction of criminal law stems the notion of "the tenderness of the law for the rights of individuals; and . . . the plain principle that the power of punishment is vested in the legislative, not in the judicial department").

[288] *See* INS v. St. Cyr, 533 U.S. 289, 320 (2001) (applying the rule of lenity to determine that Congress did not affirmatively provide for the retroactive repeal of a form of discretionary relief from removal); INS v. Errico, 385 U.S. 214, 218, 225 (1966) (construing the term "otherwise admissible" to permit an individual to fall within an exception to a ground of exclusion, noting that the rule of lenity would resolve any lingering ambiguities in favor of the noncitizen); Costello v. INS, 376 U.S. 120, 128 (1964) (construing a removal provision based on criminal convictions to be inapplicable to someone who was a naturalized citizen at the time of conviction and later denaturalized, applying the rule of lenity); Fong Haw Tan v. Phelan, 333 U.S. 6, 8, 10 (1948) (construing the term "sentenced more than once" in an immigration statute narrowly in light of the harsh consequences of deportation for a noncitizen who fits within that term); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (noting, without needing to apply, the longstanding rule of lenity).

[289] *Fong Haw Tan*, 333 U.S. at 10; *see also St. Cyr*, 533 U.S. at 320 (discussing the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien") (citations omitted); *Cardoza-Fonseca*, 480 U.S. at 449 (same) (citations omitted); *Errico*, 385 U.S. at 225 (same).

[290] *See, e.g.*, *St. Cyr*, 533 U.S. at 320 (applying the presumption against retroactivity and "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" to reject government's interpretation of a statutory provision as applying to all deportation proceedings commenced after its effective date (internal citations and quotation marks omitted)); Bonetti v. Rogers, 356 U.S. 691, 699 (1958) (finding an immigration statute ambiguous, and holding that "the ambiguity should be resolved in favor of lenity"); Barber v. Gonzales, 347 U.S. 637, 642–43 (1954) ("Although

have increasingly suggested that the rule has only limited applicability. The Supreme Court has stated that the criminal rule of lenity applies only in the face of "grievous" ambiguity.[291] In the immigration context, some lower courts have similarly questioned or limited the scope of the rule.[292]

The uncertainty in the courts echoes a broader debate in scholarship. Some scholars argue that the rule of lenity should apply in only limited circumstances.[293] For example, Brian Slocum has argued that courts should apply the immigration rule of lenity only at *Chevron* step two, to help determine whether the agency's interpretation is reasonable.[294] Slocum favors this approach because it more closely mirrors current case law on the rule of lenity and allows for "its strength to vary depending on the particular issue before the court."[295] In addition, David Rubenstein has argued that lenity should only apply as a rule of last resort in the *Chevron* context—i.e., only if the court deems the statue ambiguous *and* concludes that the agency's interpretation is

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not penal in character, deportation statutes as a practical matter may inflict the equivalent of banishment or exile, and should be strictly construed." (internal citations and quotation marks omitted); *Fong Haw Tan*, 333 U.S. at 10 (construing deportation provisions in favor of noncitizens "because deportation is a drastic measure and at times the equivalent of banishment or exile" (citation omitted)).

291 In *Chapman v. United States*, for example, the Court declined to apply lenity, stating that the "rule of lenity . . . is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of the Act, such that even after a court has seize[d] everything from which aid can be derived it is still left with an ambiguous statute." 500 U.S. 453, 463 (1991) (citations and internal quotations omitted). *See also* Barber v. Thomas, 560 U.S. 474, 488 (2010) ("[T]he rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." (internal citations and quotation marks omitted)); Muscarello v. United States, 524 U.S. 125, 138 (1998) ("[S]imple existence of some statutory ambiguity . . . is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree."); Sanford N. Greenberg, *Who Says It's a Crime?:* Chevron *Deference to Agency Interpretations of Regulatory Statutes that Create Criminal Liability*, 58 U. PITT. L. REV. 1, 44–45 (1996) (discussing the dissonance between *Crandon* and *Chapman*).

292 *See, e.g.*, Soto-Hernandez v. Holder, 729 F.3d 1, 5–6 (1st Cir. 2013) (declining to address the applicability of the immigration rule of lenity and noting that the court has "consistently limited the application of the rule of lenity to criminal statutes"); Mizrahi v. Gonzales, 492 F.3d 156, 174–75 (2d Cir. 2007) ("The rule of lenity is a doctrine of last resort, and it cannot overcome a reasonable BIA interpretation entitled to *Chevron* deference.").

293 *See* Greenberg, *supra* note 291, at 25 ("[C]ourts should decline to undermine *Chevron*'s well-reasoned approach to judicial review by adopting [lenity] exceptions, which will be shown to be unwise."); Rubenstein, *supra* note 162, at 519 ("The better approach is for courts to employ the rule of lenity as a tool of last resort only after the court first finds that the statute is ambiguous and that the agency's interpretation is unreasonable.").

294 Slocum, *supra* note 162, at 575.

295 *Id*.

unreasonable.[296] Rubenstein argues for this approach in the immigration context because "it affords the Attorney General an unencumbered first bite at balancing the competing policies undergirding the immigration law" and "best comports with the judicial deference that judges traditionally afford to the political branches in immigration matters."[297]

Other scholars, however, have argued that the rule of lenity should, where applicable, displace the *Chevron* framework entirely.[298] According to these scholars, the rule of lenity obviates the need to consider or defer to the agency's viewpoint, because it directs courts to choose the construction of an ambiguous statute that favors the defendant/noncitizen.[299] As such, a court never proceeds to *Chevron* step two, because the rule of lenity resolves any remaining ambiguities after other tools of statutory construction are applied. In this sense, the immigration rule of lenity is akin to a "tie breaker" canon of statutory construction, which courts should apply at *Chevron* step one.[300]

This latter formulation allows the rule of lenity to serve its original purpose—to prevent harsh results in the face of ambiguities. Nonetheless, at least one court in the immigration detention context has rejected the application of the rule of lenity. In *Hosh v. Lucero*, the Fourth Circuit applied *Chevron* deference to the BIA's reading of the mandatory detention statute "without invoking the rule of lenity."[301] The court questioned the applicability of the rule of lenity to the immigration detention context, noting that the rule traditionally applied to deportation statutes and the immigrant "would [still] be subject to deportation proceedings" whether or not the mandatory

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296 *See* David S. Rubenstein, *supra* note 162, at 519 ("The better approach is for courts to employ the rule of lenity as a tool of last resort only after the court first finds that the statute is ambiguous and that the agency's interpretation is unreasonable.").

297 Rubenstein, *supra* note 162, at 482.

298 *See, e.g.*, Greenfield, *supra* note 287, at 61 ("The protection of . . . constitutional principles, a primary duty of the judiciary, must trump the rule of deference."); Sunstein, *supra* note 160, at 332 (explaining that lenity trumps *Chevron* because "[o]ne function of the lenity principle is to ensure against delegations").

299 Greenfield, *supra* note 287, at 10 ("The rule of lenity complements the vagueness doctrine by providing that when a criminal statute is ambiguous, rather than vague, courts should resolve the ambiguity in the favor of the narrower scope of criminal liability.").

300 John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of* INS v. Ventura, 18 GEO. IMMIGR. L.J. 605, 623 (2004); *see also id.* ("To the extent that the rule of lenity . . . is applicable at step one of *Chevron* analysis, it would tend to serve as a tie breaker resolving any otherwise irresolvable ambiguities in favor of a construction contrary to that reached by the [BIA]."); David A. Luigs, Note, *The Single-Scheme Exception to Criminal Deportations and the Case for* Chevron*'s Step Two*, 93 MICH. L. REV. 1105, 1131 n.110 (1995) (arguing that courts should apply the rule of lenity at *Chevron* step one in cases involving criminal deportations).

301 Hosh v. Lucero, 680 F.3d 375, 383 (4th Cir. 2012).

detention statute applied.[302] The court also borrowed from non-immigration case law to conclude that, even if the rule of lenity applies, it would only apply in cases of "grievous ambiguity" and would not otherwise displace *Chevron* deference.[303] After finding only some ambiguity in the statute, the court decided that the agency reasonably construed the ambiguous statute and concluded that the rule of lenity would not trump *Chevron* deference to the BIA's broader interpretation.

There is good reason to question the analysis in *Hosh.* First, the distinction *Hosh* draws between detention and deportation provisions in the immigration statute is spurious. The immigration statute covers a variety of provisions, all of which have implications for individual liberty—whether they are grounds of removal, standards for relief from review, provisions for judicial review, or provisions for detention pending removal.[304] The Supreme Court has never carved out exceptions to the immigration rule of lenity based on the type of statutory provision involved. The detention provisions in the statute raise the "high stakes" that motivated the Court to recognize the rule of lenity in the first place. As the Court stated in *Fong Haw Tan*, given the stakes, "we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."[305] Detention pursuant to deportation proceedings trenches upon the same freedoms—and in some sense is more serious given the bodily confinement that comes with imprisonment. Application of the rule of lenity would therefore comport with courts' historically broad application of the rule to a variety of immigration contexts. Adopting this reasoning, some lower courts have rejected the reasoning in *Hosh* and have applied the immigration rule of lenity to construe mandatory detention provisions in favor of the noncitizens.[306] For these reasons, courts should apply

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302 *Id.* at 384.

303 *Id.* at 383–84 (quoting Muscarello v. United States, 524 U.S. 125, 138–39 (1998)).

304 *See* Slocum, *supra* note 162, at 523 (noting the broad application of the immigration rule of lenity to "a wide variety of statutory provisions, including provisions that provide relief from deportation, asylum provisions, provisions closing deportation hearings to the public, in determinations of whether statutes are retroactive, and in construing exclusion provisions . . . in deportation cases" (citations omitted)).

305 *Fong Haw Tan*, 333 U.S. at 10.

306 Some district courts have rejected the reasoning in *Hosh* on this basis. *See* Castaneda v. Souza, 952 F. Supp. 2d 307, 320 (D. Mass. 2013) (applying the rule of lenity to construe the mandatory detention statute because mandatory detention "has such a dramatic effect on the outcome of deportation proceedings and because an individual's liberty is at stake"); *see also* Castillo v. Ice Field Office Dir., 907 F. Supp. 2d 1235, 1240 (W.D. Wash. 2012) (applying the immigration rule of lenity to construe the mandatory detention statute).

the rule of lenity to construe ambiguities in immigration law that would adversely impact noncitizens' freedoms, including any ambiguities in the detention provisions within the immigration statute.

Second, the suggestion in *Hosh* of a narrow construction of the immigration rule of lenity—one that applies only to "grievous" ambiguities—is similarly problematic. While the rule of lenity is considered a canon of last resort, it is traditionally applied to interpret "lingering" ambiguities in immigration statutes without regard to whether they are "grievous" in nature. The focus on "grievous" ambiguity has arisen in the criminal context, where *Chevron* is generally not at play.[307] The desire to limit the criminal rule of lenity to grievous ambiguities stems from judges' reluctance to usurp Congress's role in specifying what constitutes a crime. In the context of agency interpretations of immigration detention statutes, however, there is a third player—the executive—and judges must be equally wary of abdicating their role in reviewing executive detention to agency actors.

For these reasons, courts should be applying the rule of lenity in statutory immigration detention cases. The rule can put the focus of the analysis back on the harsh implications of the agency's interpretation of the detention statute and allow courts to preserve their role as providing a check on unlawful executive detention.

C. A Presumption in Favor of Physical Liberty in Immigration Detention Cases

In addition to the constitutional avoidance canon and the rule of lenity, courts could arguably apply a more tailored interpretive tool in the detention context: a presumption in favor of physical liberty. I flesh out the contours of such a presumption here, drawing from and expanding discussions that scholars have had in the context of the detention of enemy combatants.

Over the last several years, the Supreme Court has issued a number of decisions rejecting the government's calls for deference to its detention of citizens and noncitizens detained as part of the "war on terror."[308] These cases have raised several important questions regarding the applicability and scope of habeas corpus review of executive detention in that context. Imbedded in this debate are discussions regarding the interpretive norms that guide courts' review of executive detention decisions.

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[307] *See supra* notes 286–87 and accompanying text (discussing the inapplicability of *Chevron* to the interpretation of criminal statutes).

[308] *See supra* notes 227–34, 237 and accompanying text (discussing key "war on terror" cases rejecting deference to the executive branch).

Several scholars have posited pro-liberty norms to help guard against aggrandizing executive interpretations. For example, Fallon and Meltzer argue for an "interpretive presumption against restraints on bodily liberty," at least in the context of habeas review of the detention of U.S. citizens.[309] Under their formulation of the rule, courts should seek a clear statement from Congress to overcome the presumption that U.S. citizens should not be subject to detention. As they explain, "[i]n assessing the permissibility of intrusions on traditionally fundamental rights, a vague and hasty mandate to the President, though undoubtedly significant, should not carry the same weight as would a sober, specifically considered judgment that extraordinary circumstances justify extraordinary deprivations of citizens' liberties."[310] The level of clarity necessary to overcome the presumption, in their view, "depends on a complex of factors, including exigency, the nature of the enactment, and context."[311] Similarly, Sunstein argues for a "presumption of liberty" to apply in war-on-terror cases, tracing a long line of Supreme Court precedent seeking clear congressional authorization before assuming an entrenchment on citizens' liberties during national security crises.[312]

No scholar has discussed how or whether a similar presumption should apply to noncitizens in the immigration detention context. Of course, there may be several reasons why such a rule might not apply to courts' readings of immigration detention statutes. First, the genesis of the rule, as articulated in the enemy combatant cases, in part depends on the notion that the executive detention of citizens is an extraordinary power. One might assert the detention of noncitizens does not raise the same concerns. To be clear, courts have long distinguished between the rights of citizens and noncitizens.[313] But that distinction, as noted above, is of limited meaning in the habeas context, at least to the extent that noncitizens have long been able to challenge the illegality of their detention.[314] As the Court has repeatedly noted, immigration detention power is limited by constitutional constraints, including recognition of the profound liberty interest at stake.[315] Thus

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309 Fallon & Meltzer, *supra* note 31, at 2069.

310 *Id.*

311 *Id.* at 2070.

312 Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2668–70 (2005).

313 *See* Fallon & Meltzer, *supra* note 31, at 2049–64 (discussing differences in the treatment of citizens and noncitizens for purposes of habeas jurisdiction).

314 *See supra* notes 233–35 and accompanying text (discussing the evolution of cases from *St. Cyr* to *Boumediene*).

315 *E.g.*, Zadvydas v. Davis, 533 U.S. 678, 695 (2000) (explaining that "[plenary] power is subject to important constitutional limitations").

a presumption in favor of physical liberty should not be rejected in this context merely because such cases involve immigrant, rather than citizen, detention.

Secondly, however, one might try to distinguish any pro-liberty presumption as being limited to legislation enacted during times of war or national emergency, on the theory that such laws are hastily enacted and the pressure to give the executive broad powers is significant. In that lens, a presumption in favor of physical liberty should not apply to courts' reading of immigration detention statutes, as they have been enacted in the regular course of legislative debate. The need for the presumption is lessened because one may safely assume that Congress weighed the deprivation of liberties.

Such a distinction seems similarly flawed. First, one may validly argue that immigration law is influenced by some of the same factors that result in nationality security law, as the war on terror has become increasingly intertwined with the immigration debate.[316] Indeed, the mandatory detention statute was vastly expanded in the wake of the Oklahoma City bombing as part of the Anti-Terrorism and Effective Death Penalty Act.[317] Moreover, the democratic deliberative norms that motivate such a rule arguably always apply to immigrants given their disenfranchised status. In supporting its application of a presumption against retroactivity in immigration law, the Supreme Court observed that since "noncitizens cannot vote, they are particularly vulnerable to adverse legislation."[318] Scholars have acknowledged similar concerns.[319]

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316 *See generally* Geoffrey A. Hoffman & Susham M. Modi, *The War on Terror as a Metaphor for Immigration Regulation: A Critical View of a Distorted Debate*, 15 J. GENDER RACE & JUST. 449 (Spring 2012).

317 *See* Melissa Cook, Note, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act as a Human Rights Violation*, 23 B.C. THIRD WORLD L.J. 293, 304 (2003) (describing how Congress "rushed" to enact the Anti-Terrorism and Effective Death Penalty Act, which vastly expanded mandatory detention, to coincide with the one-year anniversary of the Oklahoma City bombing).

318 INS v. St. Cyr, 533 U.S. 289, 315 n.39 (2001) (citing Stephen Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1626 (2000)). As the Court explained, the legislature "may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Id.* at 315. Given the vulnerability of immigrants, it is proper for courts to use interpretive canons to determine whether delegation occurred in a "democratically reasonable fashion." Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 765 (2006); *see also id.* at 798 (arguing that executive agencies are "not entitled to deference when taking positions that, though politically expedient, disregard Congress's views and the engagement of the people").

319 Rubenstein, *supra* note 162, at 480; *see also* Slocum, *supra* note 162, at 522 ("The Court's use of lenity may also stem from its recognition that noncitizens typically have no political voice or access to political power and its desire to counteract possible prejudice against them and ensure that the political process treats them fairly.").

Adopting a presumption in favor of physical liberty in the interpretation of detention statutes would address these liberty and democratic norms.[320] Such a presumption would operate most effectively if it takes a form akin to the stronger forms of constitutional avoidance and the rule of lenity. In other words, ambiguities in immigration detention statutes should be construed to preserve physical liberty. Applying this presumption would give proper weight to the liberty interest that is implicated in immigration detention cases, while also resolving the tension that occurs when deference norms apply in the habeas context. Moreover, it would serve the purpose of nondelegation principles generally, ensuring careful deliberation by Congress in legislating immigration detention provisions.[321] For these reasons, a presumption in favor of liberty is fitting.

Moreover, a presumption in favor of physical liberty enhances federal courts' ability to serve as a meaningful check on executive detention. Its applicability flows from some of the same principles that suggest that federal courts should not be forced to defer to the executive's view of the statute through *Chevron*. Furthermore, even within the *Chevron* framework, such a presumption would operate at step one, never proceeding to the second step of the analysis where deference is at play. Most importantly, it would bring the physical liberty interest to the forefront of statutory analysis in detention cases—a factor that has been woefully missing from recent federal court cases interpreting current immigration detention law.

Conclusion

Federal courts serve an essential role in reviewing immigration detention challenges. Robust review safeguards longtime residents' freedom from unlawful physical confinement at the hands of the executive. As administrative agencies have begun to play an increasingly important role in the immigration detention context, one might assume that federal courts would respond with greater vigilance, not less. Yet through the application of *Chevron* deference, federal courts have subjugated themselves to the agency in reviewing the lawfulness

320 This rule would also align with international human rights law, which calls for a presumption against detention to ensure that immigration detention is used as a last resort. *See* Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 Fordham Int'l L.J. 243, 267–79 (2013) (elaborating on the principles that circumscribe immigration detention under an international human rights framework).

321 *See* Sunstein, *supra* note 160, at 317 ("The nondelegation canons represent a salutary kind of democracy-forcing minimalism, designed to ensure that certain choices are made by an institution with a superior democratic pedigree.").

of immigrants' detention. While in theory this application of *Chevron* is predicated on Congress's desire for the agency to play this heightened role, there are several reasons to question this assumption. An examination of the statutory scheme reveals little indication that Congress delegated—expressly or implicitly—its lawmaking power over detention to the BIA. Moreover, given the unique authority that Congress has in the area of detention, and the important role that federal courts have played as a check on that power through habeas corpus review, any strong application of deference to the agency proves disruptive to this careful balance. For these reasons, courts should not apply *Chevron* to statutory immigration detention challenges, and should instead review the meaning of the statutory provisions at issue de novo and without deference to the agency. At the same time, such statutory interpretation should include tools that properly account for the physical liberty interest at stake.