

## Eroding Immigration Exceptionalism: Administrative Law in the Supreme Court's Immigration Jurisprudence

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ERODING IMMIGRATION EXCEPTIONALISM: ADMINISTRATIVE  
LAW IN THE SUPREME COURT’S IMMIGRATION  
JURISPRUDENCE

*Kate Aschenbrenner Rodriguez\**

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## INTRODUCTION

Both the current and the prior presidential administrations have attempted to engage in the strong exercise of the executive power to regulate immigration. President Obama created the Deferred Action for Childhood Arrivals (“DACA”) and Deferred Action for Parental Accountability (“DAPA”) programs, while President Trump, among other actions, issued his executive order entitled Protecting the Nation from Foreign Terrorist Entry into the United States.

When Congress was unable to pass comprehensive, or even partial, immigration reform, President Obama stepped in to create DACA.<sup>1</sup> On June 15, 2012, the initial DACA program was announced.<sup>2</sup> Individuals who entered the United States before sixteen years of age, were under 31 years of age, had continuously resided in the United States since June 15, 2007, and were out of legal status, could apply for relief if they were currently in school, had graduated from school, or were honorably discharged veterans.<sup>3</sup> Noncitizens were barred from applying if they had a significant criminal history.<sup>4</sup> Applications were accepted and processed under this initial DACA program.<sup>5</sup> Individuals whose applications were approved were granted deferred action – a temporary and insecure form of protection from deportation – and work authorization in two year increments.<sup>6</sup> On November 20, 2014, President Obama announced that he was expanding the DACA program by removing the 31-years-of-age cap and pushing back the residence date to January 1, 2010.<sup>7</sup> At the same time, he created a new Deferred Action for Parental Accountability

1. President Barack Obama, Remarks by the President on Immigration, Address at the White House Rose Garden (June 15, 2012) (transcript available at <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration>).

2. *See id.*; USCIS, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS, <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last visited May 17, 2017).

3. *See* CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS, *supra* note 2.

4. *See id.* (a felony, a “significant misdemeanor,” or three other misdemeanors).

5. *See* USCIS, DATA SET: FORM I-821D DEFERRED ACTION FOR CHILDHOOD ARRIVALS, <https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-form-i-821d-deferred-action-childhood-arrivals> (last visited May 17, 2017); USCIS, 2014 EXECUTIVE ACTIONS ON IMMIGRATION, <https://www.uscis.gov/immigrationaction> (last visited May 17, 2017).

6. CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS, *supra* note 2; Richard Gonzales, *DREAMer Deportation Case Raises Questions On Trump's Deferred Action Policy*, NPR (Apr. 18, 2017), <http://www.npr.org/sections/thetwo-way/2017/04/18/524610150/first-dreamer-protected-by-deferred-action-program-is-deported>; Shane Dixon Kavanaugh, *Meet The Terrified 'Dreamers' in Trump's Crosshairs*, VOCATIVE (May 12, 2017), <http://www.vocativ.com/426459/terrified-dreamers-trumps-crosshairs/>.

7. Press Release, The White House Office of the Press Secretary, Fact Sheet: Immigration Accountability Executive Action (Nov. 20, 2014) (available at <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action>).

(“DAPA”) program for certain parents of United States citizens and lawful permanent residents.<sup>8</sup> However, as a result of the legal challenges discussed below, expanded DACA and DAPA never took effect.<sup>9</sup>

President Trump campaigned on promises to crack down on illegal immigration and to ensure the national security of the United States.<sup>10</sup> In an attempt to follow through on these promises, Trump issued a series of immigration-related executive orders shortly after taking office.<sup>11</sup> The most immediately controversial order, titled “Protecting the Nation from Foreign Terrorist Entry into the United States,” was released after 4:30pm on Friday, January 27, 2017.<sup>12</sup> The language of the order was vague, and it took some time and work to determine what the order meant and exactly how it would be implemented.<sup>13</sup> The order purported to bar admission to the United States of all noncitizens from Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen for 90 days; to bar entry to all refugees from anywhere in the world for 120 days; and to place an indefinite ban on refugees from Syria.<sup>14</sup> When this initial order was subject to court challenge, as discussed below, Trump issued an amended order on March 6, 2017, in an attempt to overcome the legal issues with the first order.<sup>15</sup>

A strong immigration executive power derives from a theory of

8. *Id.*

9. 2014 EXECUTIVE ACTIONS ON IMMIGRATION, *supra* note 5.

10. This language understates Trump’s rhetoric; he used strong, inflammatory, and offensive language in making and justifying these promises. With respect to immigration from Mexico, Trump said, “When Mexico sends its people, they’re not sending their best. . . . They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people.” He also said, “we have some bad hombres here, and we’re going to get them out.” See Janell Ross, *From Mexican rapists to bad hombres, the Trump campaign in two moments*, WASH. POST (Oct. 20, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/10/20/from-mexican-rapists-to-bad-hombres-the-trump-campaign-in-two-moments/?utm\\_term=.875152b8fed7](https://www.washingtonpost.com/news/the-fix/wp/2016/10/20/from-mexican-rapists-to-bad-hombres-the-trump-campaign-in-two-moments/?utm_term=.875152b8fed7). With respect to Islam and national security, Trump called for a “total and complete shutdown of Muslims entering the United States” and stated “there is great hatred towards Americans by large segments of the Muslim population.” Third Amended Complaint for Declaratory and Injunctive Relief at 10-12, *Hawaii v. Trump*, 241 F.Supp.3d 1119 (D. Haw. Mar. 8, 2017) (No. 17-00050) (quoting Press Release, Donald J. Trump for President, Donald J. Trump Statement on Preventing Muslim Immigration (Dec. 7, 2015) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=113841>)).

11. Exec. Order No. 13767, 3 C.F.R. § 8793 (2017) (“Border Security and Immigration Enforcement Improvements”); Exec. Order No. 13768, 3 C.F.R. § 8799 (2017) (“Enhancing Public Safety in the Interior of the United States”); Exec. Order No. 13769, 3 C.F.R. § 8977 (2017) (Protecting the Nation From Foreign Terrorist Entry Into the United States”).

12. Exec. Order No. 13769, 3 C.F.R. § 8977 (2017); Meredith McGraw and Adam Kelsey, *A timeline of Trump’s immigration executive order and legal challenges*, ABC NEWS (Mar. 16, 2017), <http://abcnews.go.com/Politics/timeline-president-trumps-immigration-executive-order-legal-challenges/story?id=45332741>.

13. Phil McCausland, *Trump Defends His Immigration Ban Amid Uncertainty, Public Outcry*, NBC NEWS (Jan. 30, 2017), <http://www.nbcnews.com/news/us-news/civil-rights-groups-fight-trump-s-refugee-ban-uncertainty-continues-n713811>.

14. Exec. Order No. 13769, 3 C.F.R. § 8977 (2017).

15. Exec. Order No. 13780, 3 C.F.R. § 13209 (2017).

immigration exceptionalism. As previously explained,<sup>16</sup> immigration exceptionalism has been defined as “the view that immigration and alienage law should be exempt from the usual limits on government decision-making . . . .”<sup>17</sup> The theory of immigration exceptionalism stems from the plenary power doctrine, or the concept that Congress has the absolute power, immune from judicial review, to decide which noncitizens to admit into and deport from the United States.<sup>18</sup> Immigration exceptionalism goes beyond the plenary power doctrine in two respects. First, it extends to all aspects of immigration law, not just entry and expulsion.<sup>19</sup> Second, it extends the plenary power doctrine’s focus on Congress to the executive branch, and to the executive’s relationship with Congress and the judiciary.<sup>20</sup> Some courts and advocates have described this as plenary power delegated to the agency, or the power of the agency to act to implement Congress’ policy choices.<sup>21</sup> President Obama’s and President Trump’s actions, however, at least arguably go beyond delegation; they are acting in part because Congress has failed to do so.

In both instances, opponents to President Obama’s and President Trump’s actions have raised legal challenges that include arguments based in administrative law. First, twenty-six states, led by Texas, filed suit challenging the expanded DACA and DAPA programs under the Administrative Procedure Act (“APA”) and the Take Care Clause of the U.S. Constitution.<sup>22</sup> The major administrative law arguments were that the program was not valid because it did not go through the notice and comment rulemaking process; because it was arbitrary and capricious or otherwise not in accordance with the law; and because it exceeded the substantive authority of the Department of Homeland Security.<sup>23</sup> Judge

16. Kate Aschenbrenner Rodriguez, *Irreconcilable Similarities: The Inconsistent Analysis of 212(c) and 212(h) Waivers*, 69 OKLA. L. REV. 111, 115-118 (2017).

17. Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1363 (1999).

18. See Rodriguez, *supra* note 16, at 115-118; Kevin Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 58-59 (2015). See also *Fong Yue Ting v. United States*, 149 U.S. 698, 706-15 (1893); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (The Chinese Exclusion Case).

19. See Rodriguez, *supra* note 16, at 115-118; Motomura, *supra* note 17.

20. See Rodriguez, *supra* note 16, at 115-118; Cf. Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1672-76 (2007) (focusing on the distribution of authority between Congress and the executive agencies and the judiciary’s role in influencing that distribution).

21. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 766, 770 (1972); Brief of Amici Curiae Law School Professors in Support of Respondent at 16-17, *Kerry v. Din*, 135 Sup. Ct. 2128 (2015) (No. 13-1402); *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)).

22. *Texas v. United States*, 86 F. Supp.3d 591, 604 (S.D. Tx 2015).

23. *Id.* at 607.

Andrew S. Hanen in the U.S. District Court for the Southern District of Texas issued a nationwide preliminary injunction banning any implementation of expanded DACA and DAPA on the grounds that the plaintiffs were likely to succeed on their procedural APA arguments at trial.<sup>24</sup> A divided panel of the U.S. Court of Appeals for the Fifth Circuit affirmed.<sup>25</sup> The Supreme Court agreed to hear the case on an expedited basis in the October 2015 term and heard oral argument on April 18, 2016.<sup>26</sup> Ultimately, however, the Supreme Court, sitting with only eight justices as a result of Justice Scalia's death, was unable to reach agreement to decide the case. The Court issued a single sentence per curiam opinion on June 23, 2016: "The judgment is affirmed by an equally divided Court."<sup>27</sup> This had the effect of leaving in place the Fifth Circuit's decision.

On June 16, 2017, the Department of Homeland Security issued a memorandum rescinding the November 2014 memorandum that expanded DACA and created DAPA.<sup>28</sup> This would appear to have mooted the lawsuit, as Texas did not initially challenge the original DACA program. Texas and several other states, however, sent a letter to Attorney General Jefferson Sessions stating that they would voluntarily dismiss the lawsuit only if the Trump administration did away with DACA entirely by September 5, 2017.<sup>29</sup> If the administration failed to do so, Texas and the other states threatened to amend the complaint to challenge DACA in its entirety.<sup>30</sup>

Second, Trump's "travel bans" have been the subject of multiple legal challenges.<sup>31</sup> In the most prominent and consequential case challenging the January 27<sup>th</sup> Executive Order, the states of Washington and Minnesota sued the Trump Administration.<sup>32</sup> Two administrative law challenges were among the ten causes of action alleged in the complaint: (1) the

24. *Id.* at 677-678.

25. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015).

26. *United States v. Texas*, 136 S. Ct. 906 (2016); Transcript of Oral Argument, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674).

27. *United States v. Texas*, 136 S. Ct. 2271 (2016). Although *United States v. Texas* was before the Supreme Court in its October 2015 Term, because the Court did not issue a substantive decision it will not be discussed further in Section II.

28. Memorandum from John F. Kelly, Sec'y of Homeland Sec., to Kevin K. McAleenan, Acting Comm'r, Customs and Border Prot., et al. (June 15, 2017) (available at <https://www.dhs.gov/sites/default/files/publications/DAPA%20Cancellation%20Memo.pdf>).

29. Letter from Texas, et al., to Att'y Gen. Jefferson Sessions (June 29, 2017) (available at <https://assets.documentcloud.org/documents/3882101/Texas-et-al-DACA-Letter-6-29-2017.pdf>).

30. *Id.*

31. See *Special Collection: Civil Rights Challenges to Trump Refugee/Visa Order*, U. MICH. L. SCHOOL: C.R. LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/results.php?searchSpecialCollection=44>.

32. Complaint for Declaratory and Injunctive Relief, *Washington v. Trump*, No. C17-0141JLR (W.D. Wash. Jan. 30, 2017), 2017 WL 462040.

agency action affected substantive rights and, therefore, required formal rule-making pursuant to 5 U.S.C. §§ 553 and 706(2)(D), and (2) the agency action was arbitrary, unconstitutional, and contrary to statute in violation of 5 U.S.C. § 706(2).<sup>33</sup> In response, the government argued that the federal courts did not have the authority to review the executive orders, raising judicial review of agency/executive action questions.<sup>34</sup> District Court Judge James Robart in Washington issued a preliminary injunction enjoining enforcement of the Executive Order nationwide.<sup>35</sup> Trump asked the U.S. Court of Appeals for the Ninth Circuit to stay the preliminary injunction, but the Ninth Circuit refused to do so.<sup>36</sup> This case was stayed after the March 6<sup>th</sup> Executive Order and subsequent legal challenges.<sup>37</sup>

Two significant cases also challenged Trump's substituted March 6<sup>th</sup> Executive Order: *State of Hawaii v. Trump* and *International Refugee Assistance Project ("IRAP") v. Trump*. Both cases were initially filed in response to the January 27<sup>th</sup> Executive Order, and amended to respond to the March 6<sup>th</sup> Order.<sup>38</sup> The state of Hawaii made the same two APA claims as the state of Washington's case.<sup>39</sup> Out of six total claims, IRAP made three APA claims: (1) the Executive Order mandated discrimination on the basis of nationality, place of birth, and/or place of residence and such actions were arbitrary and capricious, unconstitutional, contrary to the statute, and without observance of the procedure required by law in violation of the APA, 5 U.S.C. §§ 706(2)(A)-(D); (2) the changes made to the refugee admission process by the Executive Order were arbitrary and capricious, unconstitutional, contrary to the statute, and without observance of the procedure required by law in violation of the APA, 5 U.S.C. §§ 706(2)(A)-(D); and (3) the actions of the defendants required or permitted under the Executive Order were arbitrary and capricious, unconstitutional, contrary to the statute, and without observance of the procedure required by law in violation of the APA, 5 U.S.C. §§ 706(2)(A)-(D).<sup>40</sup>

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33. *Id.* at 12-13.

34. *Washington v. Trump*, 847 F.3d 1151, 1161-64 (9th Cir. 2017).

35. *Washington v. Trump*, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012 (W.D. Wash. Fed. 3, 2017).

36. *Washington*, 847 F.3d 1151.

37. See Mike Carter, *Seattle judge won't rule on local challenge to revised Trump travel ban*, SEATTLE TIMES (Mar. 20, 2017), <http://www.seattletimes.com/seattle-news/seattle-judge-wont-rule-on-local-challenge-to-revised-trump-travel-ban/>.

38. Second Amended Complaint for Declaratory and Injunctive Relief, *Hawaii v. Trump*, 241 F.Supp.3d 1119 (D. Haw. Mar. 8, 2017) (No. 17-0050); First Amended Complaint for Declaratory and Injunctive Relief, *International Refugee Assistance Project v. Trump*, 241 F.Supp.3d 539 (D. Md. Mar. 10, 2017) (No. TDC-17-0361).

39. Second Amended Complaint for Declaratory and Injunctive Relief, *supra* note 38, at 35-36.

40. First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 38, at 49-51.

District Court Judges in Hawaii and Maryland issued injunctions, and the government appealed to the Ninth and Fourth Circuit Courts of Appeal, respectively.<sup>41</sup> Both the Ninth and the Fourth Circuits upheld the district courts' injunctions of the travel ban, and the government asked the Supreme Court to intervene.<sup>42</sup> As expected,<sup>43</sup> the Supreme Court agreed to accept the case.<sup>44</sup> The Court will hear the case during the first session of its October 2017 term.<sup>45</sup> In the interim, the Court issued a decision lifting the stay, with some much-litigated exceptions.<sup>46</sup>

These very prominent attempts by Presidents Obama and Trump to exercise a strong executive power over immigration and the equally prominent opposition to them brought the complex role of administrative law in our immigration system front and center. The questions raised by opponents in both instances remain unresolved by the courts, but will be crucial moving forward. Immigration remains a central and polarizing issue in the United States; Congress appears at a stalemate; and presidents and their executive branches will likely continue to push the envelope on the exercise of their executive power over immigration. In fact, however, these questions are not new. Administrative law has historically played a role, albeit a shifting and uncertain one, in our immigration system. Numerous immigration cases before the Supreme Court have raised (and dealt with) administrative law issues.<sup>47</sup>

In the last seven terms (October 2010 to October 2016), a total of eight immigration cases before the Supreme Court involved questions of administrative law. The Supreme Court hears approximately 80 cases per term, for around 560 cases over this seven-term period.<sup>48</sup> While these

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41. *Hawai'i*, 241 F. Supp. 3d 1119; *Int'l Refugee Assistance Project*, 241 F. Supp. 3d 539; Lee Ross, *Trump's travel ban lands in Seattle appellate court*, FOX NEWS (May 15, 2017), <http://www.foxnews.com/politics/2017/05/15/trumps-travel-ban-lands-in-seattle-appellate-court.html>.

42. *Hawai'i v. Trump*, 859 F.3d 741 (9th Cir. 2017); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017).

43. See, e.g., Richard Wolf, *Will Supreme Court rescue Trump's immigration travel ban?*, USA TODAY (May 11, 2017), <https://www.usatoday.com/story/news/politics/2017/05/11/supreme-court-rescue-trump-immigration-travel-ban/101523088/>; Jaweed Kaleem, *With new court filings, Trump's travel ban appears more likely to reach Supreme Court*, L.A. TIMES (Mar. 31, 2017), <http://www.latimes.com/nation/la-na-trump-travel-ban-court-20170401-story.html>; Alan M. Dershowitz, *Why the Supreme Court will uphold Trump's travel ban*, THE HILL (March 16, 2017), <http://thehill.com/blogs/pundits-blog/immigration/324336-to-block-trumps-ban-hawaii-judge-uses-psychoanalysis-not-legal>.

44. *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017).

45. *Id.*

46. *Id.*; Amy Howe, *Hawaii urges justices to deny motion for clarification on travel ban*, SCOTUSBLOG (Jul. 18, 2017, 12:53 PM), <http://www.scotusblog.com/2017/07/hawaii-urges-justices-deny-motion-clarification-travel-ban/>.

47. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999).

48. See *Frequently Asked Questions*, SUPREME COURT OF THE U.S., <https://www.supremecourt.gov/about/faq.aspx>.



immigration/administrative law cases are just a small percentage of the cases heard by the Court (less than one percent), this number is still significant given the extremely wide diversity of types of cases heard by the Court.

Two of these cases involved questions of when judicial review of agency decisions is appropriate: *Kerry v. Din*, involving judicial review of the consular denial of a visa,<sup>49</sup> and *Reyes Mata v. Lynch*, involving judicial review of a motion to reopen removal proceedings.<sup>50</sup> Five involved questions of deference to agency actions. Of these, four invoked *Chevron* deference: *Holder v. Martinez Gutierrez*,<sup>51</sup> *Scialabba v. Cuellar de Osorio*,<sup>52</sup> *Mellouli v. Lynch*,<sup>53</sup> and *Esquivel-Quintana v. Sessions*.<sup>54</sup> The fifth case – *Judulang v. Holder* – applied arbitrary and capricious review.<sup>55</sup> The final case is *United States v. Texas*, which involved the appeal of the order enjoining the expanded DACA and DAPA programs and raised issues of the extent of the executive’s power to act in the immigration arena, when notice and comment rulemaking is required, and when agency action is arbitrary and capricious in violation of the APA.<sup>56</sup>

I have previously argued that the application of ordinary administrative and constitutional principles of law in immigration cases regarding the availability of waivers under Immigration and Nationality Act (“INA”) § 212(h) and the former INA § 212(c) demonstrated the erosion of a theory of immigration exceptionalism.<sup>57</sup> The failure of the courts to fully engage on the administrative and constitutional questions in these cases, however, resulted in many gaps and unanswered questions in applying administrative and constitutional law principles, as well as an irreconcilable discrepancy in outcome between 212(c) and 212(h).<sup>58</sup> I argued that this failure was a vestige of the theory of immigration exceptionalism.<sup>59</sup>

In this Article, I analyze the application of administrative law principles in the Supreme Court’s recent immigration jurisprudence, from the October 2010 through the October 2016 terms, to determine whether

49. 135 S. Ct. 2128 (2015).

50. 135 S. Ct. 2150 (2015).

51. 566 U. S. 583 (2012).

52. 134 S. Ct. 2191 (2014).

53. 135 S. Ct. 1980 (2015).

54. 137 S. Ct. 1562 (2017).

55. 565 U.S. 42 (2011).

56. 86 F. Supp. 3d 591 (S.D. Tx. 2015); 809 F.3d 134 (5th Cir. 2015); 136 S. Ct. 2271 (2016). Because the Supreme Court did not issue a substantive decision in *United States v. Texas*, it will not be discussed further in section II, *infra*.

57. Rodriguez, *supra* note 16.

58. *Id.*

59. *Id.*

this slow and uneven erosion of the theory of immigration exceptionalism holds true on a larger scale. I find that it does. The Supreme Court cases show a similar invocation of administrative law principles in some, but not all, immigration cases where administrative law could be applicable. Just as in the 212(c) and 212(h) cases, in many, if not all, of the cases where administrative law was invoked, the Court failed to fully analyze the relevant doctrinal questions. There are significant questions that were not addressed by the Court, and some inconsistencies in those issues that have been the subject of Court opinions. In its most recent case of this type – *Esquivel Quintana v. Sessions* – the Supreme Court had the opportunity to engage thoughtfully and explicitly with respect to the role of administrative law, and particularly deference, in immigration cases.<sup>60</sup> As discussed below, however, the Court chose to instead avoid the administrative law questions.<sup>61</sup> As before, I argue that these gaps are vestiges of immigration exceptionalism – a function of the courts’ lingering hesitation in applying administrative principles to immigration questions as well as a practical consequence of the fact that courts and litigants historically have been slow to consider the impact of administrative law in immigration cases.

I initially began this Article as a description of what was occurring, rather than a prescription of any particular outcome. However, the current administration and its supporters have invoked immigration exceptionalism to justify actions that violate statutes and the Constitution and are harmful to individuals and the country as a whole. It has become increasingly clear that the courts will play a critical role in checking these excesses.<sup>62</sup> In addition, as the challenges to President Obama’s and President Trump’s actions make clear, administrative law is an important, existing tool for litigants in bringing these challenges to the courts.

I am not arguing that administrative law is the only or best vehicle available for these challenges. It is, however, a potentially powerful option that is currently available. With greater clarity in its doctrine, administrative law can be an even more effective vehicle. I therefore am arguing that the Supreme Court should engage in the application of administrative and constitutional law principles in immigration cases on a deeper level, in a thoughtful way that will provide real guidance in other cases and an example to the lower federal courts. I am not arguing for or against the application of any particular administrative law doctrine in immigration cases, but rather for clarity in when and why each particular

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60. *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017).

61. *Id.*

62. See, e.g., Kevin Johnson, *Supreme Court Immigration Watch: The 2016 Term -- Look Out for Six Decisions*, IMMIGRATIONPROF BLOG (May 15, 2017), <http://lawprofessors.typepad.com/immigration/2017/05/supreme-court-immigration-watch.html>.

doctrine applies. This should result in the faster erosion of a theory of immigration exceptionalism, which will then have the positive circular effect of improving the analysis of administrative and constitutional law principles in immigration cases throughout the federal courts.

In parts I and II, I will analyze the Supreme Court immigration cases from the October 2010 through the October 2016 terms that do raise administrative law principles. Part I addresses the two cases on judicial review of agency decisions: *Kerry v. Din*<sup>63</sup> and *Reyes Mata v. Lynch*.<sup>64</sup> Part II discusses the five deference to agency action cases: *Holder v. Martinez Gutierrez*,<sup>65</sup> *Sciallaba v. Cuellar de Osorio*,<sup>66</sup> *Mellouli v. Lynch*,<sup>67</sup> *Esquivel-Quintana v. Sessions*,<sup>68</sup> and *Judulang v. Holder*.<sup>69</sup> In Part III, I consider the unanswered questions regarding the application and effect of administrative law doctrines in immigration cases. In particular, Part III.A looks at those immigration cases before the Supreme Court where administrative law could have been raised but was not; Part III.B focuses on the themes and questions that arose from the cases discussed in Parts I, II, and III.A; and Part III.C discusses the opportunities that the Supreme Court has to clarify at least some of these questions in its next term, including in the Trump entry ban cases.<sup>70</sup>

#### I. AVAILABILITY OF JUDICIAL REVIEW OF AGENCY DECISIONS

In order for judicial review of agency action to be available, the federal courts must have jurisdiction and review of the particular agency action at issue must not be precluded.<sup>71</sup> Jurisdiction may come either from the enabling act or from a general jurisdictional statute, most commonly federal question jurisdiction.<sup>72</sup> Once jurisdiction is established, there is a presumption that judicial review is available.<sup>73</sup> The Administrative Procedure Act, however, provides certain exceptions to this presumption: judicial review is available “except to the extent that statutes preclude judicial review or agency action is committed to agency discretion by

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63. 135 Sup. Ct. 2128 (2015).

64. 135 Sup. Ct. 2150 (2015).

65. 566 U.S. 583 (2012).

66. 134 S. Ct. 2191 (2014).

67. 135 S. Ct. 1980 (2015).

68. 137 S. Ct. 1562 (2017).

69. 565 U.S. 42 (2011).

70. See, e.g., Chuck Roth, *Immigration symposium: Prelude to a turning point*, SCOTUSBLOG (Jun. 29, 2017, 12:25 PM), <http://www.scotusblog.com/2017/06/immigration-symposium-prelude-turning-point/>.

71. WILLIAM F. FOX, UNDERSTANDING ADMINISTRATIVE LAW § 10.02 (6th ed. 2012).

72. *Id.*

73. See *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); see also FOX, *supra* note 71, at § 10.05.

law.”<sup>74</sup>

The Supreme Court heard two cases addressing the availability of judicial review of agency decisions between 2010 and 2015: *Kerry v. Din* and *Reyes Mata v. Lynch*.<sup>75</sup> *Din* was concerned with the doctrine of consular non-reviewability, while *Reyes Mata* considered judicial review of motions to reopen in removal proceedings. Both cases were heard in the October 2014 term along with *Mellouli v. Lynch*, a case invoking *Chevron* deference discussed in Section II.C below.<sup>76</sup>

#### A. *Kerry v. Din*

*Kerry v. Din* was heard by the Supreme Court during the October 2014 term. In it, the Court considered the doctrine of consular non-reviewability.<sup>77</sup> In its most extreme form, consular non-reviewability is the concept that there is no right to judicial review of a consular officer’s denial of a visa.<sup>78</sup> Fauzia Din, a naturalized United States citizen who first entered the United States as a refugee, filed a petition for her husband, Kanishka Berashk.<sup>79</sup> The petition was granted, but Berashk’s application for a visa was denied by the United States Embassy in Islamabad, Pakistan.<sup>80</sup> The consular officer told Berashk simply that he was inadmissible under INA § 212(a)(3)(B), with no further explanation.<sup>81</sup> Din brought suit in federal district court, seeking a writ of mandamus directing the United States to properly adjudicate Berashk’s visa application; a declaratory judgment that INA § 212(b)(2)-(3), which exempts the Government from providing notice to an alien found inadmissible under the terrorism bar, was unconstitutional as applied; and a declaratory judgment that the denial violated the Administrative Procedure Act.<sup>82</sup> The Ninth Circuit ultimately concluded that Din had a due process right to review of the denial of her spouse’s visa, and the procedures employed did not provide her with the judicial review to which she was entitled under the due process clause.<sup>83</sup>

Before the Supreme Court, the government argued that, even assuming Din had a protected liberty interest, holding that she had a right to judicial

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74. 5 U.S.C. § 701(a) (2011); *see also* FOX, *supra* note 71, at § 10.05.

75. 135 S. Ct. 2150 (2015).

76. *Kerry v. Din*, 135 S. Ct. 2128 (2015); *Reyes Mata*, 135 S. Ct. 2150; *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015).

77. *Din*, 135 S. Ct. at 2128.

78. Brief for the Petitioners at 33-34, *Kerry v. Din*, 135 Sup. Ct. 2128 (2015) (No. 13-1402).

79. *Din*, 135 Sup. Ct. at 2132.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

review of the consular officer's visa denial could not "be reconciled with the deeply rooted doctrine of consular non-reviewability, which bars courts from second-guessing Congress's choices about which aliens abroad should be granted visas and from revisiting decisions about whether aliens who appear before consular officers at far-off posts satisfy the conditions Congress has decreed."<sup>84</sup> The government further argued that consular non-reviewability was strongly established in the case law, and that Congress had acknowledged it and left it in place.<sup>85</sup> The government took a strong position in support of the plenary power doctrine and against judicial review, citing such historical pro-plenary power, anti-individual rights cases as *Shaughnessy v. United States ex rel. Mezei*, *United States ex rel. Knauff v. Shaughnessy*, *Nishimura Ekiu v. United States*, and *Wong Wing v. United States*.<sup>86</sup> Din countered by arguing simply that plenary power and the doctrine of consular non-reviewability were not as extreme as argued by the government and, specifically, could not preclude judicial review of constitutional claims by a United States citizen.<sup>87</sup>

The Supreme Court disagreed with the Ninth Circuit, vacating the decision and remanding for further proceedings.<sup>88</sup> The Court focused substantially more on the scope of constitutional due process than on judicial review of visa decisions.<sup>89</sup> Due process may also be considered to be an administrative principle, however, as a constitutional limitation on agency action.<sup>90</sup> Beyond this due process focus, the Court could reach little agreement; there was no majority opinion.<sup>91</sup> Justice Scalia announced the judgement of the Court and authored a plurality opinion joined by Chief Justice Roberts and Justice Thomas taking the position that Din had no constitutional right that would have justified judicial review.<sup>92</sup> Justice Kennedy concurred in the judgment in an opinion joined by Justice Alito.<sup>93</sup> Without deciding whether Din had a protected liberty interest, Justice Kennedy found that the notice Din received with respect

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84. Brief for the Petitioners, *supra* note 78 at 15.

85. *Id.* at 33-53.

86. *Id.*; *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Wong Wing v. United States*, 163 U.S. 228 (1896); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892).

87. Brief for the Respondents at 35-39, *Kerry v. Din*, 135 Sup. Ct. 2128 (2015) (No. 13-1402).

88. *Din*, 135 S. Ct. at 2131.

89. *See, e.g.*, Kevin Johnson, *Opinion analysis: Limited judicial review of consular officer visa decisions – foreshadowing the result in the same-sex marriage case?*, SCOTUSBLOG (Jun. 15, 2015, 5:02 PM), <http://www.scotusblog.com/2015/06/opinion-analysis-limited-judicial-review-of-consular-officer-visa-decisions-foreshadowing-the-result-in-the-same-sex-marriage-case/>.

90. *See, e.g.*, FOX, *supra* note 71, at ch. 5.

91. *Din*, 135 S. Ct. at 2130.

92. *Id.* at 2131-2138.

93. *Id.* at 2128 2139-2141.

to the visa denial was sufficient to satisfy due process.<sup>94</sup> Finally, Justice Breyer drafted a dissenting opinion joined by Justices Ginsburg, Sotomayor, and Kagan holding that Din had a protected liberty interest and had been denied the process she was due.<sup>95</sup>

Given the Court's primary focus on the constitutional issues, the limited mention of administrative law principles, and the fragmented nature of the opinions in the case, few conclusions can be drawn with respect to the role of administrative law in immigration cases. Even here, however, it is possible to see the erosion of immigration exceptionalism. None of the Court's opinions, including the plurality opinion finding no protected liberty interest, argued strongly in favor of no judicial review of consular decisions.<sup>96</sup> None of the opinions took anywhere near the strong position against judicial review advocated for by the United States. In fact, a majority of the court – Justices Kennedy and Alito in the concurrence and Justices Breyer, Ginsburg, Sotomayor, and Kagan in the dissent – were engaged in some level of review of the consulate's decision.<sup>97</sup>

Beyond this basic conclusion, there are more gaps than substance in the Court's treatment of the judicial review of consular decisions. First, the Court did not fit the question at issue into our modern administrative law framework. As discussed in the introduction to this subsection, under the APA, once jurisdiction is established there is a presumption that judicial review is available with certain exceptions.<sup>98</sup> These exceptions include statutory preclusion or agency action that is committed to agency discretion.<sup>99</sup> The Court did not so much as mention the APA, much less consider the interaction of consular non-reviewability and the presumption of judicial review. It is not clear whether the Court thought that review of the consular officer's decision was precluded by statute or as a matter committed to the agency's discretion, or whether it was possible to fit the matter within the APA's exceptions at all. Second, as detailed in the amicus brief submitted by law professors, the basis for the doctrine of non-reviewability in the case law was tenuous at best.<sup>100</sup>

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94. *Id.* at 2139-2141.

95. *Id.* at 2141-2147.

96. *See, e.g.,* Johnson, *supra* note 89 (“Among the opinions, there was no ready defense of the doctrine of consular non-reviewability and no aggressive invocation of cases contrary to modern constitutional sensibilities such as *Knauff* and *Mezei*.”).

97. *See, e.g., id.* (“A majority of the Court is willing to allow *some* kind of review of consular officer visa decisions. Justice Kennedy's concurring opinion would allow for more deferential judicial review than Justice Breyer's dissent.”).

98. *See* *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *see also* FOX, *supra* note 71, at § 10.05.

99. 5 U.S.C. § 701(a) (2011); *see also* FOX, *supra* note 71, at § 10.05.

100. Brief for Amici Curiae Law School Professors in Support of Respondent at 9-16, *Kerry v. Din*, 135 S. Ct. 2128 (2015) (No. 13-1402).

Again, the Court did not mention the doctrine by name or consider its viability in light of its misinterpreted history.

*B. Reyes Mata v. Lynch*

*Reyes Mata v. Lynch* was also heard in the October 2014 term. In fact, the Court's decisions in *Reyes Mata* and *Din* were issued on the same date – June 15, 2015. In *Reyes Mata*, the Supreme Court considered whether the federal circuit courts could review an untimely motion to reopen in removal proceedings.<sup>101</sup> Noel Reyes Mata was placed into removal proceedings as the result of a Texas criminal conviction for assault.<sup>102</sup> An immigration judge ordered his removal, and Reyes Mata's lawyer filed a timely appeal with the Board of Immigration Appeals ("BIA").<sup>103</sup> Although indicating that he would file a brief with the BIA, Reyes Mata's lawyer failed to do so, and the BIA consequently dismissed the appeal.<sup>104</sup> New counsel for Reyes Mata filed a motion to reopen with the BIA outside the 90 day statutory window for such motions, arguing that the 90 day period should be equitably tolled because of the ineffective assistance of Reyes Mata's original counsel.<sup>105</sup>

The BIA held that although it had the authority to toll the 90-day statutory period for filing motions to reopen, it would not do so in Reyes Mata's case because he had not demonstrated prejudice arising out of his counsel's deficient performance.<sup>106</sup> Reyes Mata appealed to the Court of Appeals for the Fifth Circuit, which held that it did not have jurisdiction to review what it considered to be the BIA's sua sponte decision not to reopen the removal proceedings.<sup>107</sup> Because the other ten Circuits had affirmed their jurisdiction to hear appeals requesting equitable tolling of the statutory deadline for motions to reopen, the Supreme Court granted certiorari to resolve the conflict.<sup>108</sup> The Attorney General did not oppose certiorari, agreeing that the Fifth Circuit's opinion was wrongly decided, so the Supreme Court appointed an amicus to defend the Fifth Circuit's decision.<sup>109</sup>

The Supreme Court reversed and remanded the case to the Fifth Circuit, holding that the lower court had erred in holding that it did not

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101. *Reyes Mata v. Lynch*, 135 S. Ct. 2150 (2015).

102. *Id.* at 2153.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 2154; *Reyes Mata v. Holder*, 558 Fed Appx. 366, 367 (2014).

108. *Reyes Mata*, 135 S. Ct. at 2154.

109. *Id.*

have jurisdiction.<sup>110</sup> The opinion of the Court was delivered by Justice Kagan.<sup>111</sup> The opinion relied heavily on the Supreme Court's prior decision in *Kucana v. Holder*, which held that the federal circuit courts had jurisdiction to review the denial of motions to reopen a removal proceeding.<sup>112</sup> Justice Kagan explained that the fact that the motion was untimely, or that it requested equitable tolling, did nothing to change the Court's conclusion.<sup>113</sup> Justice Thomas alone dissented. He would have decided the case even more narrowly by remanding to the Fifth Circuit for it to decide the question of jurisdiction without erroneously applying a categorical rule construing all untimely motions to reopen as requests for sua sponte reopening.<sup>114</sup>

Both before and after the Supreme Court's decision, *Reyes Mata* has been described as "a hyper-technical question of immigration jurisdiction."<sup>115</sup> It was narrowly decided, based on the jurisdictional question alone, and was remanded to the Fifth Circuit to consider the merits of the underlying question of equitable tolling of the statutory deadline for motions to reopen in the first instance.<sup>116</sup> While it may not be "one of the more memorable decisions from the Court's October 2014 Term,"<sup>117</sup> it reinforces several key points about the Court's current position on the role of administrative law in immigration case and the erosion of immigration exceptionalism. First, as in the deference cases, it is clear that ordinary principles of administrative law have a role in immigration cases. Second, administrative law in the immigration context does not mean abdication of all decision-making to the executive. Courts act as an important check on the power of the executive branch in the immigration context. Both points suggest the conclusion that the theory of immigration exceptionalism continues to loose traction in the Supreme Court's case law.

These conclusions can be drawn much more clearly from *Reyes Mata* than from *Din*, of course. Despite this increased clarity, however, there are still significant gaps in *Reyes Mata*'s analysis. Just as in *Din*, the Court

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110. *Id.* at 2154, 2156-57.

111. *Id.* at 2153.

112. *Id.* at 2154-56; *Kucana v. Holder*, 558 U.S. 233 (2010).

113. *Reyes Mata*, 135 S. Ct. at 2154-56.

114. *Id.* at 2157-58.

115. Steve Vladeck, *Opinion analysis: Distinguishing between jurisdiction over (and the merits of) untimely immigration appeals*, SCOTUSBLOG (Jun. 15, 2015, 11:59 AM), <http://www.scotusblog.com/2015/06/opinion-analysis-distinguishing-between-jurisdiction-over-and-the-merits-of-untimely-immigration-appeals/>; Steve Vladeck, *Argument preview: What happens when deadlines in removal proceedings are missed due to ineffective assistance of counsel?*, (Apr. 27, 2015, 11:38 AM), <http://www.scotusblog.com/2015/04/argument-preview-what-happens-when-deadlines-in-removal-proceedings-are-missed-due-to-ineffective-assistance-of-counsel/>.

116. *Reyes Mata*, 135 S. Ct. 2150; Vladeck, *supra* note 115.

117. Vladeck, *supra* note 115.



did not consider how the question of judicial review at issue fits into the modern administrative law framework.

## II. SCOPE OF REVIEW OF AGENCY ACTION

Once it is established that judicial review of a particular agency action is available, the focus then shifts to the scope of that review. That is, from zero deference to complete deference, how far can a reviewing court go in scrutinizing the agency action? The answer to this question depends in large part on the type of agency action at issue – an interpretation of a statute, an interpretation of a regulation, a factual determination, a discretionary determination, or some hybrid of the above.<sup>118</sup> Determining within which category a particular agency action falls can be challenging for many reasons, including the fact that there are no bright lines between these categories. Once that determination is made, generally speaking a reviewing court will be more deferential to an agency's factual or discretionary determinations than to its legal conclusions.<sup>119</sup>

The analysis of the scope of judicial review starts with 5 U.S.C. § 706, the APA's provision on the scope of judicial review. It provides:

The reviewing court shall— . . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Courts have developed doctrinal tests – including most prominently *Chevron* deference for agency's legal conclusions<sup>120</sup> – that overlay the statutory language for the purpose of providing more guidance to courts

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118. ERNEST GELLHORN & RONALD M. LEVIN, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 74-79 (5th ed. 2006).

119. *Id.* at 75.

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

on the scope of their review. Between the October 2010 and October 2016 terms, the Supreme Court considered the scope of judicial review in immigration cases concerning the agency's interpretation of the relevant statute and concerning agency policymaking, or discretionary determinations. Section II.A below discusses the Supreme Court's application of *Chevron* deference to agency legal conclusions. Part II.B considers the Supreme Court's application of arbitrary and capricious review to an agency statement of policy.

Despite the limitations on its scope, judicial review "is generally regarded as the most significant safeguard available to curb excesses in administrative action."<sup>121</sup> While it may seem counterintuitive to talk about principles of agency deference as a means of controlling agency action, this is, in fact, the case. The APA and the judicially developed guidance on deference provide standards by which to review agency action. If agency action does not meet these standards, it will be struck down. While we group these standards under the heading of deference, they are as much about judicial control as they are about respecting agency expertise. In the immigration context, under a strong theory of immigration exceptionalism, the alternative to these standards for reviewing agency action is to let the agency action stand. Applying those principles of administrative law that are applied without serious question in other administrative areas and that have the possibility of overturning agency action, then, does demonstrate the erosion of this theory of immigration exceptionalism.

#### A. Agency Legal Conclusions – Chevron Deference

The Supreme Court invoked *Chevron* deference as part of its review of agency legal conclusions in four immigration decisions between 2010 and 2016: *Holder v. Martinez Gutierrez* and *Holder v. Sawyers*, consolidated and issued on May 12, 2012;<sup>122</sup> *Scialabba v. Cuellar de Osorio*, issued on June 9, 2014;<sup>123</sup> *Mellouli v. Lynch*, issued on June 1, 2015;<sup>124</sup> and *Esquivel Quintana v. Sessions*, issued on May 30, 2017.<sup>125</sup> Each case involved a distinctly different facet of immigration law. *Gutierrez* and *Sawyers*, discussed in section II.A.1, involved applications for cancellation of removal by lawful permanent residents.<sup>126</sup> *Cuellar de Osorio*, discussed

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121. ERNEST GELLHORN & RONALD M. LEVIN, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 74 (5th ed. 2006).

122. *Holder v. Martinez Gutierrez*, 566 U.S. 583 (2012).

123. *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014).

124. *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015).

125. *Esquivel Quintana v. Sessions*, 137 S. Ct. 1562 (2017).

126. *Martinez Gutierrez*, 132 S. Ct. at 2012.

in section II.A.2, related to certain family-based applications for immigrant visas.<sup>127</sup> *Mellouli*, discussed in section II.A.3, interpreted the controlled substance grounds of deportability.<sup>128</sup> Finally, *Esquivel Quintana*, discussed in section II.A.4, construed the meaning of one of the aggravated felony grounds of deportability, specifically sexual abuse of a minor.<sup>129</sup>

The first three cases were ultimately resolved at step two of the *Chevron* analysis. The Court found the agency's interpretation reasonable in *Martinez Gutierrez* and *Cuellar de Osorio*, but unreasonable in *Mellouli*.<sup>130</sup> The Court also overturned the agency's interpretation in *Esquivel Quintana*, but on the grounds that it was "unambiguously foreclose[d]" by the statute.<sup>131</sup> As discussed below, the Court's explanation of how this determination fits within the *Chevron* framework lacks clarity.<sup>132</sup>

### 1. *Holder v. Gutierrez and Holder v. Sawyers*

Damien Antonio Sawyers' and Carlos Martinez Gutierrez' cases were heard by the Supreme Court in the October 2011 term.<sup>133</sup> Both cases turned on the BIA's interpretation of language in INA § 240A(a), the section of the Act providing for cancellation of removal for lawful permanent residents who meet certain qualifications.<sup>134</sup> This section provides, in relevant part, that the Attorney General may cancel the removal of an inadmissible or deportable noncitizen if the noncitizen "(1) has been an alien lawfully admitted for permanent residence for not less than 5 years" and "(2) has resided in the United States continuously for 7 years after having been admitted in any status."<sup>135</sup> Martinez Gutierrez could not meet either requirement on his own, and Sawyers could not meet the seven year continuous residence requirement on his own, so both noncitizens argued that a parent's years of continuous residence or lawful permanent resident ("LPR") status should be imputed to them.<sup>136</sup> The Board of Immigration Appeals in both cases rejected this argument, interpreting INA § 240A(a)(1) and (2) as requiring that a noncitizen meet

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127. *Cuellar de Osorio*, 134 S. Ct. at 2193.

128. *Mellouli*, 135 S. Ct. at 1981.

129. *Esquivel Quintana*, 137 S. Ct. at 1565.

130. *Martinez Gutierrez*, 566 U.S. at 591; *Cuellar de Osorio*, 134 S. Ct. at 2195; *Mellouli*, 135 S. Ct. at 1989.

131. *Esquivel Quintana*, 137 S. Ct. at 1572.

132. See *infra* section II.A.4.

133. *Martinez Gutierrez*, 566 U.S. 583.

134. *Id.* at 586-88.

135. 8 U.S.C. §§ 1229b(a)(1)-(2) (2008).

136. *Martinez Gutierrez*, 566 U.S. at 588-92.

the requirements for years of lawful permanent resident status and continuous residence on his or her own.<sup>137</sup> This rejection was part of a long-standing disagreement involving multiple cases between the BIA and the Ninth Circuit over the imputation of lawful residence for purposes of cancellation of removal and its predecessor, relief under the former section INA 212(c).<sup>138</sup> Both Martinez Gutierrez and Sawyers appealed to the Court of Appeals for the Ninth Circuit.<sup>139</sup>

In both cases, the Ninth Circuit issued brief, unpublished memorandum opinions remanding the cases to the BIA for reconsideration in light of the Ninth Circuit's decision in *Mercado-Zazueta v. Holder*.<sup>140</sup> In *Mercado-Zazueta*, the Ninth Circuit was concerned with only whether a parent's years as a permanent resident could be imputed to a minor child for purposes of satisfying the five-year permanent residence requirement for cancellation of removal.<sup>141</sup> While the Ninth Circuit's opinion is somewhat difficult to parse, it appears to have held (1) that this question was controlled by a previous Ninth Circuit decision, *Cuevas-Gaspar v. Gonzales*,<sup>142</sup> and (2) because the BIA's interpretation conflicted with *Cuevas-Gaspar* it was unreasonable at step two of a *Chevron* analysis.<sup>143</sup> In a relatively straightforward application of the *Chevron* analysis, *Cuevas-Gaspar* held that the BIA's interpretation of INA § 240A(a)(2) finding that a parent's continuous residence could not be imputed to a minor child for purposes of satisfying the seven-year continuous residence requirement for cancellation of removal was unreasonable at *Chevron* step two.<sup>144</sup>

The Attorney General concurrently filed petitions for a writ of certiorari in both *Sawyers* and *Gutierrez* to ensure that the BIA's interpretation regarding the imputation of a parent's status for both requirements, seven years continuous residence and five years lawful permanent residence, were before the Supreme Court.<sup>145</sup> Certiorari was

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137. *Id.* at 590-92.

138. See also Jill E. Family, *Argument preview: Calculating relief from removal*, SCOTUSBLOG (Jan. 13, 2012, 11:06 AM), <http://www.scotusblog.com/2012/01/argument-preview-calculating-relief-from-removal/> (“[T]he BIA and the Ninth Circuit engaged in an imputation tug of war that only an administrative law professor could love.”).

139. *Sawyers v. Holder*, 399 Fed. Appx. 313 (9th Cir. 2010); *Gutierrez v. Holder*, 411 Fed. Appx. 121 (9th Cir. 2011).

140. *Sawyers*, 399 Fed. Appx. at 314; *Gutierrez*, 411 Fed. Appx. at 122 (both citing *Mercado-Zazueta v. Holder*, 580 F.3d 1102 (9th Cir. 2009)).

141. *Mercado-Zazueta*, 580 F.3d at 1103.

142. 430 F.3d 1013 (9th Cir. 2005).

143. *Mercado-Zazueta*, 580 F.3d at 1115.

144. *Cuevas-Gaspar*, 430 F.3d at 1021-29.

145. Petition for a Writ of Certiorari at 7, *Holder v. Sawyers*, 132 S. Ct. 2011 (2012) (No. 10-1543); Petition for a Writ of Certiorari at 21, *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011 (2012) (No. 10-1542). Certiorari was apparently not sought in *Mercado-Zazueta*.

granted over Sawyers' and Martinez Gutierrez' opposition in September 2011, and the cases were consolidated.<sup>146</sup>

After detailing the history of the various positions on imputation taken by the Ninth Circuit and the BIA and the relevant facts of the individual cases, the Supreme Court ultimately reversed the Ninth Circuit and ruled in favor of the Attorney General.<sup>147</sup> Justice Kagan wrote the opinion for a unanimous Court.<sup>148</sup> The Court focused its analysis on step two of the *Chevron* framework: whether the BIA's interpretation of the statutory language was reasonable and therefore deserving of deference.<sup>149</sup> In analyzing whether the BIA's construction was reasonable, the Court began with analyzing the consistency of the BIA's position with the statutory text.<sup>150</sup> It also considered the history and context of the statute,<sup>151</sup> the purpose of the statute as a whole,<sup>152</sup> the consistency of the BIA's interpretation with its interpretation of similar statutory provisions,<sup>153</sup> and whether the BIA understood that it was exercising its interpretive authority.<sup>154</sup> Although the Supreme Court in *Martinez Gutierrez* did not cite to non-immigration cases in support of considering these factors, all of them are relatively uncontroversial factors commonly raised at *Chevron* step two.

The Court emphasized the purpose of deference and the need for the courts not to replace the agency's judgement with their own in several places. At the beginning of its step two analysis, it stated that the BIA's interpretation "prevails if it is a reasonable construction of the statute, whether or not it is the only possible interpretation or even the one a court might think best."<sup>155</sup> At the end of its opinion, the Court stated more explicitly "the decision reads like a multitude of agency interpretations—not the best example, but far from the worst—to which we and other courts have routinely deferred."<sup>156</sup>

The Court's decision reads as a typical, straightforward application of *Chevron* deference.<sup>157</sup> The Court did not hesitate to apply *Chevron* in the

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146. Brief in Opposition to a Writ of Certiorari, *Sawyers*, 132 Sup. Ct. 2011 (No. 10-1543); Brief in Opposition to a Writ of Certiorari, *Martinez Gutierrez*, 132 Sup. Ct. 2011 (No. 10-1542); *Sawyers v. Holder*, 399 Fed. Appx. 313 (9th Cir. 2010), cert. granted, 564 U.S. 1066 (2011) (No. 10-1543); *Gutierrez v. Holder*, 411 Fed. Appx. 121 (9th Cir. 2011), cert. granted, 564 U.S. 1066 (2011) (No. 10-1543).

147. *Holder v. Martinez Gutierrez*, 566 U.S. 583, 585-92 (2012).

148. *Id.* at 585-86.

149. *Id.* at 590-98.

150. *Id.* at 590-94.

151. *Id.* at 592-94.

152. *Id.* at 594-95.

153. *Id.* at 594-96.

154. *Id.* at 597-98.

155. *Id.* at 590-92.

156. *Id.* at 597-98 (referring to *Matter of Escobar*, 24 I&N Dec. 231 (2007)).

157. See, e.g., Jill E. Family, *Opinion analysis: Deferring to (even more) limited relief from*

immigration context, and cited to immigration and non-immigration cases alike to guide its analysis. While the Court ultimately deferred to the agency's construction of the statute, it did so only after an in-depth inquiry into that position. Immigration was treated no differently than any other area of administrative law, reinforcing the erosion of a theory of immigration exceptionalism.

There is much, however, that the Supreme Court did not do in the *Martinez Gutierrez* decision. The apparent simplicity of the Supreme Court's decision masks the actual complexity of a number of issues of deference in these cases.<sup>158</sup> Because the Court began and ended its analysis with the question of whether the BIA's interpretation was reasonable, it necessarily did not address all relevant questions regarding the *Chevron* analysis. First, it did not explicitly answer the question of whether *Chevron* was the appropriate framework of deference to apply in the first instance. This inquiry is sometimes called *Chevron* step zero.<sup>159</sup> At first, the answer here may appear self-evident, as the BIA was clearly interpreting a provision of the Immigration and Nationality Act, the statute it was charged with administering.<sup>160</sup> However, the Supreme Court has held that *Chevron* still may not apply, depending on the formality of the procedures used by the agency when distributing the interpretation.<sup>161</sup>

Amicus Curiae the National Immigration Justice Center ("NIJC") argued that the lesser *Skidmore* deference should have been applied in *Martinez Gutierrez* instead.<sup>162</sup> *Skidmore* deference means essentially that a court "accords an agency's interpretation of a statute a certain amount of respect or weight correlated with the strength of the agency's reasoning."<sup>163</sup> NIJC took the position that applying *Chevron* deference to adjudicatory decisions of the BIA was not settled law and was not appropriate for a number of reasons: the BIA makes rules with no public

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*removal*, SCOTUSBLOG (May. 24, 2012, 1:06 PM), <http://www.scotusblog.com/2012/05/opinion-analysis-deferring-to-even-more-limited-relief-from-removal/> ("[T]he Court's opinion reads as a run-of-the-mill application of *Chevron*").

158. Cf. Brief of the National Immigration Justice Center as Amicus Curiae in Support of Respondents at 1, *Martinez Gutierrez*, 566 U.S. 583 (No. 10-1542) ("Lurking below the prominently argued questions of statutory interpretation in this case are complicated questions of how deference to the Board of Immigration Appeals ought to function.").

159. See, e.g., Mary Holper, *The New Moral Turpitude Test: Failing Chevron Step Zero*, 76 BROOK. L. REV. 1241, 1242 (2011); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).

160. See, e.g., *Negusie v. Holder*, 555 U.S. 511, 516-17 (2009) (citing *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999)).

161. See *United States v. Mead Corp.*, 533 U.S. 218 (2001); Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003).

162. Brief of the National Immigration Justice Center as Amicus Curiae in Support of Respondents, *supra* note 158 at 13.

163. Jared P. Cole, *An Introduction to Federal Judicial Review of Agency Action*, CONGRESSIONAL RESEARCH SERVICE 15 (Dec. 7, 2016), <https://fas.org/sgp/crs/misc/R44699.pdf>. (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

or stakeholder input, has comparatively limited subject matter expertise, and has limited resources.<sup>164</sup> The Supreme Court did not address this argument in its decision.

Perhaps more significantly, the Supreme Court did not take on the issue of how to interpret the statute and determine whether the statutory language was ambiguous at *Chevron* step one. The choice not to do so is particularly interesting in a case with so many different positions with respect to the “clear” meaning of the statute. Both the Attorney General and Appellee Sawyers would have resolved the case at *Chevron* step one. The Attorney General argued that the statute unambiguously prohibited imputation of a parent’s residence and lawful permanent residence.<sup>165</sup> Sawyers argued the exact opposite: the statute unambiguously required imputation.<sup>166</sup> Only Martinez Gutierrez (in apparent agreement with the Ninth Circuit) found the statute ambiguous at *Chevron* step one.<sup>167</sup> The parties considered a number of substantial questions in their *Chevron* step one analysis: How should the plain text of the statute be interpreted? If the plain language of the statute is silent on a particular point, does that by definition make the statute ambiguous? How significant of a role should legislative history play in interpreting the statute? What about statutory context, including prior judicial interpretations of the same or similar language?

In addition, the Supreme Court chose not to address the *Brand X* issues raised by the Ninth Circuit in its decision in *Mercado-Zazueta*<sup>168</sup> and by Amicus NIJC in its brief in the instant case.<sup>169</sup> *National Cable & Telecommunications Association v. Brand X Internet Services*<sup>170</sup> (“*Brand X*”) is a Supreme Court decision that the BIA has interpreted as allowing it to overrule prior circuit court decisions interpreting an ambiguous statute.<sup>171</sup> In the instant case, the BIA rejected the Ninth Circuit’s decision in *Cuevas-Gaspar v. Gonzales*, purportedly under the authority of *Brand X*.<sup>172</sup>

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164. Brief of the National Immigration Justice Center as Amicus Curiae in Support of Respondents, *supra* note 158, at 13-25.

165. Brief for Petitioner at 33, *Holder v. Martinez Gutierrez*, 566 U.S. 583 (2012) (No. 10-1542).

166. Brief for Respondent Damen Antonio Sawyers at 37-38, *Martinez Gutierrez*, 566 U.S. 583 (No. 10-1542).

167. Brief for Respondent Carlos Martinez Gutierrez at 19-29, *Martinez Gutierrez*, 566 U.S. 583 (No. 10-1542) (citing *Mercado-Zazueta v. Holder*, 580 F.3d 1102, 1106-12 (9th Cir. 2009)).

168. *Mercado-Zazueta*, 580 F.3d at 1113-15.

169. Brief of the National Immigration Justice Center as Amicus Curiae in Support of Respondents, *supra* note 158, at 7-13.

170. 545 U.S. 967 (2005).

171. *See, e.g., Matter of Ramirez-Vargas*, 24 I&N Dec. 599, 600-01 (2008); *see also* Brief of the National Immigration Justice Center as Amicus Curiae in Support of Respondents, *supra* note 158, at n.1, n.2.

172. *Matter of Sawyers* (2007); File: A44 852 478, 2007 WL 4711443 (BIA Dec. 26, 2007).

The Supreme Court's choice not to address the *Brand X* issue made its opinion considerably more straightforward than the Ninth Circuit's complex and convoluted decision in *Mercado-Zazueta*.<sup>173</sup> It also had the effect of allowing the Supreme Court to make a more broadly applicable statement with respect to the BIA's position on the imputation of a parent's continuous residence and lawful permanent residence for purposes of cancellation of removal. By ignoring the tug of war between the BIA and the Ninth Circuit, the Court's decision also resolved the questions of imputation for cases in other circuits. However, as NIJC argued, these considerations meant that *Brand X* questions will perpetually evade Supreme Court review.<sup>174</sup>

## 2. *Scialabba v. Cuellar de Osorio*

*Scialabba v. Cuellar de Osorio* was heard by the Supreme Court in the October 2013 term, two terms after *Martinez-Gutierrez*. The case turned on the BIA's interpretation of INA § 203(h)(3), a provision of the Child Status Protection Act.<sup>175</sup> INA § 203(h)(3) provides that, where a noncitizen beneficiary is over 21 years of age and has aged out, "the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition."<sup>176</sup> In a case called *Matter of Wang*, the BIA held that this provision applied only to cases where the petitioner remained the same.<sup>177</sup> That is, a petition for the child of a lawful permanent resident who aged out of the F2A category (spouses and minor children of lawful permanent residents) would automatically convert to a petition in the F2B category (unmarried sons and daughters of lawful permanent residents) and would retain the priority date of the original F2A petition.<sup>178</sup> The beneficiary in *Wang* was originally a derivative beneficiary on a fourth preference I-130 filed for her father by his United States citizen sister.<sup>179</sup> When the beneficiary aged out and was unable to immigrate with her father to the United States, her lawful permanent resident father filed for her on a second (F2B) preference I-130 and sought

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173. See, e.g., *Mercado-Zazueta*, 580 F.3d at 1113-1115.

174. See Brief of the National Immigration Justice Center as Amicus Curiae in Support of Respondents, *supra* note 158 at 12 ("In any agency case that comes to the Court, it will analyze the agency action under the Chevron test, and Brand X issues would become irrelevant by virtue of the grant of certiorari.")

175. *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014).

176. INA § 202(h)(3).

177. 25 I&N Dec. 28 (2009).

178. See, e.g., *de Osorio v. Mayorkas*, 695 F.3d 1003, 1009 (9th Cir. 2012).

179. *Matter of Wang*, 25 I&N Dec. at 29.



to retain the priority date of the petition filed by his sister.<sup>180</sup> The BIA held that INA § 203(h) did not apply under these circumstances.<sup>181</sup>

Rosalina Cuellar de Osorio and several other similarly situated petitioners challenged the BIA's interpretation.<sup>182</sup> Cuellar de Osorio was petitioned for on a third preference (married daughter) I-130 by her United States citizen mother.<sup>183</sup> Her son was originally a derivative beneficiary on this petition, but had aged out in the eight years it took for the priority date to become current.<sup>184</sup> After immigrating to the United States as a lawful permanent resident, Cuellar de Osorio filed a (F2B) preference petition for her son as the unmarried adult child of an LPR.<sup>185</sup> She sought to retain the priority date from the original third preference petition but United States Citizenship and Immigration Services ("USCIS") refused, meaning that Cuellar de Osorio's son had to wait several additional years for an immigrant visa.<sup>186</sup> After Cuellar de Osorio and the other similarly situated petitioners sued, the district court deferred to the BIA's decision in *Matter of Wang* and granted summary judgment to USCIS.<sup>187</sup>

Sitting en banc, the Court of Appeals for the Ninth Circuit ultimately reversed the district court and ruled against the BIA, holding at step one of the *Chevron* analysis that the statute "unambiguously grants automatic conversion and priority date retention to [all] aged-out derivative beneficiaries."<sup>188</sup> The Supreme Court disagreed, siding with the BIA and the district court.<sup>189</sup> There was much divergence within the Court's decision with respect to both outcome and rationale; no one opinion won over a majority of the Justices. Justice Kagan delivered the judgment of the Court and authored a plurality opinion joined by Justices Kennedy and Ginsburg.<sup>190</sup> Chief Justice Roberts wrote an opinion concurring in the judgment that was joined by Justice Scalia.<sup>191</sup> Justice Alito wrote his own dissenting opinion.<sup>192</sup> Finally, Justice Sotomayor wrote a dissenting

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180. *Id.* at 29.

181. *Id.* at 39.

182. *de Osorio*, 695 F.3d at 1010. The case began as two separate lawsuits, one a class action and one with numerous individual named plaintiffs. The Ninth Circuit consolidated the cases on appeal, and they remained consolidated before the Supreme Court. *See Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2202 (2014).

183. *de Osorio*, 695 F.3d at 1010.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 1006.

189. *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2196-97 (2014).

190. *Id.* at 2196-2213.

191. *Id.* at 2214-2216.

192. *Id.* at 2191 2216.

opinion that was joined by Justice Breyer and joined except for a single footnote by Justice Thomas.<sup>193</sup>

As a baseline, all of the Justices agreed that *Chevron* deference was the appropriate vehicle for the Court's analysis.<sup>194</sup> Only Justice Kagan in her plurality opinion explained, without extensive discussion, why *Chevron* deference was appropriate. She stated briefly that it was because the BIA was interpreting the immigration laws.<sup>195</sup> Interestingly, she invoked immigration exceptionalism in support of this deference: "Indeed, 'judicial deference to the Executive Branch is especially appropriate in the immigration context,' where decisions about a complex statutory scheme often implicate foreign relations."<sup>196</sup> The concurring and dissenting opinions essentially assumed the applicability of *Chevron*.<sup>197</sup>

In fact, none of the parties, amici, or lower court opinions questioned the applicability of administrative law. Unlike in *Martinez-Gutierrez*, the question of whether *Chevron* deference was the appropriate vehicle was not raised. Only *Cuellar de Osorio* alluded briefly in a footnote to the possible applicability of arbitrary and capricious review under Section 706(2)(A) of the APA, while stating that the outcome would be the same.<sup>198</sup> USCIS and the Amici invoked *Chevron* deference with brief or no discussion.<sup>199</sup>

Despite agreeing to apply *Chevron* deference, the Justices did not concur on what step of the *Chevron* analysis resolved the case or on how to analyze each step. The majority of the Justices – Kagan, Ginsburg, and Kennedy in the plurality opinion and Roberts and Scalia in the concurrence – found the statute ambiguous at *Chevron* step one.<sup>200</sup> They differed substantially, however, on how they reached this conclusion. Justice Kagan for the plurality found the statute to be internally contradictory, with the first clause pointing in favor of a broad interpretation of the group benefitted but the second clause indicating a

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193. *Id.* at 2216-2228.

194. *Id.* at 2213 (Kagan, J., plurality opinion), 2214 (Roberts, C.J., concurring), 2216 (Alito, J., dissenting), 2217-2219 (Sotomayor, J., dissenting).

195. *Id.* at 2203.

196. *Id.* at 2203 (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)).

197. *Id.* at 2214 (Roberts, C.J., concurring), 2216 (Alito, J., dissenting), 2217-2219 (Sotomayor, J., dissenting).

198. Brief for Respondents at 46, n.16, *Cuellar de Osorio*, 134 S. Ct. 2191 (No. 12-930) (citing 5 U.S.C. § 706(2)(A) (1966)).

199. Brief for the Petitioners at 15-19, *Cuellar de Osorio*, 134 S. Ct. 2191 (No. 12-930); Brief of Current and Former Members of Congress as Amicus Curiae in Support of Respondents at 13, *Cuellar de Osorio*, 134 S. Ct. 2191 (No. 12-930); Brief of the Catholic Legal Immigration Network, Inc. as Amicus Curiae in Support of Respondents at 24, *Cuellar de Osorio*, 134 S. Ct. 2191 (2014) (No. 12-930).

200. *Cuellar de Osorio*, 134 S. Ct. at 2203-2212 (Kagan, J., plurality opinion), 2214-2216 (Roberts, C.J., concurrence).

narrow one.<sup>201</sup> In interpreting the statutory language, she relied on the plain language of the statute, the statutory context (the meaning of the same terms in other parts of the same Act), and the logical outcome of each interpretation.<sup>202</sup> She held that, given this internal tension, it was appropriate to defer to the BIA's reasonable selection of which interpretation to apply.

Justice Roberts in the concurrence was strongly critical of this approach.<sup>203</sup> While he still found the statute ambiguous, he did not do so as a result of internal conflict within the statute. He emphasized that *Chevron* was based on the premise that Congress intended to assign responsibility to resolve an ambiguous provision to the agency but that direct conflict was not ambiguity: "*Chevron* is not a license for an agency to repair a statute that does not make sense."<sup>204</sup> This issue was avoided, however, as Justice Roberts found that there was no internal conflict or tension in INA § 203(h)(3) as it was possible (and required) to interpret the provision as a coherent whole.<sup>205</sup> Focusing on the plain language of the statute, he interpreted the first clause as stating a condition, rather than as granting a benefit to a broad group as in the plurality opinion.<sup>206</sup> He then relied on Congress' silence with respect to which petitions can be automatically converted in the second clause to find the provision ambiguous.<sup>207</sup>

Because both the plurality and concurring opinions found that INA § 203(h)(3) was ambiguous at step one of the *Chevron* analysis, they moved on to assessing the reasonableness of the BIA's interpretation of it at *Chevron* step two. Neither spent long on this portion of their analysis before concluding that the BIA's interpretation was reasonable.<sup>208</sup> For the plurality, Justice Kagan held that "the Board chose a textually reasonable construction consonant with its view of the purposes and policies underlying immigration law."<sup>209</sup> She thus focused on the consistency of the BIA's interpretation with the statutory language and on the policy reasons advanced by the BIA. She also mentioned the greater administrative simplicity of the BIA's interpretation.<sup>210</sup>

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201. *Id.* at 2203-2205.

202. *Id.* at 2203-2212.

203. *Id.* at 2214.

204. *Id.* at 2214.

205. *Id.* at 2214 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). Justice Roberts did not discuss what he believed to be the appropriate approach in a case where such internal tension actually existed.

206. *Id.* at 2214-15.

207. *Id.* at 2215.

208. *Id.* at 2212-13, 2215-16.

209. *Id.* at 2213.

210. *Id.* at 2212.

In his concurring opinion, Justice Roberts relied on the “ordinary meaning of the statutory terms,” the statutory context and meaning of the statutory terms in other areas of immigration law, and “with the structure of the family-based immigration system.”<sup>211</sup> Like Justice Kagan, he also highlighted the fact that the BIA’s interpretation avoided problems that would come with the other proposed interpretations of the statute.

Both dissenting opinions, like the Ninth Circuit’s opinion being reviewed, would have resolved the case at *Chevron* step one by finding the language of the statute unambiguously applied to aged-out derivative beneficiaries in all five family preference categories.<sup>212</sup> Justice Alito’s dissent was brief, and focused on the fact that the mandatory word “shall” appears twice in INA § 203(h)(3).<sup>213</sup> The heart of Justice Sotomayor’s disagreement with respect to how the statute should be interpreted boils down to this: “Because the Court and the BIA ignore obvious ways in which [INA § 203](h)(3) can operate as a coherent whole and instead construe the statute as a self-contradiction that was broken from the moment Congress wrote it, I respectfully dissent.”<sup>214</sup> Justice Sotomayor, in interpreting the statutory language, repeated that she was using traditional tools of statutory construction to interpret INA § 203(h)(3), including looking at compatibility with the rest of the law.<sup>215</sup>

As in *Martinez-Gutierrez*, the uncontroversial invocation of *Chevron* deference is significant in that it demonstrates that the Court was not hesitant to apply ordinary administrative law principles in the “exceptional” immigration context.<sup>216</sup> While the Court did again ultimately defer to the agency’s construction of the statute, it did so only after an in-depth inquiry into the BIA’s position. Immigration was treated no differently than any other area of administrative law, again reinforcing the erosion of a theory of immigration exceptionalism.

*Cuellar de Osorio* differs from *Martinez-Gutierrez*, however, in the apparent difficulty the Justices had in reaching agreement on any one approach or outcome. The members of the Court that heard the two cases were the same; there had been no change in the composition of the Court between *Martinez-Gutierrez* and *Cuellar de Osorio*.<sup>217</sup> So what explains the radically greater divergence in opinions in *Cuellar de Osorio*?

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211. *Id.* at 2215.

212. *Id.* at 2216-17.

213. *Id.* at 2216.

214. *Id.* at 2217.

215. *Id.* at 2228.

216. See Kevin Johnson, *Opinion analysis: Another stop at the Chevron station and deference to the BIA*, SCOTUSBLOG (June 9, 2014, 3:26 PM), <http://www.scotusblog.com/2014/06/opinion-analysis-another-stop-at-the-chevron-station-and-deference-to-the-bia/>.

217. See *Justices: Current Members*, SUPREME COURT OF THE UNITED STATES: ABOUT THE COURT, <https://www.supremecourt.gov/about/biographies.aspx> (last visited May 18, 2017).

One possibility is the fact that *Martinez-Gutierrez* focused primarily on *Chevron* step two, while the controversy in *Cuellar de Osorio* was centered on the meaning of the statutory language at *Chevron* step one. The disagreement in *Cuellar de Osorio*, then, was the Court's relatively standard disagreement with respect to how statutes should be interpreted and the role of these principles of statutory interpretation in the *Chevron* analysis.<sup>218</sup> In addition to the usual *Chevron* step one questions highlighted in the discussion of *Martinez-Gutierrez*, *Cuellar de Osorio* added an additional question: How should potentially conflicting or contradictory statutory language be interpreted?<sup>219</sup> There was some recognition of this meta-debate regarding the role of statutory interpretation at *Chevron* step one within the opinions in *Cuellar de Osorio*, although for the most part the Justices were simply engaged in the interpretation without discussing the theory of it.<sup>220</sup>

Another layer of interpretation of the divergence of opinions in *Cuellar de Osorio* is that this was the beginning of the next step of the erosion of a theory of immigration exceptionalism. While courts have increasingly begun to invoke ordinary principles of administrative (and constitutional) law in immigration cases, these theories are sometimes applied at a very surface level with little recognition or real analysis of the troubling questions inherent in the doctrines.<sup>221</sup> The Justices in *Cuellar de Osorio* began to grapple with the deeper questions and issues that remain particularly unresolved in the immigration context. As a result, new areas of disagreement were revealed.

### 3. *Mellouli v. Lynch*

*Mellouli v. Lynch* was heard by the Supreme Court during the October 2014 term, just one term after *Cuellar de Osorio*.<sup>222</sup> The case turned on the BIA's interpretation of the controlled substance ground of deportability, which provides: "Any alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State . . . relating to a controlled substance (as defined in section 102 of the Controlled Substances Act . . .) . . . is deportable."<sup>223</sup> *Mellouli* was convicted of misdemeanor possession of drug paraphernalia, in his case a sock used to store a controlled substance, in violation of a Kansas

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218. See, e.g., Abbe R. Gluck, *What 30 Years of Chevron Teaches Us About the Rest of Statutory Interpretation*, 83 *FORDHAM L. REV.* 607 (2014).

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

220. See, e.g., *Cuellar de Osorio*, 134 S. Ct. at 2207, 2213, 2214, 2216, 2217, 2220.

221. Kate Aschenbrenner Rodriguez, *Irreconcilable Similarities: The Inconsistent Analysis of 212(c) and 212(h) Waivers*, 69 *OKLA. L. REV.* 111, 114, 196-201 (2017).

222. *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015); *Cuellar de Osorio*, 134 S. Ct. at 2203.

223. INA § 237(a)(2)(B)(i); see also *Mellouli*, 135 S. Ct. at 1984-85.

statute.<sup>224</sup> The question at issue was whether this conviction fell within the controlled substance ground of deportability.<sup>225</sup> The BIA held that it did, and the Eighth Circuit deferred to this interpretation as reasonable.<sup>226</sup> The Supreme Court disagreed, finding that the BIA's interpretation was not reasonable.<sup>227</sup> Justice Ginsburg wrote the opinion of the Court.<sup>228</sup> Justice Thomas filed a dissenting opinion, which was joined by Justice Alito.<sup>229</sup>

The Supreme Court clearly applied ordinary principles of administrative law, specifically *Chevron* deference (as did the Eighth Circuit).<sup>230</sup> Furthermore, unlike in *Martinez-Gutierrez* and *Cuellar de Osorio*, the Supreme Court applied those principles to overturn the agency's decision, finding it unreasonable, instead of to defer to it. This is further evidence of the erosion of a theory of immigration exceptionalism.<sup>231</sup>

However, the Supreme Court's invocation of *Chevron* may raise more questions than it answers. The two-step *Chevron* analysis was not used as an overarching framework for the Court's decision. The same was essentially true of the Eighth Circuit decision the Supreme Court was reviewing and of the parties' merits briefs before the Supreme Court.<sup>232</sup> None of the Amici Curiae so much as reference *Chevron* in their briefs. *Chevron* was, however, raised by the Justices several times during oral argument, both with Mellouli's counsel and government counsel.<sup>233</sup>

*Chevron* was referenced exactly once in the Supreme Court's opinion, in the Court's description of its conclusion that the BIA's position was unreasonable: "Because it makes scant sense, the BIA's interpretation, we hold, is owed no deference under the doctrine described in *Chevron* . . . ." <sup>234</sup> The Court's opinion was comparatively brief, and focused primarily on the particulars of the case rather than on any overarching legal

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224. *Id.* at 1985.

225. *Id.* at 1984.

226. *Mellouli v. Holder*, 719 F.3d 995, 998-1000 (8th Cir. 2013).

227. *Mellouli*, 135 S. Ct. at 1989.

228. *Id.* at 1983-91.

229. *Id.* at 1991-95.

230. *Id.* at 1989; *Mellouli*, 719 F.3d at 1000.

231. For a different interpretation of the invocation of *Chevron* in *Mellouli*, see Patrick Glen, *Response to Walker on Chevron Deference and Mellouli v. Lynch*, YALE J. ON REG.: NOTICE & COMMENT (June 10, 2015), <http://yalejreg.com/nc/response-to-walker-on-chevron-deference-and-mellouli-v-lynch-by-patrick-glen/> (taking the position that *Chevron* was a strawman, "brought out to the scaffold only to be summarily executed on the Court's path to an interpretation of the statute it prefers.")

232. *Mellouli*, 719 F.3d at 1000.

233. See Transcript of Oral Argument at 5-6, 30-31, 44, *Mellouli*, 135 S. Ct. 1980 (No. 13-1034).

234. *Mellouli*, 135 S. Ct. at 1989 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)).

theory.<sup>235</sup> Justice Thomas' dissent did not mention *Chevron* or deference at all, even to discuss whether or not they are applicable.<sup>236</sup> It treated the case as a question purely of statutory interpretation.<sup>237</sup>

The first, and perhaps most significant for this case, question left unanswered by the Court's opinion was whether *Chevron* was applicable at all.<sup>238</sup> In his initial merits brief to the Court, Mellouli argued "[t]here is no place for *Chevron* deference in this case."<sup>239</sup> He stated briefly that the Court in the past had determined for itself "the elements that Congress requires for immigration consequences to attach to a conviction for purposes of categorical analysis," rather than deferring to the BIA's determination, but did not offer any kind of rationale or explanation for this phenomenon.<sup>240</sup> Mellouli expanded somewhat on this issue in a footnote in his reply brief, explaining that the terms being interpreted have "criminal implications."<sup>241</sup> The Attorney General, on the other hand, argued that *Chevron* deference was appropriate because the BIA was interpreting the immigration laws, citing to the Supreme Court's decision in *Cuellar de Osorio*, among other cases.<sup>242</sup> He conceded that deference was not due to the BIA's interpretation of purely criminal statutes, but argued that this exception did not apply in the situation at hand, where the BIA was using "the 'categorical approach' to determine if a state crime met a federal statutory definition."<sup>243</sup> As discussed further below in section III.B.1, this is an important area in substantial need of clarification from the Supreme Court.

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235. See also Kevin Johnson, *Opinion analysis: Court rejects removal based on misdemeanor drug paraphernalia conviction*, SCOTUSBLOG (June 1, 2015, 1:42 PM), <http://www.scotusblog.com/2015/06/opinion-analysis-court-rejects-removal-based-on-misdemeanor-drug-paraphernalia-conviction/> ("Today's decision is a typical statutory interpretation and agency deference case, which would not seem to have many far-reaching doctrinal implications.").

236. *Mellouli*, 135 S. Ct. at 1991-95.

237. *Id.*

238. See, e.g., Kevin Johnson, *Argument preview: Removal for a misdemeanor "drug paraphernalia" conviction*, SCOTUSBLOG (Jan. 2, 2015, 3:28 PM), <http://www.scotusblog.com/2015/01/argument-preview-removal-for-a-misdemeanor-drug-paraphernalia-conviction/> ("Indeed, the argument has been made that *Chevron* deference is not justified in instances like this one given that the BIA's expertise is in *immigration*, not *criminal*, law.").

239. Petitioner's Brief on the Merits at 11, *Mellouli*, 135 S. Ct. 1980 (No. 13-1034).

240. *Id.* at 35 (citing *Moncrieffe v. Holder*, 569 U.S. 184, 189-93 (2013); *Kawashima v. Holder*, 565 U.S. 478, 481-84 (2012); *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 573-74 (2010); *Nijhawan v. Holder*, 557 U.S. 29, 33-34 (2009); *Gonzales v. Duenas- Alvarez*, 549 U.S. 183, 186 (2007); *Lopez v. Gonzales*, 549 U.S. 47, 48 (2010); *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004)). Mellouli also argues in the alternative that the Congressional language was unambiguous or that the BIA's position was unreasonable. *Id.* at 35-42.

241. Petitioner's Reply Brief on the Merits at 19 n.6, *Mellouli*, 135 S. Ct. 1980 (No. 13-1034) (citing *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014) ("The critical point is that criminal laws are for courts, not for the Government, to construe.")).

242. Brief for the Respondent at 45, *Mellouli*, 135 S. Ct. 1980 (No. 13-1034).

243. *Id.* at 45-48.

The Court furthermore did not address additional questions on the application of the two steps of the *Chevron* analysis. First, the Court did not specify whether it was resolving the case at *Chevron* step one or *Chevron* step two.<sup>244</sup> Because the Court highlighted the “scant sense” of the BIA’s interpretation, it would appear that they were reviewing the reasonableness of the agency’s position at step two. If this is the case, however, the Court did not address step one at all; there was no discussion whatsoever of whether Congress had spoken clearly. The opinion, therefore, provides no guidance on how to apply the traditional tools of statutory construction and interpret a statute as part of *Chevron* step one.

The Court did address step two, but only in application. Before concluding that the BIA’s position was unreasonable, the Court discussed in particular the consistency of the BIA’s position with the language of the statute, the history of the interpretation of this provision, and the fit of the BIA’s interpretation within the overall statutory scheme.<sup>245</sup> Presumably, then, these are among the factors that should be considered in assessing the reasonableness of the agency’s position. The Court’s opinion provided only the most limited guidance on this point, however, as the Court never stated this explicitly, much less explored their comparative importance or the relevance of other factors.

Furthermore, there is an analytical problem if the Court is in fact resolving the case at *Chevron*’s step two. Normally, where a statute is ambiguous but the agency’s interpretation is unreasonable, the appropriate action for a reviewing court is to reverse and remand the case to the agency for it to issue a new decision.<sup>246</sup> Instead of doing so here, however, the Court’s opinion can be read as reaching its own interpretation of the statute.<sup>247</sup> This would make the Court’s opinion somewhat internally contradictory – the statute is ambiguous for purposes of *Chevron* step one, but clear for purposes of the Court’s own interpretation. The Court says nothing to resolve this apparent tension.

#### 4. *Esquivel Quintana v. Sessions*

In the October 2016 term, the Supreme Court heard a case that squarely presented the opportunity for the Court to answer many of the unanswered, and unacknowledged, questions regarding the role of administrative law within the immigration context: *Esquivel Quintana v.*

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244. See Christopher Walker, *The “Scant Sense” Exception to Chevron Deference in Mellouli v. Lynch*, YALE J. ON REG.: NOTICE & COMMENT (June 2, 2015), <http://yalejreg.com/nc/the-scant-sense-exception-to-chevron-deference-in-mellouli-v-lynch-by-chris-walker/>.

245. *Mellouli*, 135 S. Ct. at 1986-89.

246. See *Negusie v. Holder*, 555 U.S. 511 (2009). Cf. *Judulang v. Holder*, 565 U.S. 42 (2011).

247. *Mellouli*, 135 S. Ct. at 1991. See Glen, *supra* note 231.



*Sessions*.<sup>248</sup> Juan Esquivel Quintana was convicted under California Penal Code § 261.5 for having consensual sex with his 16-year-old girlfriend when he was 20. The Court considered whether this conviction constituted an aggravated felony, specifically sexual abuse of a minor under INA § 101(a)(43)(A).

The BIA held that “sexual abuse of a minor” in INA § 101(a)(43)(A) categorically encompassed convictions under California Penal Code § 261.5.<sup>249</sup> The Sixth Circuit applied *Chevron* deference and found that INA § 101(a)(43)(A) was ambiguous but that the BIA’s interpretation was reasonable.<sup>250</sup> The Sixth Circuit addressed the *Chevron* step zero question, beginning its analysis with the broad statement: “The Supreme Court and Sixth Circuit have repeatedly held that *Chevron* deference applies to the Board’s interpretations of immigration laws.”<sup>251</sup> The Sixth Circuit then noted that at least three other circuit courts had applied *Chevron* to the BIA’s interpretation of sexual abuse of a minor,<sup>252</sup> while at least two other circuit courts had not.<sup>253</sup> Finally, the Sixth Circuit rejected arguments that *Chevron* deference should be supplanted, either due to the fact that this was a criminal hybrid statute or to the fact that the rule of lenity should apply.<sup>254</sup>

In his brief before the Supreme Court, Esquivel Quintana simply applied the *Chevron* analysis without briefing the question of *Chevron*’s applicability. However, the National Association of Criminal Defense Lawyers (“NACDL”), as amicus curiae in support of Esquivel Quintana, considered at length the question of whether *Chevron* was applicable under these circumstances, ultimately concluding that it was not. NACDL argued first that *Chevron* deference should not be afforded to BIA interpretations of aggravated felony provisions because of the criminal law implications of those provisions.<sup>255</sup> They advocated for the

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248. *Esquivel Quintana v. Lynch*, 137 S. Ct. 368 (2016); *see also* *Esquivel Quintana v. Sessions*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/esquivel-quintana-v-lynch/> (last visited May 18, 2017).

249. *Esquivel Quintana v. Lynch*, 810 F.3d 1019, 1024-27 (6th Cir. 2016).

250. *Id.*

251. *Id.* at 1021-22 (citing *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203, 2214 (2014)); *Negusie v. Holder*, 555 U.S. 511, 516-17 (2009); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999); *Kellermann v. Holder*, 592 F.3d 700, 702 (6th Cir. 2010); *Singh v. Gonzales*, 451 F.3d 400, 403 (6th Cir. 2006)).

252. *Id.* at 1022 (citing *Velasco-Giron v. Holder*, 773 F.3d 774, 776 (7th Cir. 2014); *Restrepo v. Att’y Gen.*, 617 F.3d 787, 796 (3d Cir. 2010); *Mugalli v. Ashcroft*, 258 F.3d 52, 60 (2d Cir. 2001)).

253. *Id.* at 1021-22 (citing *Amos v. Lynch*, 790 F.3d 512, 518-20 (4th Cir. 2015); *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1156-58 (9th Cir. 2008)).

254. *Id.* at 1022-24.

255. Brief of the Nat’l Assoc. of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner at 6-12, *Esquivel Quintana v. Sessions*, 137 S. Ct. 368 (2016) (No. 16-54).

application of the rule of lenity in *Chevron*'s stead.<sup>256</sup> In the alternative, NACDL argued that, even if the *Chevron* framework was applicable, deference to the BIA's interpretation of "sexual abuse of a minor" was not warranted because the BIA had no criminal law expertise and their interpretation would harm criminal defense attorneys.<sup>257</sup> The government contended that *Chevron* deference was applicable in a brief argument that essentially mirrored the Sixth Circuit's decision.<sup>258</sup> As discussed below, the Supreme Court appeared to be concerned with *Chevron*'s applicability, raising this issue during oral argument.<sup>259</sup>

As for *Chevron* steps one and two, Esquivel Quintana took the position that "sexual abuse of a minor" under INA § 101(a)(43)(A) unambiguously excluded his conviction. He explained that a statute could not be termed ambiguous until all tools of statutory interpretation, including the categorical approach, had been exhausted.<sup>260</sup> After applying the categorical approach, looking at the plain language and context of the statute, construing any ambiguities in favor of the noncitizen, and applying the rule of lenity, he concluded that "sexual abuse of a minor" did not include consensual sex between a 20-year-old and someone who was almost 18.<sup>261</sup> Alternatively, Esquivel Quintana argued that the BIA's interpretation of the phrase was unreasonable because the BIA erred legally in three ways: the BIA was functionally arguing against the categorical approach, the BIA sought guidance to interpret "criminal abuse of a minor" from noncriminal sources, and the BIA should have, at a minimum, applied the principle interpreting deportation narrowly and the criminal rule of lenity.<sup>262</sup>

The government, on the other hand, appears to have argued that "sexual abuse of a minor" unambiguously included convictions such as Esquivel Quintana's or, in the alternative, that the BIA's interpretation of California Penal Code § 261.5 to include such convictions was reasonable.<sup>263</sup> The government viewed the relationship between the categorical approach and *Chevron* deference very differently than Esquivel Quintana. Instead of arguing that the categorical approach should be part of the analysis of the statute at *Chevron* step one, the government argued that *Chevron* deference should be part of the first step

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256. *Id.* at 12-19.

257. *Id.* At 19-24.

258. Brief for the Respondent at 36-38, *Esquivel Quintana*, 137 S. Ct. 368 (No. 16-54).

259. Transcript of Oral Argument, *Esquivel Quintana*, 137 S. Ct. 368 (No. 16-54).

260. Brief for the Petitioner at 35-45, *Esquivel Quintana*, 137 S. Ct. 368 (No. 16-54).

261. *Id.*

262. *Id.* at 45-48.

263. Brief for the Respondent, *supra* note 258..

of the categorical approach.<sup>264</sup> The government also argued that the rule of lenity should not be triggered until all tools of statutory interpretation, including deference, have been employed.<sup>265</sup>

The Supreme Court appeared to be concerned with the role and application of *Chevron* deference during oral argument.<sup>266</sup> With respect to the applicability of *Chevron* deference, Justice Alito asked Esquivel Quintana's counsel whether he was asking for *Chevron* to be overturned;<sup>267</sup> Justice Kennedy asked why the BIA had any expertise interpreting criminal statutes;<sup>268</sup> and Justice Kagan proposed an exception to *Chevron* deference where criminal law came into play.<sup>269</sup> Justices Breyer and Roberts also discussed the interplay between immigration and criminal law and the implications for *Chevron*.<sup>270</sup>

Given the depth at which these issues of administrative law were addressed, both in the briefs and during oral argument, it seemed reasonable to expect that the Supreme Court would take this opportunity to resolve at least some of the unanswered and unacknowledged questions with respect to the role of administrative law in the immigration context. However, the Court ultimately failed to do so. In an opinion issued on May 30, 2017, the Court reversed the BIA and the Sixth Circuit, holding that a conviction under California Penal Code § 261.5 was not an aggravated felony because the California statute did not categorically fall within the definition of "sexual abuse of a minor."<sup>271</sup> Justice Thomas delivered the opinion of the Court, joined by all of the other Justices with the exception of Justice Gorsuch, who was not yet part of the Court at the time the case was argued.<sup>272</sup>

The majority of the Court's decision focused on the analysis of whether the relevant California statute was categorically a sexual abuse of a minor aggravated felony.<sup>273</sup> The Court only mentioned *Chevron*, or any kind of deference, in the last, very brief, section of its decision.<sup>274</sup> The Court stated: "We have no need to resolve whether the rule of lenity or *Chevron*

264. *Id.* at 36-55.

265. *Id.* at 12-13.

266. See also, e.g., Kevin Johnson, *Argument analysis: Justices divided on meaning of "sexual abuse of a minor" for removal purposes*, SCOTUSBLOG (Feb. 27, 2017, 8:10 PM), <http://www.scotusblog.com/2017/02/argument-analysis-justices-divided-meaning-sexual-abuse-minor-removal-purposes/>.

267. Transcript of Oral Argument, *supra* note 259, at 6.

268. *Id.* at 38-39.

269. See generally *id.*

270. *Id.*

271. *Esquivel Quintana v. Sessions*, 137 S. Ct. 1562, 1572-73 (2017).

272. *Id.* at 1567.

273. *Id.* at 1567-73.

274. *Id.* at 1572.

receives priority in this case because the statute, read in context, unambiguously forecloses the Board's interpretation. Therefore, neither the rule of lenity nor *Chevron* applies."<sup>275</sup> This could be read as a *Chevron* step one decision, a holding at step one of the *Chevron* framework that Congress had spoken clearly such that there was no room for agency interpretation. However, the Court also stated that the *Chevron* framework did not apply. This part of the Court's conclusion seems more like a *Chevron* step zero analysis. The Court did not explain its conclusion or the basis for it any further. Rather than clarifying the role and application of *Chevron* deference in immigration cases or in specific types of immigration cases, then, the Court's decision in *Esquivel Quintana* only further confuses it.

### *B. Agency Policymaking – Arbitrary and Capricious Review*

The Supreme Court invoked arbitrary and capricious review in just a single case between 2010 and 2016: *Judulang v. Holder*, decided by the Court on December 12, 2011.<sup>276</sup> Arbitrary and capricious review comes from Section 706(2)(A) of the APA, which provides that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>277</sup> It is typically triggered by agency policymaking, rather than the agency legal conclusions that trigger *Chevron* deference.<sup>278</sup> *Judulang* was heard in the same term as the first *Chevron* case discussed above – *Holder v. Martinez-Gutierrez* – but was decided before arguments in *Martinez-Gutierrez* were heard.<sup>279</sup> The Court ruled in favor of *Judulang*, overturning the agency's action.

#### 1. *Judulang v. Holder*

Joel *Judulang*'s case turned on the BIA's interpretation of who remained eligible for relief from removal under the former section 212(c) of the INA.<sup>280</sup> The history of the case and its place and significance among the 212(c) decisions was explained at length in my prior article, *Irreconcilable Similarities: The Inconsistent Analysis of 212(c) and 212(h) Waivers*.<sup>281</sup> In brief, INA § 212(c) has a complex and heavily

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275. *Id.*

276. *Judulang v. Holder*, 565 U.S. 42 (2011).

277. 5 U.S.C. § 706(2)(A) (2012).

278. ERNEST GELLHORN & RONALD M. LEVIN, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 102-107 (5th ed. 2006).

279. *Judulang*, 565 U.S. 42; *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011 (2012).

280. *Judulang*, 565 U.S. 42.

281. Rodriguez, *supra* note 16, at 165-69.

litigated legal history in multiple respects.<sup>282</sup> It is a waiver of inadmissibility in Section 212 of the INA, but has been expanded through a series of court decisions to also apply to certain noncitizens charged as deportable.<sup>283</sup> It was repealed by the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) in 1996,<sup>284</sup> but the Supreme Court held that it must remain retroactively available to noncitizens who were convicted prior to the date of repeal.<sup>285</sup> A final regulation meant to implement these decisions was promulgated in 2004.<sup>286</sup> The regulations provided that, in order to be eligible for 212(c) relief, the charged ground of deportability must have a statutory counterpart in the grounds of inadmissibility in the INA.<sup>287</sup>

Judulang was charged as deportable for an aggravated felony crime of violence because of his conviction for voluntary manslaughter.<sup>288</sup> The BIA found that he was not eligible for 212(c) relief because, it held, aggravated felony crimes of violence did not have a substantially similar statutory counterpart in the grounds of inadmissibility.<sup>289</sup> The Ninth Circuit agreed in an unpublished and brief decision, relying on one of its prior decisions as controlling.<sup>290</sup> The Ninth Circuit’s opinion in *Judulang* did not mention *Chevron* or any other form of deference to the agency’s interpretation.<sup>291</sup> The prior decision that it relied on – *Abebe v. Gonzales* – applied *Chevron* deference to the BIA’s interpretation of INA § 212(c), holding that Congress had not spoken clearly but the BIA’s interpretation was reasonable.<sup>292</sup>

The Supreme Court disagreed with the Ninth Circuit with respect to both substance and framework, rejecting *Chevron* deference and instead finding the BIA’s approach to be arbitrary and capricious in violation of

282. See, e.g., *id.* at 122-71; Patrick Glen, *Judulang v. Holder and the Future of 212(c) Relief*, 27 GEO. IMMIGR. L.J. 1, 6-15 (2013); 6 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 74.04(2)(a) (Matthew Bender, rev. ed. 2016);

283. See, e.g., Rodriguez, *supra* note 16, at 122-71; Matter of Abdelghany, 26 I&N Dec. 254 (BIA 2014).

284. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-546, 3009-597 (1996).

285. *INS v. St. Cyr*, 533 U.S. 289, 314-326 (2001); *Vartelas v. Holder*, 566 U.S. 257 (2012); Matter of Abdelghany, 26 I&N Dec. at 268-69.

286. *Blake v. Carbone*, 489 F.3d 88, 97 (2d Cir. 2007); 8 C.F.R. § 1212.3(f)(5) (2005).

287. 8 C.F.R. § 1212.3(f)(5).

288. *Judulang v. Holder*, 565 U.S. 42, 51-52 (2011).

289. *Judulang v. Gonzales*, 249 Fed. App’x 499, 502 (9th Cir. 2007), *rev’d and remanded*, 565 U.S. 42.

290. *Id.* (citing *Abebe v. Gonzales*, 493 F.3d 1092 (9th Cir. 2007)). The Ninth Circuit’s subsequent decisions in the *Abebe* litigation occurred after this decision in *Judulang*. See *Abebe v. Mukasey*, 577 F.3d 1113 (9th Cir. 2009).

291. See *Judulang*, 249 Fed. App’x at 502.

292. *Id.* at 502; *Abebe*, 493 F.3d 1092.

Section 706(2)(A) of the APA.<sup>293</sup> Justice Kagan again delivered the opinion for a unanimous Court.<sup>294</sup> Like many of the *Chevron* cases previously discussed, the Court's opinion in *Judulang* reads like a straightforward, ordinary application of administrative law principles. The applicability of administrative law in the first instance, or its interpretation particular to the immigration context, were not contested or questioned.

The Supreme Court explained that, in order to survive arbitrary and capricious review, an agency must provide a reasoned explanation, based on “non-arbitrary, ‘relevant factors’” for its choices when setting policy.<sup>295</sup> In the immigration context, this means “that the BIA's approach must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system.”<sup>296</sup> The Supreme Court held that the BIA's approach failed this test: “Rather than considering factors that might be thought germane to the deportation decision, that policy hinges § 212(c) eligibility on an irrelevant comparison between statutory provisions.”<sup>297</sup> Again, this straightforward application of administrative law is further evidence of the erosion of immigration exceptionalism. As in the previous cases, however, there are gaps in the Court's treatment of these administrative law issues.

First, the Supreme Court's choice of which administrative law framework to apply was in some respects remarkable. Neither the Ninth Circuit in the opinion being reviewed nor the numerous other major decisions reviewing the BIA's interpretation of who was eligible for 212(c) relief had so much as considered arbitrary and capricious review.<sup>298</sup> *Judulang* in his initial brief argued his case under the APA arbitrary and capricious framework.<sup>299</sup> He failed to explain, however, why this approach was more appropriate than the *Chevron* deference relied on by the Ninth Circuit. The Attorney General, on the other hand, argued the case under *Chevron* deference without addressing the use of the arbitrary and capricious framework.<sup>300</sup> None of the amicus briefs addressed this

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293. *Judulang*, 565 U.S. at 52-53 n.7.

294. *Id.* at 45.

295. *Judulang*, 565 U.S. at 55 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

296. *Id.*

297. *Id.*

298. See Rodriguez, *supra* note 16, at 128-71.

299. Brief for Petitioner at 31-55, *Judulang*, 565 U.S. 42 (No. 10-694). *Judulang*'s petition for certiorari proceeded in the same manner, arguing that the BIA's interpretation was arbitrary and capricious in violation of the APA, without discussing why this framework should have been substituted for the *Chevron* deference employed by the Ninth Circuit. Petition for Writ of Certiorari at 17, 26, *Judulang*, 565 U.S. 42 (No. 10-694).

300. Brief for Respondent at 18-30, *Judulang*, 565 U.S. 42 (No. 10-694). Specifically, the Attorney General argued that the statutory language of INA § 212(c) was ambiguous at *Chevron* step one and the

choice between administrative law frameworks. It is somewhat surprising to see such a major shift in approach receive such little discussion and analysis.

Setting aside the jarring nature of the switch, however, in substance it was at a minimum justifiable as a logical and legally sound change. In a footnote, the Court explained that the agency was not interpreting a statute Congress had charged it with administering and, therefore, *Chevron* deference was not triggered.<sup>301</sup> INA § 212(c) did not even mention grounds of deportation, so it was a stretch to consider the BIA's comparable-grounds rule to be a statutory interpretation.<sup>302</sup> As a general rule, however, there is no bright line between legal interpretations and agency policymaking, and it can be challenging to determine how to classify individual agency actions. The Supreme Court in *Judulang* did not provide guidance on how to make this determination moving forward, even though such guidance might have been expected given the change in analytical framework.

Second, both *Judulang*<sup>303</sup> and the Court<sup>304</sup> acknowledged that both the analysis and the result of arbitrary and capricious review would be the same as reviewing the reasonableness of the BIA's position under step two of *Chevron*.<sup>305</sup> This means that the choice of framework likely had little effect on the outcome. This parallel has potentially significant implications for administrative law, but was not explored further by the Court.

### III. TESTING THE THEORY – IS IMMIGRATION EXCEPTIONALISM REALLY BEING ERODED?

In the October 2010 to October 2016 terms, the Supreme Court issued the seven immigration decisions discussed above in Sections I and II, that included reference to ordinary principles of administrative law.<sup>306</sup> Over

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BIA's reasonable interpretation of that language was entitled to deference at *Chevron* step two. *Id.* at 18-20.

301. *Id.*

302. *Id.*

303. Brief for Petitioner, *supra* note 299, at 44 n.16 (citing *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53 (2011)) (“Whether understood under the Administrative Procedure Act, 5 U.S.C. §706(2)(A), or under the second step of *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984), the standard is the same: whether the BIA's policy is ‘arbitrary or capricious in substance.’”).

304. *Judulang*, 565 U.S. at 52 n.7 (quoting *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53 (2011)) (“Were we to do so, our analysis would be the same, because under *Chevron* step two, we ask whether an agency interpretation is ‘arbitrary or capricious in substance.’”).

305. *See also* Rodriguez, *supra* note 16, at 166-69, 196-202.

306. This works out to an average of one case per term. In fact, however, three of the cases were decided in the October 2014 term, and none of the cases were heard in the October 2010 term. Although no substantive decision was issued as a result of a tie vote, the Supreme Court did consider *United States*

the same period of time (the October 2010 to October 2016 terms), the Supreme Court released four additional immigration opinions that did *not* mention administrative law despite its at least arguable applicability. Three of these cases – *Kawashima v. Holder*,<sup>307</sup> *Moncrieffe v. Holder*,<sup>308</sup> and *Luna Torres v. Lynch*<sup>309</sup> – dealt with various aggravated felony grounds for removal. A fourth case, *Vartelas v. Holder*, considered the retroactive application of the Illegal Immigration Reform and Immigrant Responsibility Act’s new definition of admission.<sup>310</sup>

The fact that the Supreme Court did not apply ordinary principles of administrative law in these cases does not automatically counter the erosion of the theory of immigration exceptionalism discussed above in Sections I and II. In some respects, these cases may be taken as further supporting the erosion of immigration exceptionalism. In other respects, however, these cases highlight the slow and uneven nature of this erosion. Many of the same, and some new, unanswered questions with respect to the role of administrative law in immigration cases are evident. The fact that the Supreme Court failed to discuss why it was not applying arguably relevant principles of administrative law is particularly problematic.

Section III.A below discusses those Supreme Court immigration opinions that did not invoke administrative law and the potentially applicable administrative law questions that were not addressed. Section III.B summarizes the themes and remaining questions from all of the Supreme Court immigration cases discussed in this article, both those that did and those that did not invoke administrative law. Section III.C is forward looking. It considers the Supreme Court’s opportunity through various cases in the October 2017 term, including the cases challenging Trump’s entry ban, to confront some of the unanswered and unacknowledged questions.

#### A. Administrative Law Not Invoked

The Supreme Court heard four immigration cases from the October 2010 through the October 2016 terms where administrative law principles were at least arguably applicable but were not discussed in the Supreme Court’s decisions. In all but one of these cases, administrative law principles were squarely before the Court, either because they were raised by the lower courts or because they were argued by the parties or amici

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v. *Texas* in the October 2015 term, which involved substantial immigration and administrative law issues. See *United States v. Texas*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/united-states-v-texas/>.

307. 565 U.S. 478 (2012).

308. 569 U.S. 184 (2013).

309. 136 S. Ct. 1619 (2016).

310. 566 U.S. 257 (2012).



curiae. The exception is *Moncrieffe v. Holder*, where neither the Fifth Circuit nor the parties nor the amici curiae raised administrative law arguments.<sup>311</sup>

Three of the cases – *Kawashima v. Holder*,<sup>312</sup> *Moncrieffe v. Holder*,<sup>313</sup> and *Luna Torres v. Lynch*<sup>314</sup> – concerned noncitizens removable for aggravated felony convictions and involved similar themes. Section III.A.1 discusses these cases. The fourth case, *Vartelas v. Holder*,<sup>315</sup> involved a lawful permanent resident who took a brief trip abroad and was charged as inadmissible upon his return because of the new definition of admission in INA § 101(a)(13)(C). Section III.A.2 discusses this case.

### 1. Aggravated Felonies – *Kawashima*, *Moncrieffe*, and *Luna Torres*

*Kawashima v. Holder*,<sup>316</sup> *Moncrieffe v. Holder*,<sup>317</sup> and *Luna Torres v. Lynch*<sup>318</sup> all dealt with interpretations of the definition of “aggravated felonies” in INA § 101(a)(43). A conviction for an aggravated felony at any time after admission makes a noncitizen deportable pursuant to INA § 237(a)(2)(A)(iii). It will also bar eligibility for certain immigration benefits and forms of relief from removal.<sup>319</sup>

*Kawashima* was heard by the Supreme Court in the October 2011 term, along with *Vartelas*, discussed in more detail below in Section III.B.2, and *Martinez Gutierrez* and *Judulang*, which were discussed above in Section II. In *Kawashima*, the Supreme Court held that a conviction for filing a false tax return was an offense involving fraud or deceit within the meaning of INA § 101(a)(43)(M)(i).<sup>320</sup> *Moncrieffe* was heard the year after *Kawashima*, in the October 2012 term. The Court in *Moncrieffe* held that a Georgia conviction for possession with intent to distribute was not a drug trafficking crime within the meaning of INA § 101(a)(43)(B).<sup>321</sup> In so holding, the Court in *Moncrieffe* confirmed the use of the categorical approach, which requires a court to determine that all conduct criminalized under a statute fits within the criminal removal ground to

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311. See *Moncrieffe v. Holder*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/moncrieffe-v-holder/>.

312. 565 U.S. 478 (2012).

313. 569 U.S. 184 (2013).

314. 136 S. Ct. 1619 (2016).

315. 566 U.S. 257 (2012).

316. 565 U.S. 478.

317. 569 U.S. 184.

318. 136 S. Ct. 1619.

319. See, e.g., INA § 240A(a) (LPR cancellation of removal); INA § 208(b)(2)(A)(ii) and (B)(i) (asylum).

320. See generally 565 U.S. 478.

321. See generally 569 U.S. 184.

find a noncitizen removable.<sup>322</sup> *Luna Torres* was decided most recently, in the October 2015 term.<sup>323</sup> The Court in *Luna Torres* held that a New York conviction for attempted arson was an offense described in the federal arson statute, 18 U.S.C. § 844, when the New York statute matched all elements of the federal statute except the jurisdictional interstate commerce element.<sup>324</sup>

The Second Circuit in *Luna Torres* and the parties' merits briefs before the Supreme Court in both *Luna Torres* and *Kawashima* engaged in the *Chevron* two-step analysis.<sup>325</sup> The lower court decisions in *Kawashima* (Ninth Circuit) and *Moncrieffe* (Fifth Circuit) and the parties in *Moncrieffe* did not.<sup>326</sup> The Supreme Court opinions in all three cases did not follow the *Chevron* framework. In fact, they did not mention *Chevron*, even to explain why it did not apply. Furthermore, they did not discuss any other type of deference to the agency, or for that matter any aspect of administrative law.

Why was the Supreme Court silent on the question of *Chevron* deference in these three cases? And what explains the difference between these cases and the Supreme Court's decision in *Mellouli*, which referenced *Chevron*, albeit obliquely? It is of course difficult to extract meaning from the Supreme Court's silence, but there are at least several possible explanations.

First, some advocates and commentators have suggested a "*Chevron* Step Zero" type argument that deference to the BIA is not appropriate where the BIA is interpreting statutes or terms that also have meaning in the criminal context rather than the purely immigration statutes it is charged with administering.<sup>327</sup> This is true of the term "aggravated felony," which also plays a role in the context of the sentencing guidelines and is therefore being interpreted simultaneously by the federal courts.<sup>328</sup>

322. *Id.*

323. 136 S. Ct. 1619.

324. *See generally id.*

325. *Torres v. Holder*, 764 F.3d 152, 156-58 (2d Cir. 2014); Brief for the Petitioner at 38-49, *Luna Torres*, 136 S. Ct. 1619 (No. 14-1096); Brief for the Respondent at 45-56, *Luna Torres*, 136 S. Ct. 1619 (No. 14-1096); Brief for the Petitioner at 16, *Kawashima*, 565 U.S. 478 (No. 10-577); Brief for the Respondent at 16, 41 n.17, 43, *Kawashima*, 565 U.S. 478 (No. 10-577).

326. *See Moncrieffe v. Holder*, 662 F.3d 387 (5th Cir. 2011); Brief for the Petitioner, *Moncrieffe*, 569 U.S. 184 (No. 11-702); Brief for the Respondent, *Moncrieffe*, 569 U.S. 184 (No. 11-702); *Kawashima v. Holder*, 615 F.3d 1043 (9th Cir. 2010).

327. *See, e.g.,* Katherine Brady, *Who Decides? Overview of Chevron, Brand X and Mead Principles*, IMMIGRATION LEGAL RESOURCE CENTER (May 2, 2011), [https://www.ilrc.org/sites/default/files/resources/overview\\_of\\_chevron\\_mead\\_brand\\_x.pdf](https://www.ilrc.org/sites/default/files/resources/overview_of_chevron_mead_brand_x.pdf). A broader version of this argument – that *Chevron* deference to the BIA is never appropriate – was voiced by amicus curiae National Immigration Justice Center in their brief in support of Respondent in *Holder v. Martinez Gutierrez*. Brief of the Nat'l Immigration Justice Center as Amicus Curiae in Support of Respondents at 13, *Holder v. Martinez Gutierrez*, 566 U.S. 583 (2012) (No. 10-1542).

328. *See Brady, supra* note 327, at 4 n. 13.

This could explain why the Supreme Court referenced deference in *Mellouli*, where it was confronted with a criminal ground of removability that was not an aggravated felony, and did not reference deference in *Kawashima*, *Moncrieffe*, and *Luna Torres*, where it was concerned with various aggravated felonies. However, the statute at issue in *Mellouli* also contained a reference to a criminal statute – the Controlled Substances Act – which complicates this hypothesis. Overlap between criminal and immigration statutes is common, and accepting this hypothesis could lead to a “confusing patchwork” of situations where deference is and is not applied.<sup>329</sup>

Alternatively, the Supreme Court simply may not be ready to make a definitive statement on this question.<sup>330</sup> There may be too much disagreement among the Justices to craft a coherent decision, or the Justices may still be forming their opinion on the question. As a result, they are muddling through on a case-by-case basis and avoiding the question when possible.

Finally, the explanation may lie in the *Chevron* doctrine itself.<sup>331</sup> The Supreme Court may see *Chevron* as a more flexible doctrine than its relatively rigid analytical structure would suggest. A more flexible doctrine would allow the Court to determine whether *Chevron* deference is appropriate on a case-by-case basis. It has even been suggested that the *Chevron* doctrine is in decline.<sup>332</sup> This may cause the Court to hesitate in invoking it.

## 2. *Vartelas v. Holder*

*Vartelas v. Holder* was decided by the Supreme Court in its October 2011 term, along with *Kawashima*, *Martinez Gutierrez*, and *Judulang*.<sup>333</sup> The Supreme Court held that the new definition of admission in INA § 101(a)(13)(C)(v) created by the IIRIRA in 1996 could not be applied retroactively to noncitizens with convictions occurring before the statute’s effective date.<sup>334</sup> This new definition of admission provided that certain lawful permanent residents with criminal convictions would be deemed to be seeking admission into the United States upon returning from abroad.<sup>335</sup> Prior to 1996, *Vartelas* could have traveled freely outside

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329. Michael Kagan, *Chevron’s Immigration Exception, Revisited*, YALE J. ON REG.: NOTICE & COMMENT (June 10, 2016), <http://yalejreg.com/nc/chevron-s-immigration-exception-revisited-by-michael-kagan/>.

330. *Id.*

331. *Id.*

332. *Id.*

333. 566 U.S. 257 (2012).

334. *Vartelas*, 566 U.S. at 259-62.

335. *Id.* at 262.

the United States. Upon returning to the United States in 2003 after visiting his ill parents in Greece for a week, however, he was denied admission and placed into removal proceedings.<sup>336</sup>

The Second Circuit, when deciding *Vartelas*, explicitly declined to use *Chevron* deference. It explained that *Chevron* was not triggered at step zero because the BIA was not interpreting a statute it was charged with administering:

We consider the issue of retroactivity de novo, without giving deference to the opinion of the BIA, as the question of whether an IIRIRA amendment “would have an improper retroactive effect in [a] particular case . . . does not concern the sort of statutory gap that Congress has designated the BIA to fill, nor a matter in which the BIA has particular expertise.”<sup>337</sup>

The Second Circuit held that IIRIRA’s new definition of admission in INA § 101(a)(13) was not impermissibly retroactive as applied to Vartelas’ 2003 trip to Greece.<sup>338</sup> Vartelas petitioned for certiorari and was granted; the Supreme Court held that INA § 101(a)(13)(C) was impermissibly retroactive as applied to Vartelas.<sup>339</sup> The Supreme Court did not apply *Chevron* deference, but it also did not actively explain why it was not appropriate.

### *B. Themes and Gaps*

This Section summarizes the themes and remaining questions from all of the Supreme Court immigration cases discussed in this Article, both those that did and those that did not invoke administrative law. Section III.B.1 argues that this body of case law, considered as a whole, demonstrates erosion of a theory of immigration exceptionalism. This erosion, however, has not proceeded in a linear fashion and has faced setbacks in recent terms. Section III.B.2 highlights the gaps in the application of administrative law in immigration cases that remain. These gaps are the vestiges of a theory of immigration exceptionalism, showing where the Supreme Court has hesitated in engaging with administrative law principles in immigration cases on a deeper level.

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336. *Id.* at 264.

337. *Vartelas v. Holder*, 620 F.3d 108 (2d Cir. 2010) (quoting *Martinez v. INS*, 523 F.3d 365, 372-73 (2d Cir. 2008)).

338. *Id.* at 121.

339. *Vartelas*, 566 U.S. at 275-76.

## 1. Erosion of Immigration Exceptionalism

The analysis of the Supreme Court's recent immigration and administrative law jurisprudence in the seven cases discussed in Sections I and II clearly shows that ordinary administrative law principles are being invoked in immigration law cases. Neither the Court nor, for the most part, the parties argue against this phenomenon. The one partial exception is the judicial review cases, where the government has argued that judicial review of a particular type of agency decision was precluded.<sup>340</sup> Even here, however, the government was not arguing that administrative law doctrine did not apply. It was simply taking the position that, under the principles of administrative law, judicial review was not available. It is virtually impossible, in light of this almost universal acceptance of principles of an outside legal doctrine, to maintain that a strong theory of immigration exceptionalism governs the Supreme Court's immigration jurisprudence. The application of ordinary administrative law principles in these Supreme Courts cases shows a definite erosion of the theory of immigration exceptionalism.

The fact that the Supreme Court did not apply administrative law in the four cases discussed in Section III.A when administrative law principles were raised by the lower courts or the litigants does not automatically counter the erosion of a theory of immigration exceptionalism. First, the Supreme Court did not consider and reject the application of these principles; it simply did not mention them.

Second, looking at the results in these cases demonstrates that the Court did not simply rubberstamp the agency's action even when not applying administrative law principles. If the Court was endorsing a theory of immigration exceptionalism by failing to apply administrative law principles, one would expect this to be the case. The converse is also not true; the Court did not automatically overturn the agency action when not purportedly constraining itself through principles of agency deference. The government lost in half of these cases, in *Moncrieffe* and in *Vartelas*, the same win/loss rate as in those cases where administrative law was invoked.<sup>341</sup> In all of the cases, even those where the government ultimately won (*Kawashima* and *Luna Torres*), an in-depth analysis of the agency's position was ultimately taken.

Considering, as a whole, the Supreme Court's jurisprudence in these immigration cases where administrative law was arguably applicable supports an argument that the theory of immigration exceptionalism is losing its strong hold. At the same time, however, there are many gaps

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340. See Section I, *supra*.

341. Cf. Cole, *supra* note 163, at 13 n.127.

and unanswered questions in the Supreme Court's application of administrative law in immigration cases. These gaps are discussed in section III.B.2 below.

## 2. Unanswered Questions

This section addresses the unanswered questions in the Supreme Court's application of administrative law in immigration cases. These gaps are remnants of immigration exceptionalism; the Court has not yet engaged with some of the more difficult questions in this application at more than a surface level. In order for the hold of a theory of immigration exceptionalism to continue to weaken, the Supreme Court must begin to explore these questions and provide clear guidance for lower federal courts and agencies.

Section III.B.2.a discusses one gap common to all of the different areas of administrative law that have arisen in these immigration cases: whether administrative law applies in the first place and, if so, which administrative law doctrine should be invoked. Section III.B.2.b focuses on the unanswered questions in those cases on the availability of judicial review, while section III.B.2.c concentrates on the remaining issues in those cases on the scope of judicial review, or deference to agency determinations.

### *a. Overall*

The first significant gap in the Supreme Court's immigration and administrative law jurisprudence is a threshold inquiry: the Court has frequently failed to address why administrative law was or was not applicable. In the cases already discussed in Sections I and II – *Din*, *Reyes Mata*, *Martinez Gutierrez*, *Cuellar de Osorio*, *Mellouli*, *Esquivel Quintana* and *Judulang* – the Court simply invoked administrative law without explanation. On the other hand, in the cases covered in Section III.A – *Kawashima*, *Moncrieffe*, *Luna Torres*, and *Vartelas* – the Court did not attempt to explain its choice not to operate within an administrative law framework. In neither set of cases has the Court spoken to justify its position, and there are no distinguishing factors between the groups so obvious as to eliminate the need for discussion.

Consideration of whether the Supreme Court should or should not invoke administrative law in particular immigration contexts is beyond the scope of this article. Whether courts are better suited than agencies to answer particular questions, or vice versa, is a complex question. Some

have even argued that there is not a practical difference in outcome.<sup>342</sup> I am not attempting to address those questions here.

I am, however, making two particular points about the gaps in the Supreme Court's application of administrative law in immigration cases. First, these unanswered questions are vestiges of immigration exceptionalism. While the Court is moving away from this theory, there is some lingering hesitation that results in complex issues being treated at only a surface level, if at all. In recent terms, particularly in the Court's inability to reach agreement in *U.S. v. Texas* and in its decision in *Esquivel Quintana*, administrative law issues were affirmatively avoided. There is also a lack of precedent. As a practical and theoretical matter, it will take time for the numerous subsidiary questions to be fully addressed. Second, administrative law is one possible existing way to control agency action, and such control is increasingly important in checking agency action that violates the law and the Constitution and that ignores respect for individual rights. In that context, to be a better check on the excesses of the executive and administrative agency, the Supreme Court should clearly and explicitly answer the question of why administrative law does or does not apply in each potentially applicable case.

The same is true with respect to the unanswered questions in each of the sub-areas of administrative law that have been addressed by the Supreme Court in the last seven terms. To be a better check on the excesses of the executive and immigration agencies, the Court must attempt to clearly close the existing gaps in its jurisprudence by applying administrative law principles in immigration cases. Section III.B.2.b discusses those existing gaps specific to the availability of judicial review cases. Section III.B.2.c addresses unanswered questions with respect to the scope of judicial review, i.e., deference to agency action.

### *b. Judicial Review*

The two judicial review cases, *Din* and *Reyes Mata*, reveal a lesser degree of erosion of a theory of immigration exceptionalism than the deference cases discussed in Section III.B.2.c. The Court in both *Din* and *Reyes Mata* struggled most with reconciling historical doctrines that were part of the theory of immigration exceptionalism, consular non-reviewability, and the plenary power doctrine, with the modern framework for the availability of judicial review in the APA. That framework, as previously discussed, presumes the availability of judicial review unless expressly precluded by statute or committed to agency

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342. See, e.g., *id.*

discretion by law.<sup>343</sup>

The Court and the parties in both *Din* and *Reyes Mata* focused almost exclusively on the historical immigration law doctrines. They failed to discuss how their arguments or holdings fit into the APA. Thus, it is not clear in either case whether the Court or the litigants believed that judicial review was precluded because it was precluded by statute or because it was committed to agency discretion by law. This is a significant gap in the Court's opinions.

### *c. Deference*

The remaining eight Supreme Court cases discussed in this Article all deal with some aspect of deference to the agency. Three areas of unanswered questions are most significant: (1) What type of deference, if any, applies? (2) How should statutory interpretation at step one of the *Chevron* analysis be conducted? and (3) What makes an agency action reasonable at step two of the *Chevron* analysis? A fourth question also arises less frequently: What is the role of *Brand X* in immigration cases?

First, the Supreme Court frequently glosses over the determination of which type of deference, if any, applies. Is the agency action at issue a legal interpretation? If so, what happens at *Chevron* step zero? That is, does *Chevron* deference apply to this particular legal interpretation? If not, is a lesser form of deference such as *Skidmore* appropriate? Or is the agency action a policy or factual determination, or something else altogether? This gap was present in *Martinez Gutierrez*, where amicus curiae NIJC argued that BIA decisions, even when containing legal interpretations, merit only *Skidmore* deference, not the greater *Chevron* deference.<sup>344</sup> It was a particular issue in *Judulang*, where the Supreme Court elected, with minimal explanation, to invoke arbitrary and capricious review instead of the *Chevron* deference applied by the Ninth Circuit and argued by the government.<sup>345</sup> It was also central in all of the cases involving criminal grounds of removability – *Mellouli*, *Esquivel Quintana*, *Kawashima*, *Moncrieffe*, and *Luna Torres* – where the Supreme Court reached different conclusions regarding the applicability of *Chevron* deference without so much as discussing its choices.<sup>346</sup> Finally, it was present in *Vartelas*, where the Supreme Court failed to discuss deference after the Second Circuit held explicitly that *Chevron* deference was not appropriate because retroactivity was not “the sort of

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343. See *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); 5 U.S.C. § 701(a) (2011); see also *FOX*, *supra* note 71, at § 10.05.

344. See section II.A.1, *supra*.

345. See section II.B.1, *supra*.

346. See sections II.A.3 and III.A.1, *supra*.



statutory gap that Congress has designated the BIA to fill, nor a matter in which the BIA has particular expertise.”<sup>347</sup>

The second two areas of unanswered questions have to do with the two steps of the *Chevron* analysis. Step one – determining whether or not Congress has spoken clearly – appears to be the more challenging of the two steps in the immigration context. Substantial unresolved questions about how to conduct statutory interpretation at this stage of the *Chevron* analysis exist in the Supreme Court’s jurisprudence. Although none of the *Chevron* cases discussed in Section II.A were decided at step one, this gap is particularly obvious in *Cuellar de Osorio*, where the Justices were so divided on how to interpret the provision of the Child Status Protection Act at issue that there was no majority opinion.<sup>348</sup>

Step two of the *Chevron* analysis appears to be the most fleshed out and least controversial portion of the analysis. However, some unanswered questions remain. The line between unreasonable and not what the Court would prefer is a thin one, and it can be difficult to determine exactly when agency interpretation crosses the line into unreasonable. This gap is obvious in three of the *Chevron* decisions discussed in Section II.A – *Martinez Gutierrez* and *Cuellar de Osorio*, where the Court found the agency interpretations reasonable, and *Mellouli*, where the Court found the agency interpretation unreasonable. In addition, the Supreme Court in *Judulang* noted parallels between step two of the *Chevron* analysis and arbitrary and capricious review under the APA.<sup>349</sup> Questions remain as to the significance and implications of this similarity.

It is worth noting that many of these difficulties with the *Chevron* doctrine may not be wholly an issue of the immigration context. As a doctrine, *Chevron* has been the subject of substantial criticism. Some have noted that the doctrine is on the decline.

### C. The Future

The Supreme Court will have several opportunities in the October 2017 term to address immigration exceptionalism and the role of administrative law in immigration cases writ large and to take up some of these unanswered questions writ small. First, as discussed in the Introduction, the Supreme Court has granted certiorari in *Trump v. Hawaii* and *Trump v. Int’l Refugee Assistance Project*, two of the cases challenging Trump’s

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347. *Vartelas v. Holder*, 620 F.3d 108 (2d Cir. 2010) (quoting *Martinez v. INS*, 523 F.3d 365, 372-73 (2d Cir. 2008)); see section III.A.2, *supra*.

348. See section II.A.2, *supra*.

349. See section II.B, *supra*.

entry ban executive order. If the cases are not held to be moot,<sup>350</sup> the scope of the president's power over immigration issues is likely to be at the heart of the Court's decision.

Second, the Supreme Court ordered reargument in two cases from the October 2016 term: *Sessions v. Dimaya* and *Jennings v. Rodriguez*.<sup>351</sup> Both cases were decided before Justice Gorsuch joined the Court, so reargument was presumably ordered because the Court was deadlocked.<sup>352</sup> In *Sessions v. Dimaya*, the Supreme Court must interpret and evaluate the constitutionality of another aggravated felony provision, the crime of violence, which specifically refers to criminal law.<sup>353</sup> In *Jennings v. Rodriguez*, the Court is concerned with the right to bond hearings in immigration detention and the constitutionality of indefinite detention.<sup>354</sup> If the Supreme Court directly confronts the plenary power doctrine and the issues of administrative law generally, our understanding of these complex intersections could take a significant leap forward during the October 2017 term.

#### CONCLUSION

The slow and uneven erosion of the theory of immigration exceptionalism that I found in the INA §§ 212(c) and 212(h) contexts also holds true on a larger scale. The Supreme Court's recent immigration jurisprudence, from the October 2010 through the October 2016 terms, showed a similar invocation of administrative law principles in some, but not all, immigration cases where administrative law could be applicable. Just as in the INA §§ 212(c) and 212(h) cases, in many, if not all, of the cases where administrative law was or could have been invoked, the Court failed to fully analyze the relevant doctrinal questions. These unanswered questions are the remnants of immigration exceptionalism – a function of the courts' delay in acknowledging the role of administration law in immigration cases and a lingering discomfort in applying administrative principles to immigration questions.

The validity of President Obama's DACA and DAPA programs and of President Trump's executive orders are still being litigated. More importantly, these actions will not be the last time that a presidential administration attempts to exercise a strong executive power over

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350. Leah Litman, *Symposium: The mootness games*, SCOTUSBLOG (Jul. 11, 2017, 10:49 AM), <http://www.scotusblog.com/2017/07/symposium-mootness-games/>.

351. Kevin Johnson, *No decision in two immigration-enforcement cases*, SCOTUSBLOG (Jun. 26, 2017, 4:02 PM), <http://www.scotusblog.com/2017/06/no-decision-two-immigration-enforcement-cases/>.

352. *Id.*

353. *Lynch v. Dimaya*, 137 S. Ct. 31 (2016).

354. *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016).

immigration or to justify their exercise through asserting a theory of immigration exceptionalism. Under the current administration, the courts have played a central and crucial role in ensuring that these executive actions respect individual rights and do not violate the statute or the Constitution. Administrative law has been an important tool for litigants in bringing these challenges to the courts.

For many reasons, administrative law is not the only or best vehicle available for these challenges. It is, however, currently part of the law and currently available and powerful. With greater clarity in its doctrine, administrative law can be an even more effective vehicle. The Supreme Court should engage in the application of administrative and constitutional law principles in immigration cases on a deeper level, in a thoughtful way that will provide real guidance in other cases and an example to the lower federal courts. This should result in the faster erosion of a theory of immigration exceptionalism, which will then have the positive circular effect of improving the analysis of administrative and constitutional law principles in immigration cases throughout the federal courts. Multiple cases in the October 2017 term will give the Court the opportunity to engage in this way with respect to the role of administrative law, and particularly deference, in immigration cases.<sup>355</sup>

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355. The Supreme Court also heard three cases that give it the opportunity to do the same with constitutional principles in immigration cases and to confront the plenary power doctrine head-on. These three cases are *Sessions v. Dimaya*, 137 S. Ct. 31 (2016); *Sessions v. Morales-Santana*, 136 S. Ct. 2545 (2016); and *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016).