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Chevron's Flexible Agency Expertise Model: Applying the *Chevron* Doctrine to the BIA's Interpretation of the INA's Criminal Law–Based Aggravated Felony Provision

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CHEVRON'S FLEXIBLE AGENCY EXPERTISE MODEL: APPLYING THE *CHEVRON* DOCTRINE TO THE BIA'S INTERPRETATION OF THE INA'S CRIMINAL LAW–BASED AGGRAVATED FELONY PROVISION

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For nearly thirty years, courts have looked to the U.S. Supreme Court's ruling in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. *when reviewing a challenge to an agency's interpretation of statutory language and determining whether deference is appropriate. Despite* Chevron*'s longstanding role as one of administrative law's most important legal doctrines, no specification exists as to whether judicial deference is required when an agency interprets language outside the scope of its expertise. As a result, the Second and Third Circuits have split on the issue of whether the Bureau of Immigration Appeals' (BIA) interpretation of the term "aggravated felony," a phrase drawn from criminal law, deserves a traditional* Chevron *analysis.*

This Note addresses the conflict and proposes a model of Chevron*'s framework that permits courts to remain flexible when considering an agency's nontraditional expertise, an outcome contemplated by* Chevron*'s theoretical framework and the Court's ruling in* Chevron *itself. Ultimately, this Note resolves the split in favor of the application of* Chevron *deference to the BIA's interpretation of language drawn from criminal law, despite the agency's traditional expertise in immigration law.*

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INTRODUCTION

In 1999, nineteen-year-old Ushian Kayon James legally entered the United States, leaving his home of Jamaica.[1] Only three years after entering, James learned that he would be forced to leave his new home, as the Bureau of Immigration Appeals (BIA) determined that he engaged in a sexual relationship with a sixteen-year-old girl when he was twenty-two years of age, constituting the "sexual abuse of a minor" and thus an "aggravated felony" pursuant to the Immigration and Nationality Act (INA).[2] James, faced with the prospect of deportation, challenged the determination that his relationship with a sixteen-year-old minor constituted sexual abuse.[3] His challenge involved the court's review of the BIA's interpretation of "aggravated felony" and the open question of whether the judiciary must defer to the BIA or review the case anew.[4]

Since the U.S. Supreme Court's seminal ruling in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[5] courts have granted deference to administrative agencies when reviewing their interpretation of ambiguous statutory language.[6] While *Chevron* has guided the judiciary for nearly thirty years, the application of the doctrine to the BIA's interpretation of the term "aggravated felony" has divided the Second and Third Circuits.[7] Although the term appears in the INA and is thus well within the scope of the BIA's interpretative power, its primary usage is derived from criminal law and not immigration law. Thus, while the Second Circuit has held that *Chevron*'s two-step analysis applies to the BIA's interpretation of "aggravated felony," the Third Circuit has opted not to apply the doctrine, finding that the BIA's construction of the term fails to implicate the agency's traditional expertise and does not warrant an analysis under *Chevron*.[8]

The Second and the Third Circuits have jurisdiction over a population of approximately 7,183,000 immigrants.[9] As a result, the circuits serve a

1. *See infra* notes 223–24 and accompanying text.
2. *See infra* note 237 and accompanying text.
3. *See infra* note 238 and accompanying text.
4. *See* discussion *infra* Part II.
5. 467 U.S. 837 (1984).
6. *See* discussion *infra* Part I.B–C.
7. *See infra* note 180 and accompanying text. The circuit split recently has been the subject of increased attention due to holdings by the Supreme Court and D.C. Circuit. *See* Friedman v. Sebelius, 686 F.3d 813, 819 n.3 (D.C. Cir. 2012) ("[There] appears to be a split in authority on the question whether to defer to an agency's interpretation of a term drawn from criminal law but used in a statute the agency administers."). *See generally* Nijhawan v. Holder, 557 U.S. 29 (2009) (finding that the BIA was not entitled to deference in its interpretation of criminal language without resolving the circuit split regarding *Chevron*'s applicability to agency statutory interpretation of criminal law).
8. *See infra* note 180 and accompanying text.
9. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, at 43 tbl. 38 (2012), *available at* http://www.census.gov/compendia/statab/2012/tables/12s0038.pdf. Although the Third Circuit has appellate jurisdiction over the U.S. Virgin Islands, its foreign-born population was not considered for the purposes of calculating the circuits' combined immigrant population.

combined population that is 16 percent foreign born,[10] a figure higher than the average immigrant population in the United States.[11] Although in some cases a court's formulation of its standard of review can be considered an uncontroversial procedural determination, the aforementioned jurisdictional divide has led to inconsistency in how important, life-altering determinations are made for James and millions of other legal immigrants residing within the geographic domain of the Second and Third Circuits.[12] This Note examines the conflict and proposes a resolution that acknowledges an administrative agency's expertise outside its traditional field and creates a more uniform application of the *Chevron* doctrine for the millions of immigrants the circuit split currently affects.[13]

Part I of this Note provides an overview of the *Chevron* doctrine, its principles, foundational rationales, and overlap with immigration regulation. Part II examines the split between the Second and Third Circuits and analyzes how each court has grappled with the application of *Chevron* to the BIA's interpretation of the INA's "aggravated felony" provision. Finally, Part III proposes a flexible agency expertise model that considers an agency's nontraditional expertise and applies it to the circuit split, resolving the divide in favor of the Second Circuit's application of *Chevron*'s two-step approach to the BIA's statutory interpretation of language drawn from criminal law.

I. THE *CHEVRON* DOCTRINE, IMMIGRATION REGULATION, AND THE ADMINISTRATIVE STATE

This Note first provides a necessary background on the administrative state, an extensive analysis of the *Chevron* doctrine, and an overview of relevant immigration law and regulation. Part I.A begins by providing a history of the administrative state and its theoretical foundations. Next, Part I.B examines the landmark administrative law case of *Chevron* by discussing its historical precursors, the construction of its two-step approach, and the doctrine's competing foundational theories. Finally, Part I.C provides a background on immigration regulation in the United States and examines *Chevron*'s impact on, and overlap with, immigration law.

A. The Administrative State: Beginnings, Function, and Structure

Although the administrative state has evolved since its creation, its defining features remain virtually the same: a system where specialized agencies within the executive branch engage in the creation and

10. *See National File: All 50 States, District of Columbia, and Puerto Rico*, U.S. CENSUS BUREAU, http://www.census.gov/geo/reference/docs/cenpop2010/CenPop2010_Mean_ST.txt (last visited Oct. 21, 2013).

11. *See* ELIZABETH M. GRIECO ET AL., U.S. CENSUS BUREAU, THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2010, at 2 (2012), *available at* http://www.census.gov/prod/2012pubs/acs-19.pdf.

12. *See* discussion *infra* Part II.

13. *See* discussion *infra* Part III.B–C.

enforcement of regulations that, when codified by statute, represent law with which the general public must comply.[14]

While a similar system existed in limited form prior to the twentieth century, the administrative state is primarily considered a creature of the New Deal era's progressive conceptions about the role of governmental regulation.[15] Prior to and during the New Deal era, both scholars and politicians supported the creation of a regulatory state separated from Congress and shaped by the expertise of trained specialists.[16] As a result, regulatory agencies were initially created to combat the economic disaster of the Great Depression, providing a foundation for what would eventually become the modern administrative state.[17]

Although there is some debate as to whether these agencies were effective in providing economic recovery in the wake of the Great Depression, there is little doubt that their unprecedented expansion of the administrative state drastically altered the role agencies played in creating and enforcing regulatory law.[18] In the years following the New Deal, the administrative state was accepted and utilized as the answer to regulating noneconomic subject matters, expanding far beyond its original economic purpose.[19] The administrative state's growth eventually led it to its modern form: a system of hundreds of agencies that regulate fields as diverse as immigration, the environment, and space.[20]

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14. *See* 1 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 1:21 (3d ed. 2010) (outlining the basic functions of administrative agencies); *see also* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 358–60 (2010).

15. *See* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1248 (1986); *see also* MANNING & STEPHENSON, *supra* note 14, at 380 (discussing the administrative state's New Deal origins); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 422 (1987) (noting that the administrative state was created during the New Deal).

16. *See* MANNING & STEPHENSON, *supra* note 14, at 380 (discussing the New Deal–era interest in the "dispassionate application of technocratic expertise" by trained officials); Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review As Translation of Agency Science*, 109 MICH. L. REV. 733, 756–57 (2011); Rabin, *supra* note 15, at 1267 (discussing the New Deal era's positive view of agency expertise); Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 406, 416–17 (2007); Sunstein, *supra* note 15, at 422–23 ("In the New Deal period, reformers believed that administrative officials would serve as independent, self-starting, technically expert, and apolitical agents of change.").

17. *See* Rabin, *supra* note 15, at 1248, 1253; *see also* Schiller, *supra* note 16, at 413 (stating that the expansion of the administrative state was a governmental response to the Great Depression).

18. *See supra* notes 15–16 and accompanying text (noting that the New Deal's regulatory expansion was highly influential on the emergence of the modern administrative state).

19. *See* Rabin, *supra* note 15, at 1262–63 (stating that the New Deal caused administrative regulation to become an "accepted fact," leading to further noneconomic regulation).

20. *See* OFFICE OF THE FED. REGISTER, THE UNITED STATES GOVERNMENT MANUAL, at vi–ix (2012) (listing all administrative agencies).

1. Theoretical Framework of the Administrative State: Congressional Delegation

For the administrative state to function as the regulatory body envisioned by New Deal reformers, agencies require the power to promulgate and enforce regulations. This power is primarily legislative and generally reserved to Congress with its ability to enact law.[21] Thus, in order to establish an administrative agency with the power to regulate, Congress must delegate its inherent legislative powers to that agency.[22] As a result, Congress ordinarily enacts a statute granting an administrative office or agency the power to promulgate regulations in a specific field, as well as the power to enforce those regulations through hearings, adjudications, or other processes.[23]

In addition to granting the administrative state its regulatory power, congressional delegation also represented a radical reconceptualization of the Constitution, which does not clearly permit the branches to delegate their enumerated powers.[24] Consequently, Congress is limited in its ability to delegate its enumerated legislative powers to administrative agencies by the "nondelegation doctrine," which forbids Congress from delegating too broadly without directing the agency to conform to a sufficiently narrow "intelligible principle" governing its regulations.[25] Despite the existence of this limiting doctrine, the Court has not held a congressional delegation to violate its principles in seventy-eight years, effectively granting Congress the ability to broadly delegate its power to the administrative state without fear of violating the Constitution.[26]

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21. *See supra* notes 14, 16 and accompanying text (discussing the legislative functions of executive agencies and the New Deal desire to separate agencies from the political accountability of the legislative branch); *see also* MANNING & STEPHENSON, *supra* note 14, at 360 (noting the similarities between the powers of executive agencies and congressional power).

22. *See* 1 KOCH, *supra* note 14, § 1:21 (discussing congressional delegation); *see also* JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 3.03 (2013).

23. *See* 1 KOCH, *supra* note 14, § 1:21 (discussing congressional delegation); *see also* MANNING & STEPHENSON, *supra* note 14, at 379–80 (discussing the process of congressional delegation).

24. *See* U.S. CONST. art. I, § 1 ("*All* legislative Powers herein granted shall be vested in a Congress of the United States . . . ." (emphasis added)); 1 KOCH, *supra* note 14, § 7:10; MANNING & STEPHENSON, *supra* note 14, at 360 (examining whether Congress is permitted to delegate its constitutional power); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994); Sunstein, *supra* note 15, at 447–48.

25. *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (holding that Congress must enact an intelligible statutory principle for its delegation to be valid); *see also* MANNING & STEPHENSON, *supra* note 14, at 384–92 (discussing the nondelegation doctrine and intelligible principle test).

26. *See* MANNING & STEPHENSON, *supra* note 14, at 392 (discussing the "fall" of the nondelegation doctrine); *see also* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) (observing the intelligible principle's lenient standard). *See generally* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (finding what is, to date, the last instance of an administrative agency violating the nondelegation doctrine).

2. Why Delegation? Examining the Theories Behind Congress's Transfer of Legislative Power

In addition to empowering administrative agencies, congressional delegation accomplishes several secondary goals that would otherwise be impossible.[27] Specifically, delegation allows for Congress to transfer its legislative power to the executive, a clear fulfillment of the New Deal reformer's historical goal of an expert, regulatory body that is also politically insulated.[28]

The New Deal conception of the administrative state as a body of trained specialists underlies a primary rationale of congressional delegation—that an executive agency has a high level of expertise in the field it regulates.[29] Congressional delegation, by allowing the expert agency (and not Congress itself) to create law, accomplishes this goal by providing agencies with the power to regulate, confined to their spheres of expertise.[30] In addition to expertise, congressional delegation also rests on the New Deal reformer's historical desire to politically insulate the administrative state.[31] By delegating its legislative power, Congress allows agencies to regulate from within the executive branch, removed from the political accountability of the legislature.[32] Thus, according to the expertise and political accountability rationales, congressional delegation serves as a tool in achieving some of the very same goals that spurred the creation of the administrative state.

B. The Doctrine of Chevron *Deference and Judicial Review of Agency Statutory Interpretation*

Chevron and its foundational principles remain one of the most important and frequently cited doctrines in law,[33] setting forth the procedure by which courts approach their review of agency statutory interpretation. Part I.B.1 begins by discussing the pre-*Chevron* doctrine of judicial review and its evolution towards the modern standard. After a full discussion of *Chevron*'s precursors, Part I.B.2 examines the *Chevron* Court's landmark decision. Finally, Part I.B.3 analyzes *Chevron*'s competing foundational theories, all of which attempt to rationalize *Chevron*'s two-step approach.

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27. *See infra* notes 29–32 and accompanying text.
28. *See infra* notes 29–32 and accompanying text.
29. *See supra* note 16 and accompanying text.
30. *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 708 (1995) (holding that Congress delegated to the Fish and Wildlife Service the power to regulate within its sphere of expertise); MANNING & STEPHENSON, *supra* note 14, at 380–81 (presenting the agency expertise rationale of congressional delegation).
31. *See* MANNING & STEPHENSON, *supra* note 14, at 380–81.
32. *See id.*
33. As of 2002, *Chevron* had been cited more than *Roe v. Wade*, *Brown v. Board of Education*, and *Marbury v. Madison* combined. *See* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND POLICY: PROBLEMS, TEXT, AND CASES 289 (5th ed. 2002).

1. The Buildup to *Chevron*: The Historical Importance of *Hearst* and *Skidmore*

Although the Supreme Court explicitly overruled much of the pre-*Chevron* doctrine in *Chevron* itself, it remains important to examine *Chevron*'s precursors as a tool to further understand the *Chevron* Court's reasoning and intent. The most fundamental precursors to *Chevron* include *NLRB v. Hearst Publications, Inc.*[34] and *Skidmore v. Swift & Co.*,[35] both of which focused on a formal distinction between pure and mixed questions of law when determining whether a court should defer to an agency's interpretations.[36]

In one of the Court's most important initial decisions regarding the parameters of pre-*Chevron* judicial review, the *Hearst* Court held that the grant of deference to an agency's statutory interpretation hinged on the distinction between pure questions of law and mixed questions of fact and law.[37] In *Hearst*, the Court reviewed the National Labor Relations Board's (NLRB) failure to define "newsboys" as "employees" pursuant to the National Labor Relations Act (NLRA), a statute the NLRB administered.[38] When determining how to review the NLRB's interpretation, the Court observed that the agency, in applying its interpretation of the NLRA to the parties at hand, had engaged in a mixed question of fact and law, a congressional power delegated to the agency that warranted some amount of deference.[39] In doing so, the *Hearst* Court outlined a distinction that would dominate pre-*Chevron* jurisprudence, holding that, while deference would be granted to an agency's statutory interpretation regarding mixed issues of fact and law, a court would review an agency's interpretation of pure law de novo.[40]

The Court continued its distinction between mixed and pure questions of law in *Skidmore*, in which it extended its evolving doctrine past formal statutory interpretation[41] while further clarifying why and how courts should defer to administrative agencies.[42] In *Skidmore*, the Court considered an agency's interpretation of the Fair Labor Standards Act

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34. 322 U.S. 111 (1944).

35. 323 U.S. 134 (1944).

36. *See id.* at 139–40; *Hearst*, 322 U.S. at 120–31 (holding that a court's grant of deference to an administrative agency depends on whether the court was engaging a pure question of law or mixed question of fact and law); *see also* MANNING & STEPHENSON, *supra* note 14, at 812–13 (describing the pre-*Chevron* judicial reliance on the distinction between mixed and pure questions of law).

37. *See Hearst*, 322 U.S. at 130–31; *see also* Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1027–28 (2005).

38. *See Hearst*, 322 U.S. at 114–15; *see also* John H. Reese, *Bursting the* Chevron *Bubble: Clarifying the Scope of Judicial Review in Troubled Times*, 73 FORDHAM L. REV. 1103, 1112 (2004).

39. *See Hearst*, 322 U.S. at 130–31.

40. *See id.*; *see also* MANNING & STEPHENSON, *supra* note 14, at 798–800.

41. *See Skidmore*, 323 U.S. at 139; MANNING & STEPHENSON, *supra* note 14, at 810 ("The key distinctions between *Hearst* and *Skidmore* seem to be . . . the legal status of their interpretative statements.").

42. *See infra* notes 45–48 and accompanying text.

(FLSA), which denied employees overtime compensation for time spent overnight at their place of employment.[43]

The Court first analyzed whether the agency's interpretation of the FLSA was a mixed or pure question of law in order to determine its standard of review, continuing the distinction between pure questions of law and mixed questions of fact and law outlined in *Hearst*.[44] *Skidmore* differed, however, in its formulation of the type of deference an agency could receive from a court reviewing its statutory interpretation.[45] The *Skidmore* Court held that while a court should not automatically adopt an agency's construction of a mixed question of law, the agency's relevant expertise represented a source courts "may properly resort [to] for guidance."[46] As a result, the Court found that an agency's "specialized experience"[47] mandated that courts review an agency's interpretations with deference when such interpretations engaged mixed questions of fact and law, as opposed to pure questions of law.[48]

Although both *Hearst* and *Skidmore* governed the pre-*Chevron* approach to judicial review of agency statutory interpretation, their standards began to erode soon after it became clear that applying formal distinctions between pure and mixed questions of law was a confusing and futile task.[49] As a response, a multifactor approach soon evolved, leading to what one commentator has described as a "puzzling, ad hoc, incoherent, and unpredictable" standard of judicial review.[50]

2. *Chevron*: The Two-Step Approach to Agency Statutory Interpretation

In *Chevron*, the Supreme Court drastically altered the existing framework that governed judicial review of agency statutory interpretation since the beginnings of the administrative state.[51] In *Chevron*, the Court considered the Environmental Protection Agency's (EPA) interpretation of amendments made to the Clean Air Act (CAA),[52] in which the agency concluded that the term "stationary source" referred to power plants as a

43. *See Skidmore*, 323 U.S. at 135–36; *see also* Reese, *supra* note 38, at 1117–18.

44. *See Skidmore*, 323 U.S. at 139–40 (finding that the administrator was engaged in fact finding and thus his determination was a mixed question of fact and law); *see also* Reese, *supra* note 38, at 1118.

45. *See Skidmore*, 323 U.S. at 140.

46. *See id.*; *see also* Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1153 (2012).

47. *See Skidmore*, 323 U.S. at 139.

48. *See* MANNING & STEPHENSON, *supra* note 14, at 811–12.

49. *See id.* at 812–14. The late 1990s, however, saw a revival of *Skidmore* deference and its application to an agency's informal findings and interpretations. *See* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1236–38, 1241 (2007).

50. *See* MANNING & STEPHENSON, *supra* note 14, at 812; *see also* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 974–75 (1992); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2082 (1990).

51. *See* MANNING & STEPHENSON, *supra* note 14, at 814.

52. *See* Clean Air Act Amendments of 1977, Pub. L. No. 95-96, 91 Stat. 685.

whole, rather than to any specific additions or modifications to existing plants, known as the "bubble concept."[53] Thus, under its "bubble concept," the EPA could avoid subjecting a plant to a rigorous review process as long as any modifications to the plant did not lead to a significant increase in overall emissions, allowing the EPA to prevent the CAA from causing unreasonable economic harm, a stated purpose of the CAA amendments.[54]

Famously, the *Chevron* Court held that there are two steps guiding a court's process of review when examining an agency's interpretation of a statute it administers.[55] The first step of the *Chevron* two-step approach requires a reviewing court to determine whether congressional intent was clear by a plain reading of the statute.[56] A finding of clear and unambiguous language ends the inquiry in favor of a reading in compliance with the will of Congress.[57] If a reviewing court cannot determine Congress's intent, it is required to take a second step: deference to the agency's interpretation of statutory ambiguity, contingent upon a demonstration that the agency's determination was reasonable.[58] Thus, the Court found that judicial review of an agency's statutory interpretation required a grant of deference under its newly created approach.[59]

The Court rationalized this standard of deference in several important ways.[60] First, the *Chevron* Court determined that congressional delegation mandated its deferential second step, holding that statutory ambiguity evidenced Congress's intent to grant agencies the authority to provide meaning to "gaps" in the statutes they administer.[61] The Court found that although congressional delegation is often explicitly granted to administrative agencies, statutory ambiguity could be considered an implicit

53. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Counsel, Inc., 467 U.S. 837, 839–42 (1984); *see also* Linda Jellum, Chevron*'s Demise: A Survey of* Chevron *from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 739 (2007).

54. *See Chevron*, 467 U.S. at 839–40; *see also* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1085 (2008). One of the major purposes of the amendments was to "allow reasonable economic growth to continue in an area." *Chevron*, 467 U.S. at 851 (quoting H.R. REP. NO. 95-294, pt. 211 (1977)).

55. *See Chevron*, 467 U.S. at 842; *see also* Garcia-Quintero v. Gonzales, 455 F.3d 1006, 1011–12 (9th Cir. 2006); Melina Forte, *May Legislative History Be Considered at* Chevron *Step One? The Third Circuit Dances the* Chevron *Two-Step in* United States v. Geiser, 54 VILL. L. REV. 727, 727–28 (2009).

56. *See Chevron*, 467 U.S. at 842–43.

57. *Id.* ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *see also* Barnhart v. Walton, 535 U.S. 212, 217–18 (2002); Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 598–99 (2009).

58. *See Chevron*, 467 U.S. at 843–44; *see also* Gonzales v. Oregon, 546 U.S. 243, 255 (2006); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 195–96 (2006).

59. *Chevron*, 467 U.S. at 843–44; *see also* Mary Holper, *The New Moral Turpitude Test: Failing* Chevron *Step Zero*, 76 BROOK. L. REV. 1241, 1255–56 (2011).

60. *See Chevron*, 467 U.S. at 843–45.

61. *See id.*; *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) ("Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.").

delegation that deserves a similarly deferential treatment by the judiciary.[62] Second, the Court offered two additional policy considerations to rationalize its holding: the judiciary's lack of expertise[63] and the executive branch's inherent democratic accountability.[64]

In applying its two-step approach to the EPA's interpretations, the Court first examined whether the CAA's amendments contained any clear evidence of Congress's intent.[65] Upon a finding that Congress did not directly speak to the issue of whether the term "stationary source" could be defined by the "bubble concept," the Court looked to the reasonableness of the EPA's interpretation, thus granting the agency deference.[66] Ultimately, under this deferential standard, the Court found that the EPA had reasonably interpreted the amendments, meeting its burden under the Court's two-step analysis.[67]

3. The Competing Foundational Theories of *Chevron*'s Two-Step Approach

The overall importance of the *Chevron* Court's ruling has attracted scholarly attention to the Court's motivations in constructing the two-step approach. First, Part I.B.4.a discusses how *Chevron*'s two-step approach may be grounded in an agency expertise model that finds support in *Chevron*'s text and in the administrative state's theoretical framework. Next, Part I.B.4.b examines *Chevron*'s most popular foundational theory, the implicit delegation rationale. Finally, Part I.B.4.c briefly examines *Chevron*'s political accountability rationale.

a. The Agency Expertise Model

Although the *Chevron* Court did not condition its grant of deference on any demonstration of agency expertise, some scholars have argued that *Chevron*'s principles originate in the New Deal era's conception of the administrative state as a body of technocratic officials that exhibit expertise in their respective fields.[68] Furthermore, scholars grounding *Chevron* in the

62. *See Chevron*, 467 U.S. at 843–44 (comparing the deferential treatment of implicit congressional delegation with explicit congressional delegation); *see also* Sunstein, *supra* note 58, at 195–96.

63. *See Chevron*, 467 U.S. at 865 (finding that because "[j]udges are not experts in the field," agency statutory interpretation should be held to a deferential standard); *see also* Sunstein, *supra* note 58, at 197.

64. *See Chevron*, 467 U.S. at 865–66 (noting that agencies are politically accountable by virtue of their placement in the executive branch of government); *see also* Forte, *supra* note 55, at 732 n.35.

65. *See Chevron*, 467 U.S. at 845.

66. *See id.*

67. *See id.* at 866; *see also* Reese, *supra* note 38, at 1143 ("The Court indicated that the agency advanced a reasonable explanation for its conclusion that the regulations serve both the environmental objectives and the reasonable economic growth objectives of the statute.").

68. *See* MANNING & STEPHENSON, *supra* note 14, at 824–25 (discussing the presumption that the Court granted *Chevron* deference to the EPA because agencies "usually have more

agency expertise model point to the highly technical and complex nature of agency-administered statutes, claiming that they often "address technical subjects using industry-specific terminology, which agencies are better equipped to comprehend, contextualize, and apply."[69]

The agency expertise model is further supported by the *Chevron* Court's reliance on the historical understanding of agencies as specialized experts and on the Court's determination that expert agencies are better equipped to interpret the statutes they administer.[70] In *Chevron*, the Court explicitly observed that the CAA's amendments were of a highly complex and technical nature and that Congress, in enacting ambiguous language, may have purposefully delegated power to "those with great expertise" to interpret the statute's industry-specific scientific and economic terms.[71] Furthermore, the *Chevron* Court justified the doctrine's deferential second step by pointing to the judiciary's lack of expertise, ultimately finding that expert agencies were in the best position to engage their experience in interpreting statutory language.[72] As a result, *Chevron*'s agency expertise model requires the judiciary to rely on the statutory interpretation of agencies that, as experts in their field, have more experience than courts in interpreting the statutes they administer.[73]

Although both *Chevron*'s precursors and *Chevron* itself provide evidence for the expertise rationale, some scholars remain skeptical as to whether the two-step approach primarily originates in the agency expertise model.[74] First, critics argue that an agency's statutory interpretation is most substantially impacted by political and policy considerations, and as a

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relevant expertise than do courts"); Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1286–88 (2008) ("Administrative agencies' superior experience and expertise in particular regulatory fields offers a second popular justification for *Chevron* deference."); Note, *The Two Faces of* Chevron, 120 HARV. L. REV. 1562, 1563 (2007) ("Expertise also serves a nonfunctional role as an implied motivation for the congressional delegation to the agency that is the real focus of the Supreme Court's *Chevron* inquiry."); *supra* note 16 and accompanying text; *see also* Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies As Common Law Courts*, 47 DUKE L.J. 1013, 1058 (1998); Patricia M. Wald, *The "New Administrative Law"—With the Same Old Judges in It?*, 1991 DUKE L.J. 647, 658–59 (discussing the difficulty in "asking judges to familiarize themselves enough with the policies and operations of the dozens of agencies that appear in hundreds of cases a year, and whose functions vary from labor to shipping to nuclear energy to gas regulation").

69. *See* Criddle, *supra* note 68, at 1286; *see also* Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co., 534 U.S. 327, 339 (2002) (finding that when a statute is "technical, complex, and dynamic," agencies have authority to interpret that statute under *Chevron*); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000) (noting that agencies are better suited to make interpretative determinations due to their familiarity with their regulatory field).

70. *See* Christensen v. Harris Cnty., 529 U.S. 576, 596 (2000) (Breyer, J., dissenting) (finding that *Chevron* did not alter *Skidmore*'s historical agency expertise model); Note, *supra* note 68, at 1566 (referencing the *Chevron* Court's discussion of agency expertise).

71. *See Chevron*, 467 U.S. at 865.

72. *See id.*

73. *See supra* note 68 and accompanying text.

74. *See* Criddle, *supra* note 68, at 1287; Ronald J. Krotoszynski, Jr., *Why Deference? Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 754 (2002) (finding that *Chevron* deference is a departure from the expertise rationale).

result, expertise is rarely implicated.[75] Second, critics claim that because the *Chevron* Court only offered expertise as a secondary justification for its two-step approach, it is incorrect to ground the doctrine in an agency expertise model.[76]

b. Silent Power: Implicit Congressional Delegation

Arguably the most popular and well-supported foundational rationale of *Chevron*'s two-step approach is the implicit delegation theory.[77] The theory of implicit congressional delegation finds its support in the *Chevron* Court's formulation of the doctrine's second step, in which the Court rested on two important determinations in constructing the *Chevron* framework.[78] First, the *Chevron* Court determined that statutory ambiguity represented an implicit delegation by Congress to provide the agency charged with administering the statute with interpretative authority.[79] After establishing that statutory ambiguities were evidence of congressional delegation, the *Chevron* Court equated that implicit grant of authority with Congress's ability to explicitly delegate, finding that the equivalence between implicit and explicit delegations required judicial deference to agencies exercising their authority when interpreting statutory ambiguity.[80]

Although the implicit delegation rationale is a popular and well-supported foundational theory, it continues to attract some criticism.[81]

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75. *See, e.g.*, Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1683–87 (1975); *see* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 92 (2008).

76. *See* Criddle, *supra* note 68, at 1287; Note, *supra* note 68, at 1563 ("[The] Supreme Court's *Chevron* jurisprudence seems motivated primarily by separation of powers concerns, with agency expertise relevant only at the margins of the doctrine.").

77. *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (noting that ambiguities in statutes are implicit delegations to agencies); United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (claiming that *Chevron* deference relies on congressional delegation); MANNING & STEPHENSON, *supra* note 14, at 827 ("*Chevron* itself, and subsequent cases and commentary, have grounded *Chevron* deference in a presumption . . . about [implied] congressional intent."); Criddle, *supra* note 68, at 1284 ("Arguably the leading rationale for *Chevron* deference is the presumption that Congress delegates interpretive authority to administrative agencies when it commits regulatory statutes to agency administration."); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 870–72 (2001).

78. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (discussing the implicit delegation rationale); *see* MANNING & STEPHENSON, *supra* note 14, at 827–28; *supra* notes 60–62 and accompanying text.

79. *See supra* note 61 and accompanying text; *see also Brown & Williamson Tobacco Corp.*, 529 U.S. at 159; MANNING & STEPHENSON, *supra* note 14, at 827–28.

80. *See supra* note 62 and accompanying text.

81. *See* CSX Transp. v. United States, 867 F.2d 1439, 1445 (D.C. Cir. 1989) (Edwards, J., dissenting) (noting that the implicit delegation rationale potentially violates constitutional separation of powers); Merrill & Hickman, *supra* note 77, at 871 (discussing the lack of evidence supporting the claim that agencies are the main interpreters of statutory ambiguity); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (noting that the implicit delegation rationale potentially represents a legal fiction); Sunstein, *supra* note 50, at 2090–91 (expressing doubt that Congress implicitly delegates to administrative agencies).

Despite the *Chevron* Court's holding regarding implicit delegation, critics claim there is little to no evidence that Congress intends to delegate its power when drafting vague or ambiguous statutory language.[82] As a result, supporters of the rationale have often conceded that the theory represents a legal fiction.[83] Still, critics of the implicit delegation theory point to traditional, pre-*Chevron* conceptions of explicit delegation that contradict the soundness of this legal fiction.[84]

c. The Political Accountability Rationale

Finally, some commentators have grounded *Chevron*'s two-step approach in the political accountability of administrative agencies, focusing on their position in the executive branch and close relationship to the president to assert their indirect accountability to the voting public.[85] The political accountability rationale's primary claim lies in the *Chevron* Court's explicit reliance on the democratic accountability of administrative agencies when rationalizing its second, deferential step.[86] Those critical of the political accountability rationale focus on the *Chevron* Court's discussion of political accountability, specifically on the Court's explicit assertion that agencies alone are not accountable to the public.[87]

C. The Intersection of Chevron *and Immigration Law*

The U.S. government, through its executive and legislative authority, retains the exclusive power to regulate immigration within the United States.[88] Despite the existence of federal authority, early immigration regulation took place on the state level, with much of the legislation aimed

82. *See* Merrill & Hickman, *supra* note 77, at 871; Sunstein, *supra* note 50, at 2090–91.

83. *See* Scalia, *supra* note 81, at 517; *see also* Merrill & Hickman, *supra* note 77, at 871.

84. *See, e.g.*, United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982) (demonstrating the traditional, pre-*Chevron* viewpoint that explicit congressional delegations to agencies warranted the highest level of judicial deference); Rowan Cos. v. United States, 452 U.S. 247, 253 (1981) (same); Chrysler Corp. v. Brown, 441 U.S. 281, 308–09 (1979) (same); *see also* Merrill & Hickman, *supra* note 77, at 871.

85. *See* Negusie v. Holder, 555 U.S. 511, 531 (2009) (holding that statutory ambiguity may represent congressional delegation to an "accountable administrative body"); MANNING & STEPHENSON, *supra* note 14, at 825 (discussing *Chevron* deference and democratic accountability); Criddle, *supra* note 68, at 1288–89 (examining the "political accountability" rationale of *Chevron* deference); *supra* note 64 and accompanying text.

86. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc. 467 U.S. 837, 865–66 (1984) ("Judges . . . are not part of either political branch of Government . . . . While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . ."); *see also* MANNING & STEPHENSON, *supra* note 14, at 825; Criddle, *supra* note 68, at 1288.

87. *See* Criddle, *supra* note 68, at 1289.

88. *See* U.S. CONST. art. I, § 8, cl. 4 (stating that Congress has the power to "establish a uniform Rule of Naturalization"); *see also* Arizona v. United States, 132 S. Ct. 2492, 2498 (2012) (discussing the "well-settled" constitutional power of the federal government to regulate immigration within its borders); Toll v. Moreno, 458 U.S. 1, 10 (1982) (noting the long line of Court precedent recognizing the federal government's constitutional power to regulate immigration); LaJuana Davis, *Reconsidering Remedies for Ensuring Competent Representation in Removal Proceedings*, 58 DRAKE L. REV. 123, 125 (2009).

at encouraging, rather than restricting, immigration.[89] Despite this traditional model of regulation, the late nineteenth and early twentieth centuries saw an increased demand for federal intervention, culminating in some of the first pieces of legislation aimed at taxing and excluding immigrants from entering the United States.[90]

Strict federal regulations remained at the forefront of immigration regulation throughout the twentieth century, crystallized by the rigid quota system of the Immigration Act of 1924.[91] In 1952, Congress passed its most important act regulating immigration within the United States: the INA.[92] Although the INA has undergone substantial amendment processes since its original enactment, the INA remains the statute primarily responsible for directing the operation of immigration regulation within the United States.[93]

As originally enacted in 1952, the INA had some basic features that did not substantially differ from previous congressional acts that also regulated immigration.[94] Primarily, the INA continued the national origins quota system, established annual quotas on all immigrants except those who originated in the Western Hemisphere, and placed preferences on immigrants with specific skill sets.[95]

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89. *See* 1 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE §§ 2.02–.04 (2004), *reprinted in* STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 14 (5th ed. 2009).

90. *See* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION: PROCESS AND POLICY 2–3 (3d ed. 1995) (noting the nineteenth-century practice of taxing Chinese immigrants to provide a disincentive for further immigration); GORDON ET AL., *supra* note 89, at 14–15 (describing the "[c]ontinued demand for federal action" regarding immigration regulation, ultimately culminating in the taxation of immigration); Michelle Rae Pinzon, Note, *Was the Supreme Court Right? A Closer Look at the True Nature of Removal Proceedings in the 21st Century*, 16 N.Y. INT'L L. REV. 29, 33–35 (2003).

91. *See* Pub. L. No. 68-139, 43 Stat. 153, 159; *see also* GORDON ET AL., *supra* note 89, at 15–16; Kathryn M. Bockley, *A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise*, 21 N.C. J. INT'L L. & COM. REG. 253, 259 (1995). Although the 1924 Act placed a numerical limit on immigration, the quota did not apply to native citizens of the Western Hemisphere. *See* GORDON ET AL., *supra* note 89, at 16.

92. Pub. L. No. 82-114, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2006)).

93. *See* GORDON ET AL., *supra* note 89, at 17 ("Although the [INA] has been repeatedly amended, it is still the basic statute dealing with immigration and nationality."); LEGOMSKY & RODRIGUEZ, *supra* note 89, at 2.

94. *See* Immigration and Nationality Act §§ 201–207; *see also* GORDON ET AL., *supra* note 89, at 17–18 (discussing President Truman's objections to the INA's continued reliance on the national origins quota system). The INA's continuance of the national origins quota system was controversial, resulting in a presidential veto eventually overcome by the vote of Congress. *See* GORDON ET AL., *supra* note 89, at 17–18.

95. *See* Immigration and Nationality Act §§ 201–203; *see also* GORDON ET AL., *supra* note 89, at 17; Pinzon, *supra* note 90, at 38–39; *Milestones: 1945–1952*, U.S. DEPARTMENT ST., http://history.state.gov/milestones/1945-1952/ImmigrationAct (last visited Oct. 21, 2013).

1. Traditional Agency Hierarchy: The Immigration and Naturalization Service

From the creation of the administrative state in the early 1940s to the agency's restructuring in 2002, the Immigration and Naturalization Service (INS) held the primary responsibility of administering the INA and regulating immigration within the United States.[96] In addition, Congress delegated the primary authority to administer the INA to the U.S. Attorney General (AG), who delegated that authority to several agencies within the Department of Justice (DOJ).[97] In turn, the DOJ oversaw the Executive Office for Immigration Review (EOIR) that acted through its several units as the main adjudicatory arm of the agency.[98] The EOIR's first unit, the Office of the Chief Immigration Judge (OCIJ), coordinated and directed the hundreds of Immigration Judges (IJ) throughout the United States who presided over the adjudicatory hearings of the agency.[99] The BIA, the EOIR's second unit, heard all appeals stemming from the decisions of IJs as well as other decisions within the agency.[100] Finally, the EOIR was comprised of a third unit, the Office of the Chief Administrative Hearing Officer (OCAHO), which directed evidentiary hearings in specialized circumstances regarding the employment of noncitizens and accusations of employment discrimination.[101]

In addition to the DOJ, the Department of State (DOS), the Department of Labor (DOL), and the Department of Health and Human Services (HHS) were also responsible for the regulation of immigration within the United States.[102] Traditionally, the DOS functioned as an administrator of immigration law, specifically by issuing or denying visas to immigrants attempting to enter the United States and by overseeing the various educational exchange and refugee programs.[103] In contrast, the HHS traditionally had a much smaller role, handling only the care of children entering the United States and making judgments on the admissibility of injured or ill immigrants.[104] Finally, the DOL handled the admission of

96. *See Overview of INS History to 1998*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=b7294b0738f70110VgnVCM1000000ecd190aRCRD&vgnextchannel=bc9cc9b1b49ea110VgnVCM1000004718190aRCRD (last updated May 27, 2009); *see also* LEGOMSKY & RODRIGUEZ, *supra* note 89, at 2; RICHARD D. STEEL, STEEL ON IMMIGRATION § 2:1 (2012).

97. *See* Immigration and Nationality Act § 103(a) (charging the AG with the "administration and enforcement" of the INA); *see also* Enoka Herat, Comment, *Ninth Circuit v. Board of Immigration Appeals: Defining "Sexual Abuse of a Minor" After* Estrada-Espinoza v. Mukasey, 84 WASH. L. REV. 523, 533 (2009).

98. *See* LEGOMSKY & RODRIGUEZ, *supra* note 89, at 3; STEEL, *supra* note 96, § 2:5.

99. *See* LEGOMSKY & RODRIGUEZ, *supra* note 89, at 3; STEEL, *supra* note 96, §§ 2:5, 2:8.

100. *See* LEGOMSKY & RODRIGUEZ, *supra* note 89, at 4; STEEL, *supra* note 96, §§ 2:5, 2:6.

101. *See* LEGOMSKY & RODRIGUEZ, *supra* note 89, at 4; *Background*, U.S. DEPARTMENT JUST., http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm (last updated Aug. 2013); *see also* STEEL, *supra* note 96, § 2:20.

102. *See* LEGOMSKY & RODRIGUEZ, *supra* note 89, at 4.

103. *See id.*

104. *See id.*

immigrants attempting to enter the United States for employment purposes.[105]

2. Evolution Towards the Department of Homeland Security and Maintenance of Agency Structure

As a response to the events of September 11, 2001, the Homeland Security Act of 2002 (HSA) restructured the various federal agencies responsible for national security and immigration regulation and brought them under a single administrative agency—the Department of Homeland Security (DHS).[106] The HSA, among other things, allowed for the president to divide the agency into enforcement and service branches, ultimately leading to the conversion of the DHS into three separate entities: U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), responsible for immigration enforcement, and the U.S. Citizenship and Immigration Services (USCIS), responsible for service functions.[107] Thus, the DHS, through these various entities, replaced the INS as the primary administrator of the INA.[108] Dividing the agency into three separate entities fundamentally altered the INS and the traditional structure of federal immigration regulation.[109] Despite the radical changes imposed by the HSA, many of the functions previously exercised by various arms of the INS were delegated to newly created entities, thus making the change in name only.[110]

First, the HSA explicitly authorized the EOIR, as well as the AG's power to regulate it.[111] Additionally, the HSA codified the AG's power to review the decisions of the BIA and gave statutory recognition to the binding nature of BIA decisions on the entire DHS.[112] Thus, under the HSA, the DOJ retained its administrative agency, the EOIR, and remained empowered to exercise its traditional adjudicatory role over removal

105. *See id.*

106. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 101, 471, 116 Stat. 2135 (codified as amended at 6 U.S.C. §§ 111, 291 (2006)); *see also* LEGOMSKY & RODRIGUEZ, *supra* note 89, at 2; DANIEL LEVY, U.S. CITIZENSHIP AND NATURALIZATION HANDBOOK, § 1:9 (2013); STEEL, *supra* note 96, § 2:1.

107. *See* Arizona v. United States, 132 S. Ct. 2492, 2499 (2012) (examining the enforcement functions of ICE and CBP); *see also* LEGOMSKY & RODRIGUEZ, *supra* note 89, at 3; LEVY, *supra* note 106, § 1:9.

108. *See* 8 U.S.C. § 1103(a)(1) (charging the DHS with administering the INA and immigration laws); LEVY, *supra* note 106, § 1:9; Davis, *supra* note 88, at 126.

109. *See* LEGOMSKY & RODRIGUEZ, *supra* note 89, at 3; *see also* STEEL, *supra* note 96, § 2:1.

110. *See* LEGOMSKY & RODRIGUEZ, *supra* note 89, at 5; LEVY, *supra* note 106, § 1:9 (describing the roles of the EOIR, BIA, AG, DOJ, and USCIS as either unchanged by the HSA or similar to that of the INS's previous functions).

111. *See* 6 U.S.C. § 521; 8 U.S.C. § 1103(g)(2) (authorizing the AG to enforce and enact all immigration regulations); LEGOMSKY & RODRIGUEZ, *supra* note 89, at 3 (stating that the HSA had given the EOIR "statutory recognition for the first time"); Davis, *supra* note 88, at 125 (noting the congressional delegation of regulatory and adjudicatory power to the AG in the context of immigration law).

112. *See* 8 C.F.R. § 1003.1(g) (2012); *see also* LEGOMSKY & RODRIGUEZ, *supra* note 89, at 4.

hearings and other similar evidentiary hearings in the same manner it had before 2002.[113] Additionally, CBP, in its border patrol and enforcement functions, simply overtook the former responsibilities of the INS Border Patrol.[114] Furthermore, although the HSA drastically altered the structure of immigration service and enforcement, it also left untouched the DOL's, DOS's, HHS's, and DOJ's regulatory functions by maintaining and explicitly authorizing many of their traditional powers.[115]

Finally, taking into account the drastic change in structure, hierarchy, and terminology, the HSA provided that any reference to the INS's previous structure would be considered a reference to its DHS equivalent.[116] Thus, although the HSA altered the traditional structure of federal immigration regulation, it preserved many of the same functions that preceded its enactment.[117]

3. The History and Power of Removability

The federal government's implied power to remove individuals from within the borders of the United States has been consistently upheld and supported as a power rooted in the sovereignty of the nation.[118] Deportability, in general or on the specific basis of criminal activity, has been viewed as a punitive measure that draws comparisons to criminal law and the criminal justice system.[119] Deportation traces its history to the Alien and Sedition Acts of 1798, which permitted the removal of citizens of nations at war with the United States.[120] By the late nineteenth century, Congress extended its removal power by enacting legislation that allowed for the deportation of immigrants that had illegally entered the United States.[121]

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113. *See* LEGOMSKY & RODRIGUEZ, *supra* note 89, at 3–4; *see also* LEVY, *supra* note 106, § 1:9.

114. *See* Press Release, U.S. Dep't of Homeland Sec., Border Reorganization Fact Sheet (Jan. 30, 2003), *available at* http://cdn.ca9.uscourts.gov/datastore/library/2013/02/26/Juvenile_factsheet.pdf; *see also* LEGOMSKY & RODRIGUEZ, *supra* note 89, at 3.

115. *See* LEGOMSKY & RODRIGUEZ, *supra* note 89, at 3–4.

116. *See* 6 U.S.C. § 557; LEGOMSKY & RODRIGUEZ, *supra* note 89, at 5.

117. *See supra* notes 110–16 and accompanying text.

118. *See* Arizona v. United States, 132 S. Ct. 2492, 2498 (2012) (describing the "inherent" sovereign powers of the federal government to regulate immigration and specify rules for removability); Kleindienst v. Mandel, 408 U.S. 753, 765–66 (1972) (stating that it is a well settled principle that the U.S. government has the power to deport, stemming from its powers as a sovereign nation); Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) (holding that the United States' power to deport was "absolute and unqualified"); Pinzon, *supra* note 90, at 41.

119. *See* LEGOMSKY & RODRIGUEZ, *supra* note 89, at 152–53, 549, 554–55; Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 471 (2007) (discussing the close connection between immigration law and criminal law); *see also Fong Yue Ting*, 149 U.S. at 740 ("[To be] forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment.").

120. *See* Act of June 18, 1798, ch. 54, § 1, 1 Stat. 566, 566–67; *see also* STEEL, *supra* note 96, § 1:1; Pinzon, *supra* note 90, at 40.

121. *See* LEGOMSKY & RODRIGUEZ, *supra* note 89, at 516; STEEL, *supra* note 96, § 1:1.

In 1910, Congress further enlarged its deportation powers by authorizing the removal of aliens who had been admitted to the United States legally but had engaged in prostitution after their arrival, marking the first time Congress sanctioned post-entry removal on the basis of illegal or "immoral" behavior.[122] Since these early measures, Congress has added and amended its list of criminal and noncriminal misbehaviors that warrant deportation, continuing its focus on post-entry removability.[123]

a. Post-entry Removability Under § 1227(a) and the "Aggravated Felony" Standard of § 1227(a)(2)(A)(iii)

The DHS, pursuant to its role as an administrative agency with the power to regulate immigration[124] and its function as the primary administrator of the INA,[125] has the power to remove any alien from the United States who has violated § 1227(a).[126] Thus, § 1227(a) is the primary INA provision dealing with the removal of immigrants already residing within the United States.[127] As is clear from its title alone,[128] § 1227 classifies the types of aliens that could become subject to removal by the DHS.[129] As currently amended, § 1227(a) provides six classes of "deportable aliens" that could be subject to the removal proceedings of the DHS and AG: (1) aliens who have gained unlawful admission or entry into the United States,[130] (2) aliens who have committed a criminal offense within the United States,[131] (3) aliens who have engaged in the falsification of documents or have failed to register,[132] (4) aliens found to pose a threat to national security,[133] (5) aliens who are likely to become a public charge,[134] and finally, (6) aliens engaging in an unlawful voting practice.[135]

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122. *See* LEGOMSKY & RODRIGUEZ, *supra* note 89, at 516–17; STEEL, *supra* note 96, § 1:1.

123. *See* LEGOMSKY & RODRIGUEZ, *supra* note 89, at 516; *see also* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1911 (2000) (discussing the twentieth century change in focus from pre-entry to post-entry in statutes governing removability and deportation).

124. *See supra* note 118 and accompanying text.

125. *See supra* note 108 and accompanying text.

126. *See* 8 U.S.C. § 1227(a) (2006) ("Any alien . . . in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens . . . ."); *see also* Arizona v. United States, 132 S. Ct. 2492, 2499 (2012) (discussing the DHS's role in enforcing immigration law, including the INA's removability provisions).

127. *See* 8 U.S.C. § 1227(a)(1)–(6) (listing classes of deportable aliens); Jacqueline P. Ulin, *A Common Sense Reconstruction of the INA's Crime-Related Removal System: Eliminating the Caveats from the Statue of Liberty's Welcoming Words*, 78 WASH. U. L.Q. 1549, 1554 (2000) (citing § 1227(a) when discussing the INA's grounds for removal).

128. Section 1227 is explicitly titled "Deportable aliens." *See generally* 8 U.S.C. § 1227.

129. *See id.* § 1227(a) (describing the classification of "deportable aliens").

130. *Id.* § 1227(a)(1).

131. *Id.* § 1227(a)(2).

132. *Id.* § 1227(a)(3).

133. *Id.* § 1227(a)(4).

134. *Id.* § 1227(a)(5). A public charge is defined as an "individual who is likely to become primarily dependent on the government for subsistence." *See Public Charge*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.

While § 1227(a) broadly outlines the six classes of aliens subject to the DHS's removal process, each individual class is the subject of further statutory specification, including the second listed class of aliens found to have committed a criminal offense pursuant to § 1227(a)(2).[136] In further specifying what criminal offenses trigger removability pursuant to § 1227(a)(2), the statute lists several types of crimes that could lead to the removal of an alien, including but not limited to the "aggravated felony" class under § 1227(a)(2)(A)(iii).[137] On its face, § 1227(a)(2)(A)(iii) provides that an alien who has been convicted of an "aggravated felony" is included within the "criminal offenses" class of deportable aliens under § 1227(a).[138] Thus, pursuant to § 1227(a)(2)(A)(iii), any alien within the United States convicted of an aggravated felony is at risk of undergoing a DHS-initiated removal process and ultimately, being deported.[139]

b. Filling in the Gaps: The Definitional Guide of § 1101(a)

Despite providing an exhaustive list of the type of aliens subject to the DHS's removal process, § 1227(a) does not explicitly define the bulk of its terms.[140] As a definitional guide for § 1227(a), and for the INA in general, § 1101(a) defines over fifty terms that appear within the INA, including what constitutes an "aggravated felony" pursuant to § 1227(a)(2)(A)(iii).[141] Specifically, § 1101(a)(43)(A)–(U) defines "aggravated felony" by explicitly listing various crimes, ranging from, but not limited to: "murder,"[142] "rape,"[143] "sexual abuse of a minor,"[144] trafficking in "firearms,"[145] trafficking in "controlled substances,"[146] and "counterfeiting."[147]

As a result, § 1101(a)(43), used in conjunction with § 1227(a)(2)(A)(iii), provides the DHS, individual IJs, and the BIA with a guide to determining how an alien could meet the "aggravated felony" standard of

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135. *See* 8 U.S.C. § 1227(a)(6).

136. The "criminal offenses" class of deportable aliens in § 1227(a)(2) contains five subclasses which further specify the crimes triggering removability under the statute: (1) aliens convicted of "crimes of moral turpitude," (2) "multiple criminal convictions," (3) "aggravated felon[ies]," (4) "high speed flight[s]," and (5) "failure to register as a sex offender." *See id.* § 1227(a)(2)(A)(i)–(v).

137. *See id.* § 1227(a)(2)(A)(iii).

138. *See id.* ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."). *See generally id.* § 1227(a).

139. *See infra* notes 150–60 and accompanying text. *See generally* 8 U.S.C. § 1227 (outlining the types of aliens that may be deported and thus subject to the removal process).

140. *See* 8 U.S.C. § 1101(a) (providing itself as a definitional guide for § 1227).

141. *See id.* § 1101(a)(43) (defining the term "aggravated felony").

142. *Id.* § 1101(a)(43)(A).

143. *Id.*

144. *Id.*

145. *Id.* § 1101(a)(43)(C).

146. *Id.* § 1101(a)(43)(B).

147. *Id.* § 1101(a)(43)(R).

§ 1227(a)(2)(A)(iii) and thus fall within the "deportable aliens" class pursuant to § 1227(a), triggering the initiation of the removal process.[148] Because § 1101(a)(43) is not exhaustive, however, individual IJs and the BIA are often forced to interpret the meaning of both § 1227(a)(2)(A)(iii) and of the definitions contained within § 1101(a)(43).[149]

c. The Removal Process Under § 1227(a)

The DHS, charged with administering the INA, also bears the primary responsibility of initiating the removal of aliens who have been deemed deportable by the agency.[150] The DHS, acting on its suspicion that an admitted alien falls within any one of the six "deportable alien" classes pursuant to § 1227(a), will begin the removal process by determining whether sufficient evidence exists to prove the alien is in fact deportable within the meaning of the INA.[151] If such evidence exists, the DHS and EOIR will issue a charging document to the alien, known as a Notice to Appear, outlining the violation and informing the alien of the removal proceedings and of their rights.[152] Although undocumented citizens and other unlawfully admitted citizens may be subject to an expedited removal process if found to be removable under § 1227(a), lawful permanent citizens are generally provided a removal hearing in front of an IJ who will preside over the proceedings in the first instance, hear all evidence, and ultimately decide whether the alien is removable under the INA.[153] After the alien is sufficiently notified via the Notice to Appear, the DHS, after determining whether the alien is to be detained prior to any final removal decision,[154] transfers all responsibility to the adjudicatory arm of the DOJ, the EOIR.[155]

The EOIR, under the specific supervision of an IJ assigned to the case, conducts the removal hearing during which the alien may contest his or her alleged violations of the INA against ICE officials representing the DHS.[156]

148. *See generally id.* § 1101(a) (noting that its definitional guide applies to the entire chapter, which includes § 1227(a)(2)(A)(iii)'s removability provision).

149. *See, e.g.*, James v. Mukasey, 522 F.3d 250 (2d Cir. 2008) (reviewing the BIA's interpretation of definitions contained within § 1101(a)(43)); Wong Park v. Attorney Gen., 472 F.3d 66 (3d Cir. 2006) (same); Mugalli v. Ashcroft, 258 F.3d 52 (2d Cir. 2001) (same).

150. *See* Arizona v. United States, 132 S. Ct. 2492, 2499 (2012) (discussing the discretionary power that federal officials have in choosing whether to initiate the removal process).

151. *See* 8 U.S.C. § 1229a(c)(3); LEGOMSKY & RODRIGUEZ, *supra* note 89, at 650 (discussing the DHS's general removal procedure for aliens who violate the immigration laws).

152. *See* U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT PRACTICE MANUAL 57–58 (2013), *available at* http://www.justice.gov/eoir/vll/OCIJPracManual/Practice_Manual_review.pdf; Davis, *supra* note 88, at 128.

153. *See* Davis, *supra* note 88, at 128–29.

154. The violation of certain INA provisions may trigger mandatory detention, particularly in the context of behavior violating the statute's crime-related prohibitions. *See* LEGOMSKY & RODRIGUEZ, *supra* note 89, at 651.

155. *See* Davis, *supra* note 88, at 128.

156. Immigrants charged with removal may contest removability by seeking asylum or other forms of relief. *See* Arizona v. United States, 132 S. Ct. 2492, 2499 (2012).

After conducting the hearing, the IJ must determine whether the individual is removable or should be granted relief from removal.[157] If the alien is found to be removable at the conclusion of the hearing, the alien may appeal the IJ's decision to the BIA.[158] If the BIA denies the appeal, the EOIR enters a final order of removal against the alien.[159] Once the EOIR has issued its order to remove the alien, it transfers its responsibility back again to the DHS, which enforces the order of removal.[160] At this point, all administrative appeals are exhausted, and the alien must petition a circuit court with jurisdiction over the removal hearing to further challenge their removal.[161]

4. Application of *Chevron* to Agency Interpretations of the INA

As the *Chevron* doctrine has expanded over the past thirty years, two important Supreme Court cases have solidified *Chevron*'s role in the regulatory field of immigration. In *INS v. Cardoza-Fonseca*,[162] the Court for the first time applied the principles of *Chevron* deference to the BIA's case-by-case interpretations of the INA.[163] Later, in *INS v. Aguirre-Aguirre*,[164] the Court affirmed *Chevron*'s traditional role in the context of immigration regulation, while also emphasizing the special need for *Chevron* deference in examining agency interpretations of the INA.[165]

a. INS v. Cardoza-Fonseca *and the Initial Application of* Chevron *to the INA*

Three years after its decision in *Chevron*, the Court extended its newfound framework to agency interpretations of the INA.[166] In *Cardoza-Fonseca*, the Court applied the two-step approach to the BIA's interpretation of the Refugee Act of 1980,[167] which amended portions of the INA to allow refugees to seek asylum if they suffered a "well founded fear" of persecution in their nation of origin.[168] The BIA, on the basis of its history in adjudicating the matter, concluded that the "well founded fear" language of the INA created a "clear probability of persecution" standard in

157. *See* U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, EOIR AT A GLANCE 1 (2009), *available at* http://www.justice.gov/eoir/press/09/EOIRataGlance121409.pdf; *see also* Davis, *supra* note 88, at 129.

158. *See* U.S. DEP'T OF JUSTICE, *supra* note 157, at 4; *see also* LEGOMSKY & RODRIGUEZ, *supra* note 89, at 657.

159. *See* STEEL, *supra* note 96, § 14:37; Davis, *supra* note 88, at 129.

160. *See* LEGOMSKY & RODRIGUEZ, *supra* note 89, at 659.

161. *See id.* at 657.

162. 480 U.S. 421 (1987).

163. *See infra* notes 170–72 and accompanying text.

164. 526 U.S. 415 (1999).

165. *See infra* notes 176–78 and accompanying text.

166. *See Cardoza-Fonseca*, 480 U.S. at 446–48.

167. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. The Refugee Act of 1980 (RA) amended the INA's asylum procedures by providing the AG with discretion in determining whether a refugee is experiencing or has a reasonable fear of experiencing persecution. *See Cardoza-Fonseca*, 480 U.S. at 427 n.4.

168. *See Cardoza-Fonseca*, 480 U.S. at 427–28.

which the alien seeking asylum had the burden of proving that it was likelier than not that they would suffer persecution if deported.[169]

Upon review, the Court applied its newfound *Chevron* approach to the BIA's interpretation of the INA.[170] Ultimately, the Court held that Congress had clearly spoken in the statute, finding that the INA unambiguously differentiated the "well founded fear" and "clear probability of persecution" standards, thus ending the inquiry at step one of *Chevron* with no grant of deference to the BIA's interpretation.[171] Although the Court did not defer to the BIA's determination, it emphasized that *Chevron* deference would be granted in the future to the agency in its construction of ambiguous INA terms through its process of "case-by-case adjudications," even if that ambiguity was not present in the case at hand.[172] Despite its hesitance to go beyond *Chevron*'s first step, *Cardoza-Fonseca* demonstrated the Court's willingness to apply *Chevron* to the BIA's case-by-case analyses of the INA, and in general to subject agency interpretations of the INA to the *Chevron* two-step approach.[173]

b. INS v. Aguirre-Aguirre*: Affirming and Clarifying* Chevron*'s Role in Immigration Regulation*

More than a decade after the Court's decision in *Cardoza-Fonseca*, the *Aguirre-Aguirre* Court reaffirmed *Chevron*'s role in immigration regulation and provided an additional basis for applying the two-step approach to interpretations of the INA.[174] In *Aguirre-Aguirre*, the Court reviewed the BIA's interpretation of provisions within the INA that allowed for the deportation of aliens that had committed a "serious nonpolitical crime" prior to entering the United States, even if that alien feared persecution in their nation of origin.[175] Traditionally, the BIA has interpreted the provision by weighing the political nature of the crime against its "common-law character," an analysis primarily driven by the agency's experience adjudicating similar cases.[176]

First, the Court reaffirmed the position it took in *Cardoza-Fonseca* twelve years earlier, holding that the BIA's use of precedent to interpret the INA, a statute it administers, deserved an analysis under *Chevron*'s two-

169. *See id.* at 446 n.30.
170. *See id.* at 446–48.
171. *See id.* at 446 n.30.
172. *See id.* at 448 (holding that the BIA's interpretations of the INA that give the statute "concrete meaning through a process of case-by-case adjudication" must be analyzed under *Chevron*'s principles).
173. *See id.* at 446–47 (applying the two-step *Chevron* approach to the BIA's interpretations of the INA).
174. *See generally* INS v. Aguirre-Aguirre, 526 U.S. 415 (1999).
175. *See id.* at 418. The RA, an amendment to the INA, stated, "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." *See id.* at 419 (quoting 8 U.S.C. § 1253(h)(1) (2006)).
176. *See id.* at 422–25 (citing *In re* McMullen, 19 I. & N. Dec. 90, 97–98 (B.I.A. 1984)).

step approach, and ultimately, deference under the doctrine's second step.[177] In addition, the Court emphasized the important role *Chevron* deference plays in the context of immigration, noting that because the judiciary was not "well positioned" to consider certain politically sensitive issues with the potential to impact foreign relations between the United States and other nations, it was particularly appropriate for agencies to do so.[178] As a result, the Court held that it was particularly persuasive for an immigration agency engaged in interpreting a politically motivated provision of the INA to be entitled to a grant of *Chevron* deference.[179]

II. THE SECOND AND THIRD CIRCUITS SPLIT: DO *CHEVRON*'S PRINCIPLES APPLY TO THE BIA'S INTERPRETATION OF THE INA'S "AGGRAVATED FELONY" PROVISION?

Despite the relatively straightforward nature of *Chevron*'s two-step approach, there has been a divide among federal circuit courts regarding the application of the doctrine to the BIA's interpretation of statutory language that does not implicate the agency's traditional expertise. Specifically, the Second and Third Circuits have split in their determinations of whether *Chevron*'s two-step approach applies to the BIA's interpretation of the INA's "aggravated felony" provision, a term drawn from criminal law.[180] While the circuit split involves the interplay between immigration law and criminal law, it also implicates a more general conflict regarding *Chevron*'s agency expertise rationale and its role in administrative law jurisprudence.

Part II.A begins by exploring the Second Circuit's application of a traditional *Chevron* analysis to the BIA's interpretation of the INA's "aggravated felony" provision, as well as to the court's application of the two-step approach to the BIA's use of a criminal statute as an interpretative guide. Next, Part II.B analyzes the Third Circuit's rejection of *Chevron*'s two-step approach when reviewing the BIA's interpretation of the INA's "aggravated felony" provision and discusses the court's finding that the agency can claim no traditional expertise in interpreting criminal law.

A. The Second Circuit's Application of a Traditional Chevron *Analysis to the BIA's Interpretation of "Aggravated Felony"*

The Second Circuit, when reviewing BIA-appealed removal hearings, has repeatedly held that a traditional, two-step *Chevron* analysis, and ultimately *Chevron* deference, is applicable to the BIA's interpretation of

177. *See id.* at 424–25 (holding that because the BIA is interpreting a statute it administers, it is "clear that principles of *Chevron* deference are applicable to [the INA]").

178. *See id.*

179. *See id.*

180. *Compare* James v. Mukasey, 522 F.3d 250, 254 (2d Cir. 2008) (analyzing the BIA's interpretation of the INA's "aggravated felony" language under the traditional *Chevron* two-step approach), *and* Mugalli v. Ashcroft, 258 F.3d 52, 55–56 (2d Cir. 2001) (same), *with* Wong Park v. Attorney Gen., 472 F.3d 66, 70–71 (3d Cir. 2006) (holding that the DHS's and BIA's interpretation of the INA's "aggravated felony" language would not undergo a *Chevron* analysis due to the agency's lack of expertise).

the INA's "aggravated felony" provision despite the term's criminal law origins.[181] Additionally, the Second Circuit has further extended its application of *Chevron*'s two-step approach to the BIA's use of a criminal statute in interpreting the INA.[182] *Mugalli v. Ashcroft*[183] and *James v. Mukasey*[184] both demonstrate the Second Circuit's willingness to apply the *Chevron* doctrine to the BIA's interpretation of § 1101(a)(43)(A), which defines § 1227(a)(2)(A)(iii)'s "aggravated felony" language to include the "sexual abuse of a minor." These cases are discussed in Part II.A.1 and Part II.A.2, respectively.

1. *Mugalli v. Ashcroft* and the Two-Step Approach in the Second Circuit

In *Mugalli*, the Second Circuit reviewed findings by the INS[185] and BIA that Abdulkhaleq Mugalli had committed an "aggravated felony" as that term is defined by § 1101(a)(43)(A), thus making him removable pursuant to § 1227(a)(2)(A)(iii).[186]

a. Background

Mugalli, a native citizen of Yemen, lawfully entered the United States in 1991.[187] In 1999, twenty-nine-year-old Mugalli pled guilty to rape in the third degree for engaging in sexual intercourse with a sixteen-year-old minor in violation of New York law's "statutory rape" provision,[188] resulting in a sentence of five years' probation.[189] As a result of his guilty plea, the INS initiated removal proceedings against Mugalli, claiming that he was removable as a part of § 1227(a)(2)(A)(iii)'s deportable aliens class for his commission of an "aggravated felony" as that term is defined by § 1101(a)(43)(A).[190] Specifically, the INS claimed that Mugalli, pursuant to § 1101(a)(43)(a), had engaged in the "sexual abuse of a minor" and thus had committed an "aggravated felony" triggering removability.[191]

181. *See, e.g.*, *James*, 522 F.3d at 254 (applying a traditional *Chevron* analysis to the BIA's interpretation of the term "aggravated felony"); *Mugalli*, 258 F.3d at 55–56 (same).

182. *See James*, 522 F.3d at 254.

183. 258 F.3d at 52.

184. 522 F.3d at 250.

185. For purposes of Part II and analyzing the dispute among circuits, no significant distinction should be made between the INS and DHS. *See* discussion *supra* Part I.C.2–3.

186. *See Mugalli*, 258 F.3d at 53.

187. *See id.*

188. *See id.* at 53–54. New York Penal Law section 130.25 makes it a crime for an individual twenty-one years old or older to "engage[] in sexual intercourse with another person less than seventeen years old." *See* N.Y. PENAL LAW § 130.25 (McKinney 2009). Section 130.25 criminalizes sexual conduct with a minor despite the existence of consent, a statutory scheme commonly referred to as "statutory rape." *See* BLACK'S LAW DICTIONARY 1374–75 (9th ed. 2009) (defining statutory rape as "[u]nlawful sexual intercourse with a person under the age of consent (as defined by statute), regardless of whether it is against that person's will").

189. *See Mugalli*, 258 F.3d at 54.

190. *See id.*

191. *See id.*

b. Agency Action

On August 6, 1999, the INS served Mugalli with a Notice to Appear asserting his class as a deportable alien pursuant to § 1227(a)(2)(A)(iii) and notifying Mugalli of his upcoming removal hearing.[192] Appearing before an IJ, Mugalli unsuccessfully argued that his conviction for rape in the third degree did not constitute an "aggravated felony" pursuant to § 1227(a)(2)(A)(iii), resulting in the IJ entering an order of removal.[193]

Mugalli appealed to the BIA, which reviewed the IJ's initial findings by interpreting both § 1227(a)(2)(A)(iii)'s "aggravated felony" language and § 1101(a)(43)(A)'s definition of that provision to include the "sexual abuse of a minor."[194] The BIA concluded that although "aggravated felony" is defined within § 1101(a)(43)(A) to include "rape, murder, or sexual abuse of a minor," the statute's lack of clarity coupled with the provision's broad language made it necessary for the agency to look to outside sources for guidance.[195] Relying on past adjudications by the agency,[196] the BIA found that § 3509(a)(8) was a helpful guideline in determining what activities could be classified as sexual abuse of a minor.[197] Section 3509(a)(8), a federal criminal statute, broadly defines the sexual abuse of a minor as consisting of sexual intercourse with a "child," defined as any individual under the age of eighteen.[198] Ultimately, the BIA adopted § 3509(a)(8) in its interpretation of § 1101(a)(43)(A)'s "sexual abuse of a minor" language to include sexual intercourse with any individual under the age of eighteen.[199] Although Mugalli argued for the BIA to instead adopt § 2243(a)'s more lenient definition of "sexual abuse of a minor" as sexual intercourse with persons under the age of sixteen,[200] the BIA rejected the statute in favor of § 3509(a)(8)'s broader standard.[201] As a result, the BIA found that Mugalli's conviction for third degree rape of a sixteen-year-old female constituted "sexual abuse of a minor" pursuant to § 1101(a)(43)(A) and thus an "aggravated felony" under § 1227(a)(2)(A)(iii), triggering

192. *See id.*
193. *See id.*
194. *See id.*
195. *See id.* at 57 ("[T]he BIA decided that to determine the meaning of [§ 1101], it could refer to other federal statutes for guidance.").
196. *See In re* Rodgriguez-Rodriguez, 22 I. & N. Dec. 991 (B.I.A. 1999). In *In re Rodriguez-Rodriguez*, the BIA determined that in interpreting the meaning of "sexual abuse of a minor" pursuant to § 1101(a)(43)(A), common usage of the term, congressional intent, and § 3509 commanded the agency to interpret the language to cover sexual intercourse with anyone under the age of eighteen, rather than a specific age set. *See id.* at 993–96.
197. *See Mugalli*, 258 F.3d at 57.
198. *See* 18 U.S.C. § 3509(a)(2), (8) (2006).
199. *See Mugalli*, 258 F.3d at 58.
200. Section 2243(a) defines the crime of "sexual abuse of a minor" as engaging in sexual intercourse with another who has "attained the age of 12 years but has not attained the age of 16 years." *See* 18 U.S.C. § 2243(a).
201. *See Mugalli*, 258 F.3d at 57.

removability under the INA.[202] Consequently, the BIA issued a final order of Mugalli's removal to Yemen.[203]

c. Circuit Review

In response to the BIA's order of removal, Mugalli petitioned the Second Circuit for review.[204] Pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), the final removal order of an alien is not reviewable if the alien was convicted of an aggravated felony.[205] In order to properly analyze its jurisdiction over the BIA's removal order, the Second Circuit began its review by determining whether Mugalli had in fact committed an "aggravated felony" pursuant to § 1227(a)(2)(A)(iii) as that term is defined by § 1101(a)(43)(A).[206] As a result, the Second Circuit's jurisdiction over Mugalli's petition hinged on whether the court accepted the BIA's broad interpretation of § 1101(a)(43)(A) to include "statutory rape" as an "aggravated felony."[207]

The Second Circuit began by first determining the appropriate standard of review.[208] The court, upon a finding that the BIA administers the INA,[209] held that *Chevron*'s two-step approach, as a "well-established" principle of judicial review, would clearly govern the court in its determination of whether "statutory rape" could be considered the "sexual abuse of a minor," and thus an "aggravated felony" pursuant to the INA's definition of that term.[210] Although the term "aggravated felony" originates in criminal law, the court made no mention of this possible distinction, and instead applied a straightforward *Chevron* analysis to the BIA's interpretation.[211] Furthermore, the court made no effort to distinguish the BIA's use of § 3509(a) as a guideline in interpreting § 1101(a)(43)(A), thus extending the application of *Chevron* even further by applying a traditional two-step analysis to the agency's use and interpretation of a criminal statute.[212]

The Second Circuit, adhering to the principles of *Chevron*'s first prong, began its analysis by engaging the text of § 1101(a)(43)(A) to determine

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202. *See id.* at 58
203. *See id.* at 54.
204. *See id.*
205. *See id.* at 54–55 (citing 8 U.S.C. § 1252(a)(2)(C)).
206. *See id.*
207. *See id.* (discussing the court's need to examine the meaning of "aggravated felony" to determine its jurisdiction).
208. *See id.* at 55.
209. *See id.*
210. *See id.* (quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).
211. *See id.* at 60 ("Neither the agency's reliance on 18 U.S.C. § 3509(a), supported by Black's Law Dictionary and its understanding of Congressional intent, to determine the meaning of 'sexual abuse of a minor' under § 1101(a)(43)(A), nor the resulting definition, is unreasonable. We therefore defer to the BIA's interpretation of the INA under *Chevron*." (citation omitted)).
212. *See id.* at 55, 60 (holding that a traditional *Chevron* analysis applied to the BIA's interpretation of the INA and its use of § 3509(a)).

whether Congress had intended the statute's "sexual abuse of a minor" provision to include specific crimes.[213] Upon examining the statute, the court determined that § 1101(a)(43)(A) lacked any explicit congressional guidance as to the scope of its "sexual abuse of a minor" language.[214] As a result, the court found § 1101(a)(43)(A) to be sufficiently ambiguous to warrant an analysis under *Chevron*'s second deferential step.[215]

The Second Circuit's finding of statutory ambiguity resulted in the court analyzing the BIA's construction of § 1101(a)(43)(A) under *Chevron*'s second prong, which mandates a court to "affirm the agency's construction . . . as long as that interpretation is reasonable," a standard commonly known as *Chevron* deference.[216] Although the BIA utilized a criminal statute in § 3509(a) as a guide in broadly defining the phrase "sexual abuse of a minor," the court found, in accordance with *Chevron* and Supreme Court precedent, that the BIA was still entitled to deference in its process of attaching "concrete meaning" to the ambiguous language of the INA through "case-by-case adjudications."[217] Therefore, the Second Circuit granted *Chevron* deference to the BIA's interpretation of § 1101(a)(43)(A) to include "statutory rape," and thus to the BIA's determination that such a crime constituted an "aggravated felony" under the INA.[218]

As a result of its grant of *Chevron* deference, the court was only required to determine that the BIA's interpretation was "reasonable" to uphold the agency's determination.[219] Ultimately, the court found the BIA's interpretation to be reasonable under *Chevron*'s deferential standard, holding that the BIA's use of § 3509(a) and ultimate conclusions were aimed towards the agency's reasonable goal of comprehensive protection of children.[220] By deferring to the BIA, the Second Circuit held that § 1101(a)(43)(A)'s "sexual abuse of a minor" provision included any crime involving sexual intercourse with a minor under the age of eighteen, representing the court's willingness to apply a traditional *Chevron* analysis to the BIA's interpretation of "aggravated felony."[221]

213. *See id.* at 55–56.

214. *See id.* at 56.

215. *See id.* at 56, 60 (discussing *Chevron*'s "reasonableness" standard that was used as part two of the doctrine's two-step approach).

216. *See id.* at 55–56 (quoting Bell v. Reno, 218 F.3d 86, 90 (2d Cir. 2000)).

217. *See id.* at 55–56, 60.

218. *See id.* at 60 ("We therefore defer to the BIA's interpretation of the INA under *Chevron*.").

219. *See id.* at 55 (holding that, under *Chevron*, the court "need only conclude that [the BIA's] interpretation is reasonable and that it considered the matter in a detailed and reasoned fashion" (quoting Michel v. INS, 206 F.3d 253, 263 (2d Cir. 2000))).

220. *See id.* at 60 ("[T]he agency's reliance on 18 U.S.C. § 3509(a) . . . to determine the meaning of 'sexual abuse of a minor' under § 1101(a)(43)(A), nor the resulting definition, is unreasonable.").

221. *See id.*

2. The Second Circuit's Continued Application of *Chevron* in *James v. Mukasey*

Seven years after its decision in *Mugalli*, the Second Circuit in *James* had the opportunity to reconsider whether the *Chevron* doctrine applied to the BIA's interpretation of § 1101(a)(43)(A), and once again held that the two-step approach applied to the agency's interpretation of the term "sexual abuse of a minor" as a definitional guide for the INA's "aggravated felony" provision.[222]

a. Background

Petitioner Ushian Kayon James, a native citizen of Jamaica, lawfully entered the United States in 1999 as a permanent resident.[223] In 2003, at the age of twenty-two, James began a sexual relationship with a sixteen-year-old female acquaintance.[224] As a result of the relationship, James was charged with rape in the third degree pursuant to New York Penal Law section 130.25, a charge commonly known as "statutory rape."[225] The charge was soon reduced to a misdemeanor, resulting in James pleading guilty to "Endangering the Welfare of a Child" in violation of New York Penal Law section 260.10.[226] On October 3, 2003, James was convicted and sentenced to a probationary period of three years.[227]

b. Agency Action

Two years after his conviction, the DHS issued James a Notice to Appear charging him with removability pursuant to § 1227(a)(2)(E)(i) for committing a crime of "child abuse."[228] On November 29, 2005, an IJ conducted a removal hearing where James, in an attempt to terminate the proceedings, argued that the agency had failed to demonstrate that he was convicted of a crime of "child abuse."[229] As a response, the DHS charged James with removability under a different section of the INA, claiming that James had committed the "aggravated felony" of "sexual abuse of a minor" as that term appears in § 1101(a)(43)(A).[230]

Less than one year later, the IJ denied James's motion to terminate and issued an order of removal.[231] Although James never pled guilty to his original charge of rape in the third degree, the IJ determined that based on the original felony complaint, the sexual relationship James admitted to

222. *See* James v. Mukasey, 522 F.3d 250, 253 (2d Cir. 2008).
223. *See id.* at 251.
224. *See id.* at 251–52.
225. *See id.* at 252; *see also supra* note 188 and accompanying text (discussing "statutory rape").
226. *See James*, 522 F.3d at 252.
227. *See id.*
228. *See id.*
229. *See id.*
230. *See id.*
231. *See id.*

having with a minor under the age of eighteen was "in fact the conduct [James] pleaded guilty to when he entered a plea of guilty to endangering the welfare of a child."[232] Thus, the IJ determined that James had pled guilty to behavior constituting the "sexual abuse of a minor" under § 1101(a)(43)(A), triggering removability pursuant to the "aggravated felony" provision of § 1227(a)(2)(A)(iii).[233]

On appeal to the BIA, James claimed the IJ erred in finding that his sexual relationship with a sixteen-year-old minor constituted the "aggravated felony" of "sexual abuse of a minor."[234] The BIA, in determining the scope of § 1101(a)(43)(A), invoked as precedent its past adjudications in which the agency adopted § 3509(a), a criminal statute, as a guide in interpreting the term "sexual abuse of a minor" to include sexual contact with all persons under the age of eighteen.[235] As a result, the BIA, after concluding that the IJ had properly considered James's guilty plea and felony complaint to determine that he had engaged in sexual intercourse with a sixteen-year-old girl,[236] affirmed the IJ's finding that James had committed the "aggravated felony" of "sexual abuse of a minor" as the BIA has traditionally interpreted that term, triggering removability under § 1227(a)(2)(A)(iii).[237]

c. Circuit Review

Upon the BIA's affirmation of the IJ's removal order, James petitioned the Second Circuit, claiming, among other things, that his relationship with a sixteen-year-old girl did not constitute an "aggravated felony" pursuant to the INA.[238] Reaffirming the position it took in *Mugalli* seven years earlier,[239] the Second Circuit held that when its ability to review a case "depends on the definition of a phrase used in the INA, a statute that the BIA administers," the court would apply a traditional *Chevron* analysis to the agency's interpretation.[240] Thus, the court determined it would apply *Chevron*'s two-step approach to the BIA's interpretation of "aggravated

232. *See id.*

233. *See id.* at 252–53 (finding that the IJ concluded that James's conviction constituted the aggravated felony of "sexual abuse of a minor under 8 U.S.C. § 1101(a)(43)(A)").

234. *See id.* at 253.

235. *See id.* at 254 (discussing the BIA's determination that the agency's past adoption of § 3509(a) as a guide in interpreting § 1101(a)(43)(A) to include sexual intercourse with any minor below the age of eighteen served as precedent and thus controlled); *see also* Mugalli v. Ashcroft, 258 F.3d 52 (2d Cir. 2001); *In re* Rodriguez-Rodriguez, 22 I. & N. Dec. 991, 995–96 (B.I.A. 1999) (finding that the BIA, through its past adjudications in which it adopted § 3509(a) as a guide, has broadly interpreted § 1101(a)(43)(A)'s "sexual abuse of a minor" to include sexual intercourse with minors as an "aggravated felony").

236. *See James*, 522 F.3d at 253.

237. *See id.*

238. *See id.*

239. *See supra* notes 211–12 and accompanying text (discussing the Second Circuit's holding in *Mugalli* that the principles of *Chevron* applied to the BIA's interpretation of the INA).

240. *See James*, 522 F.3d at 253–54.

felony," including the agency's continued use of § 3509(a) as a guideline in determining the scope of the term "sexual abuse of a minor."[241]

In applying *Chevron*'s two-step approach, the Second Circuit relied on *Mugalli*, again holding that an examination of the text of § 1101(a)(43)(A) revealed no clear congressional intent, leading the court to conclude that the statute was ambiguous under *Chevron*'s first step.[242] The court then engaged *Chevron*'s second step, examining the reasonableness of the BIA's statutory construction under the doctrine's deferential standard.[243] Ultimately, the court found that the BIA's interpretation of § 1101(a)(43)(A), as a definition for the INA's "aggravated felony" provision, was reasonable in its use of § 3509(a) as a guideline in determining that sexual conduct with any minor under the age of eighteen constituted the "sexual abuse of a minor."[244] Despite the application of *Chevron* to the BIA's determinations, the court did not defer to the agency's interpretation of James's conviction under New York law, ultimately leading the court to vacate the BIA's removal order and remand the case for further review.[245]

Although the BIA's decision was ultimately overturned, the *James* court granted *Chevron* deference to the agency's statutory construction of § 1101(a)(43)(A) as a definition for the INA's "aggravated felony" provision, as well as to the agency's use of § 3509(a).[246] As a result, the Second Circuit continued its application of *Chevron*'s two-step approach to agency interpretation of the INA's criminally based "aggravated felony" provision and use of § 3509(a), a criminal statute.[247]

B. Experts Only: The Third Circuit Determines Chevron*'s Two-Step Approach Is Inapplicable to the BIA's Interpretation of "Aggravated Felony" Due to a Lack of Agency Expertise*

In comparison to the Second Circuit, the Third Circuit in *Wong Park v. Attorney General*[248] held that the *Chevron* two-step approach does not apply to the BIA's interpretation of the term "aggravated felony" due to the agency's lack of expertise in analyzing criminal law, thus leading the court to review the agency's statutory construction without deference.[249]

In *Wong Park*, the Third Circuit reviewed the BIA's determination that petitioner Yong Wong Park, through his conviction for trafficking in counterfeit goods, was removable pursuant to the INA's definition of

241. *See id.* (applying *Chevron* to the BIA's interpretation of the INA and its use of § 3509(a)).
242. *See id.*
243. *See id.* at 254.
244. *See id.*
245. *See id.* at 254, 259.
246. *See id.* at 254 ("We have found that the BIA's adoption of § 3509(a) is reasonable, and have accorded it *Chevron* deference." (citing Mugalli v. Ashcroft, 258 F.3d 52, 60 (2d Cir. 2001))).
247. *See id.*
248. 472 F.3d 66 (3d Cir. 2006).
249. *See id.* at 70–71.

"aggravated felony" in § 1101(a)(43)(R), which includes "offense[s] relating to . . . counterfeiting."[250]

1. Background

Yong Wong Park, a citizen of the Republic of Korea, became involved in a criminal scheme involving the sale of counterfeit clothing from approximately February 1997 to October 1997.[251] On February 12, 1998, Wong Park was admitted into the United States.[252] As a result of his previous criminal involvement, Wong Park pled guilty to one count of trafficking in counterfeit goods or services.[253] On July 5, 2000, Wong Park was sentenced to a prison term of twenty-one months.[254]

2. Agency Action

As a result of his conviction, the DHS issued Wong Park a Notice to Appear, claiming he had committed a crime of "moral turpitude" within five years of his admission into the United States, and charged him with removability pursuant to § 1227(a)(2)(A)(i).[255] On June 25, 2002, the IJ presiding over Wong Park's removal hearing granted Wong Park's motion to terminate, finding that he had not committed a crime of "moral turpitude" and thus was not removable.[256] The DHS appealed to the BIA, which vacated the IJ's decision and ultimately determined that the parties were required to litigate the matter of whether Wong Park had committed his crime within five years of entering the United States before an IJ at a renewed removal hearing.[257] Soon after, the DHS filed an additional notice of removability pursuant to § 1227(a)(2)(A)(iii), charging Wong Park with committing the "aggravated felony" of an "offense . . . relating to counterfeiting," as defined by § 1101(a)(43)(R).[258]

On August 23, 2004, the IJ found that while Wong Park did not commit a crime of "moral turpitude,"[259] he was still removable pursuant to § 1227(a)(2)(A)(iii) for his commission of an "aggravated felony,"

250. *See id.* at 68.

251. *See id.*

252. The materials Wong Park admitted to selling included inauthentic clothing that "bore" the trademark of both Nike and Tommy Hilfiger. *See id.* at 68 n.4.

253. *See id.* at 67–68.

254. *See id.* at 68.

255. *See id.* Section 1227(a)(2)(A)(i) states that an alien shall be removable if "convicted of a crime involving moral turpitude committed within five years" after admission for which a sentence of one year or longer may be imposed. *See* 8 U.S.C. § 1227(a)(2)(A)(i) (2006). For a more lengthy discussion on the "moral turpitude" standard, see Pooja R. Dadhania, Note, *The Categorical Approach for Crimes Involving Moral Turpitude After* Silva-Trevino, 111 COLUM. L. REV. 313 (2011).

256. *See Wong Park*, 472 F.3d at 68.

257. *See id.*

258. *See id.* at 69.

259. The IJ found that because Wong Park did not commit his counterfeiting offense within five years of his admission into the United States, he was not removable pursuant to § 1227(a)(2)(A)(i). *See id.*

specifically an offense "relating to . . . counterfeiting."[260] The IJ, in examining whether Wong Park was removable, interpreted § 1101(a)(43)(R)'s "relating to . . . counterfeiting" language to determine what crimes the INA provision included.[261] First, the IJ determined that because § 1101(a)(43)(R) did not provide any explicit guidance as to its definition of "counterfeiting" and contained broad "relating to" language, Congress intended the statute to capture a wide scope of offenses beyond just counterfeiting.[262] Thus, in constructing § 1101(a)(43)(R)'s "relating . . . to counterfeiting" language, the IJ determined that the INA provision also included behavior prohibited by § 2320, namely the trafficking of counterfeit goods.[263] As a result, the IJ interpreted the language of § 1101(a)(43)(R) to include the trafficking of counterfeit goods and thus found that such crimes constituted an "aggravated felony" pursuant to § 1227(a)(2)(A)(iii).[264]

As a consequence of her determination that trafficking in counterfeit goods constituted an "aggravated felony," the IJ found Wong Park removable due to his conviction of that offense under § 2320.[265] Wong Park appealed the IJ's interpretation and order of removal to the BIA.[266] Ultimately, the BIA affirmed the IJ's decision, making the order of Wong Park's removal to the Republic of Korea final.[267]

3. Circuit Review

The Third Circuit, in reviewing Wong Park's appeal of the BIA's removal order, determined that its jurisdiction rested on an examination of whether Wong Park committed an "aggravated felony" pursuant to § 1227(a)(2)(A)(iii).[268] Therefore, the Third Circuit began by determining what standard of review it would employ when examining the BIA's interpretation of § 1101(a)(43)(R) to include the crime of trafficking in counterfeit goods.[269]

Despite the government urging the court to apply *Chevron*'s standard two-step approach to the findings of the IJ and BIA,[270] the Third Circuit held that the agency's interpretation would be reviewed de novo and thus

260. *See id.*
261. *See id.* at 69–70.
262. *See id.* at 69 (discussing the IJ's findings that a "wide variety" of offenses could be considered counterfeiting and that the Supreme Court held congressional use of the term "relating to" as demonstrating a purpose to define the offense in its "broadest sense").
263. *See id.* at 70 ("The IJ thus concluded that the offense criminalized by 18 U.S.C. § 2320 was one which related to counterfeiting within the meaning of . . . 8 U.S.C. § 1101(a)(43)(R).").
264. *See id.* at 69–70.
265. *See id.* at 70.
266. *See id.*
267. *See id.*
268. *See id.*
269. *See id.* at 70–71.
270. *See id.* at 70; *see also* Brief for Respondent at 11–12, *Wong Park*, 472 F.3d at 66 (No. 05-2054), 2006 WL 5444158, at *12 (claiming that *Chevron* deference should apply to agency interpretation of ambiguous statutory terms).

receive no grant of *Chevron* deference.[271] Although the Third Circuit acknowledged that deference seemed applicable to the BIA's interpretation of the INA, a statute it administers,[272] and that the Supreme Court previously held that *Chevron*'s two-step approach applied to such interpretations,[273] it distinguished *Wong Park* by claiming the agency's interpretation of "aggravated felony" involved a pure question of law that failed to implicate the agency's expertise, thus making a traditional application of the *Chevron* doctrine inappropriate.[274]

In distinguishing *Wong Park* from *Aguirre-Aguirre*, the Third Circuit focused on the IJ and BIA's lack of expertise in interpreting the INA's "aggravated felony" provision to include the crime of trafficking in counterfeit goods, holding that the immigration agency had "no particular expertise" in examining federal criminal offenses.[275] Therefore, the Third Circuit found that because federal courts have more expertise in defining what crimes should be considered "relat[ed] to . . . counterfeiting," and thus "aggravated felon[ies]" under the INA, the court was in the best position to evaluate that question of law anew and without deference to the agency.[276] The Third Circuit further distinguished *Wong Park*, finding that although the Court in *Aguirre-Aguirre* held that *Chevron*'s two-step approach applied to the BIA's interpretations of the INA, the Court's grant of deference in that case was motivated by highly sensitive political issues that were not similarly present in *Wong Park*.[277]

Therefore, the *Wong Park* court held that the BIA's lack of expertise in interpreting criminal law, coupled with *Aguirre-Aguirre*'s dissimilar fact pattern, led the agency's interpretations to be reviewed without the traditional application of *Chevron*'s two-step approach.[278] As a result, the Third Circuit held that it would review the BIA's decision de novo, with no deference granted to the IJ or BIA's previous findings.[279] Despite a lack of deference to the BIA's determinations, the Third Circuit held that Wong Park had indeed committed an "aggravated felony," causing the court to ultimately affirm the BIA's order of removal.[280]

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271. *See Wong Park*, 472 F.3d at 70–71.

272. *See id.* at 70 (noting that the court "usually" grants deference to an agency's interpretation of a statute it administers).

273. *See id.* at 70–71 (citing INS v. Aguirre-Aguirre, 526 U.S. 415, 424–25 (1999)); *see also supra* note 177 and accompanying text (discussing the Court's holding in *Aguirre-Aguirre*, in which the Court applied the principles of *Chevron* to the BIA's interpretation of the INA).

274. *See Wong Park*, 472 F.3d at 69–71.

275. *See id.* at 70–71.

276. *See id.* at 71 ("[T]he Attorney General has no particular expertise in defining a term under federal law, yet it is 'what federal courts do all the time.'" (quoting Drakes v. Zimski, 240 F.3d 246, 251 (3d Cir. 2001))).

277. *See id.* ("[T]he concerns motivating [deference in *Aguirre-Aguirre*] are largely absent here."); *see also supra* notes 175–76 and accompanying text (describing the general facts of *Aguirre-Aguirre*).

278. *See Wong Park*, 472 F.3d at 70–71.

279. *See id.* at 71 ("We thus engage in de novo review.").

280. *See id.* at 72–73.

III. RESOLVING THE DIVIDE: PROPOSING A NONTRADITIONAL MODEL OF AGENCY EXPERTISE AND REJECTING THE THIRD CIRCUITS' RIGID "EXPERTS ONLY" CONCEPTION OF *CHEVRON* AND THE ADMINISTRATIVE STATE

Although grounding *Chevron* in a singular, foundational theory continues to attract scholarly attention, such a discussion remains beyond the scope of this Note. Nevertheless, this Note attempts to resolve the split between the Second and Third Circuits by proposing an agency expertise model as a secondary rationale in *Chevron*'s framework that can be flexibly applied when examining an agency's experience outside its traditional field, such as the BIA's interpretation of INA language originating in criminal law.[281]

Part III.A begins by suggesting that while the agency expertise model may not exist as *Chevron*'s primary rationale, it finds support as a secondary foundational theory that courts may engage when attempting to apply the doctrine's two-step approach. Building off this assertion, Part III.B proposes that courts engaging agency expertise should apply a flexible model that considers an agency's experience outside its traditional field—an approach evidenced both by *Chevron*'s text and historical role in administrative law. Finally, Part III.C applies the proposed flexible agency expertise model to the split between the Second and Third Circuits, resolving the divide in favor of the Second Circuit's application of the *Chevron* two-step approach to the BIA's interpretation of language drawn from criminal law.

A. Chevron*'s Secondary Mandate: Agency Expertise and Its Role at the Periphery of the Doctrine*

The implicit delegation rationale has received a substantial amount of support as *Chevron*'s most appropriate primary rationale.[282] While this Note does not attempt to argue that agency expertise should replace implicit delegation as *Chevron*'s primary foundational theory, it does propose that the *Chevron* Court, in formulating its two-step approach, placed some secondary importance on agency expertise in rationalizing the *Chevron* doctrine and its deferential standard of review.[283] As a result, the *Chevron* Court left open the possibility that a court reviewing an agency's statutory interpretation could, as a secondary matter, engage the agency expertise rationale when determining whether *Chevron*'s two-step approach is appropriate.

The *Chevron* Court's formulation and justification of its two-step approach support the assignment of secondary importance to agency expertise.[284] The *Chevron* Court, in holding that agency statutory interpretation would be governed by its two-step approach, explicitly justified the doctrine's deferential principles by referencing the specialized

281. *See* discussion *infra* Part III.B.
282. *See supra* note 77 and accompanying text.
283. *See supra* notes 70–72 and accompanying text.
284. *See supra* notes 70–72 and accompanying text.

expertise of administrative agencies.[285] First, the Court held that *Chevron* deference was necessary due to the inherent complexity involved in interpreting administrative statutes, a task more easily and efficiently accomplished by an expert agency as opposed to a less experienced judge.[286] Furthermore, the Court's application of its two-step approach to the EPA's interpretation in *Chevron* demonstrates an existing role for agency expertise within the doctrine's framework.[287] Specifically, the Court rationalized its application of *Chevron* deference to the EPA's statutory interpretation by pointing to the EPA's vast experience in creating, shaping, and interpreting environmental law.[288]

Thus, although the *Chevron* Court may have assigned primary importance to implicit congressional delegation in grounding its two-step approach, the Court also determined that agency expertise played some secondary role in the initial application of the doctrine.[289] As a result, *Chevron*'s framework includes, and is partially grounded in, the agency expertise rationale, permitting courts to secondarily engage agency expertise when determining whether *Chevron*'s two-step approach applies to an agency's statutory interpretation.

B. The Flexible Agency Expertise Model: Granting Administrative Agencies Deference Within the Nontraditional Sphere of Expertise

Although agency expertise may play a secondary role within the *Chevron* framework, it remains unclear how a court reviewing an agency's statutory interpretation should engage agency expertise when determining whether the two-step approach applies or whether *Chevron* deference is appropriate. This Note proposes a flexible agency expertise model that allows a court to consider an agency's accumulated expertise outside its traditional field, an approach mandated by two defining features of *Chevron*'s framework: the historical role *Chevron* played in reforming the method of judicial review that preceded it, and the *Chevron* Court's application of its two-step approach to the EPA's interpretation of statutory language outside its traditional sphere of expertise.

1. *Chevron*'s Rejection of Rigid Distinctions Between Expert and Nonexpert Mandates a Flexible Approach

The Supreme Court's decision in *Chevron* was a landmark reformulation of administrative law that radically reconstructed how courts previously approached their review of agency statutory interpretation.[290] Although both the pre-*Chevron* and *Chevron* doctrines share a deferential spirit, pre-*Chevron* jurisprudence substantially differed in its rigidity and formalism,

285. *See supra* notes 70–72 and accompanying text.
286. *See supra* notes 63, 72 and accompanying text.
287. *See supra* note 71 and accompanying text
288. *See supra* note 71 and accompanying text.
289. *See supra* notes 70–72 and accompanying text.
290. *See* discussion *supra* Part I.B.1–3; *see also* note 51 and accompanying text.

highlighted by its reliance on the distinction between mixed questions of fact and law and pure questions of law.[291] The pre-*Chevron* approach to judicial review grounded its deferential standard in this formal distinction, in which deference was only granted when an agency implicated its expertise by interpreting a mixed question of fact and law.[292] Thus, the pre-*Chevron* doctrine held that an agency's interpretation of a pure question of law fell outside its sphere of expertise and did not deserve deference from the judiciary.[293] As a result, pre-*Chevron* jurisprudence largely centered on a black-and-white analysis of whether an agency was interpreting mixed questions of law and fact or pure questions of law and, by extension, whether the agency was acting as an expert or a nonexpert.[294]

Although these formal distinctions eroded before the *Chevron* Court's landmark decision, *Chevron*'s straightforward, two-step approach was a response to the confusing, inflexible jurisprudence that had both directly and indirectly preceded it.[295] *Chevron*'s two-step approach placed no emphasis on formal distinctions between mixed questions of fact and law or pure questions of law, replacing that doctrine's rigidness with a more flexible, open-ended approach.[296] Thus, although the *Chevron* Court could have reaffirmed the rigid expert and nonexpert distinction that dominated pre-*Chevron* law, it determined that while agency expertise played some role in its two-step approach, application of the *Chevron* doctrine would not be limited when an agency interprets a question of pure law.[297]

Viewed as a response to the framework it replaced, *Chevron* was a theoretical reconstruction of a rigid and inflexible model of agency expertise.[298] *Chevron*'s rejection of that model demonstrates that a modern application of its two-step approach should differ from pre-*Chevron* jurisprudence. As a result, *Chevron*'s rejection and fundamental alteration of that inflexible framework mandates the application of a flexible agency expertise model that recognizes an agency's ability to operate as an expert even when interpreting pure questions of law outside its traditional sphere of expertise.

2. The *Chevron* Court's Application of the Two-Step Approach to the EPA's Statutory Interpretation Evidences an Agency Expertise Model Respectful of Nontraditional Expertise

In *Chevron*, the Court applied its two-step approach to the EPA's interpretation of CAA amendments, in which the agency determined that the term "stationary source" would apply to power plants as a whole,

291. *See supra* note 36 and accompanying text.
292. *See supra* note 36 and accompanying text.
293. *See supra* note 36 and accompanying text.
294. *See* discussion *supra* Part I.B.1.
295. *See supra* note 51 and accompanying text.
296. *See supra* notes 55–59 and accompanying text.
297. *See supra* notes 55–59 and accompanying text.
298. *See supra* notes 49–51 and accompanying text.

known as the "bubble concept."[299] The Court, in ultimately deferring to the EPA, held that the agency's interpretation was in part an economic determination of what plants could be considered within the same industrial "bubble" in order to promote reasonable economic growth.[300] Although the amendments were clearly intended to impact plant emissions and other environmental concerns well within the EPA's traditional sphere of expertise, the amendment's legislative history and use of industrial terminology also demonstrated that the EPA was interpreting economic and industrial language that overlapped with fields outside that sphere.[301]

The Court's application of its two-step approach to the EPA's interpretation in *Chevron* demonstrates that *Chevron*'s framework includes a model of agency expertise that embraces an agency's experience in interpreting statutory language outside its traditional sphere of expertise.[302] If the *Chevron* Court was attempting to do otherwise, it could not have applied its two-step approach to the EPA's interpretation of language that was not solely within the realm of environmental science.[303] Therefore, in order to avoid the improbable conclusion that the *Chevron* Court incorrectly applied its own two-step approach, courts should be permitted to engage a model of agency expertise that considers the experience an agency gains outside its traditional field of expertise.

3. The Secondary Importance of Agency Expertise Indicates a Flexible Standard

Although agency expertise played some role in the *Chevron* Court's construction of its two-step approach, the Court's opinion was primarily grounded in implicit congressional delegation.[304] Furthermore, although there is some evidence that agency expertise was an important theoretical concept during the beginnings of the administrative state, there is little evidence that agency expertise was the primary focus of congressional delegation or that the administrative state was ever truly conceived as a body of experts.[305] Considering the secondary role agency expertise has historically played in the administrative state and its limited role in the *Chevron* doctrine, courts engaging an agency expertise model should remain flexible and not impose a strict standard where primary importance has not been assigned.

299. *See supra* notes 53–54 and accompanying text.
300. *See supra* note 54 and accompanying text.
301. *See supra* note 54 and accompanying text.
302. *See supra* note 65 and accompanying text.
303. *See supra* notes 54, 65 and accompanying text.
304. *See* discussion *supra* Part III.A.
305. *See supra* note 76 and accompanying text.

C. Resolving the Split: Application of the Flexible Agency Expertise Model to the BIA's Interpretation of "Aggravated Felony"

Although the Second Circuit's decision to apply a traditional *Chevron* analysis to the BIA's interpretation of the INA's "aggravated felony" provision was largely grounded in implicit delegation, the court's holding implicated the flexible agency expertise model and thus conformed to this Note's proposal.[306] In contrast, the Third Circuit's use of a rigid agency expertise model to withhold an application of *Chevron*'s two-step approach directly opposes this Note's proposal and finds less support in both *Chevron*'s text and in the doctrine's historical framework.[307]

1. The Second Circuit's Appropriate Application of the Flexible Agency Expertise Model

Although the Second Circuit primarily rationalized its application of a traditional *Chevron* analysis to the BIA's interpretation of the term "aggravated felony" by invoking the implicit delegation rationale, the court also implicated agency expertise as a secondary factor in its decision.[308] After holding that the BIA's role as the INA's administrator required the court to apply *Chevron*'s two-step approach to the agency's statutory interpretation, the court continued by discussing the BIA's accumulated experience in interpreting criminal law.[309]

The Second Circuit correctly applied the *Chevron* doctrine by engaging a flexible agency expertise model as a secondary factor.[310] First, the Second Circuit primarily relied on the implicit delegation rationale, only engaging agency expertise as a secondary factor when determining whether *Chevron*'s two-step approach applied to the BIA's interpretation.[311] Additionally, the Second Circuit took a flexible approach in examining the BIA's expertise in criminal law, finding that the agency had accumulated some experience interpreting criminal law via its past adjudications involving § 3509(a).[312] As a result, the Second Circuit considered the BIA's nontraditional expertise as a secondary factor in its determination of whether *Chevron*'s two-step approach applied to the BIA's interpretation of the term "aggravated felony," ultimately granting a traditional analysis to the agency.[313]

306. *See* discussion *infra* Part III.C.1.
307. *See* discussion *infra* Part III.C.2–3.
308. *See supra* notes 217, 241 and accompanying text.
309. *See supra* notes 217, 241 and accompanying text.
310. *See supra* notes 217, 241 and accompanying text.
311. *See supra* notes 209–10, 240 and accompanying text.
312. *See supra* notes 217, 241 and accompanying text.
313. *See supra* notes 217, 241 and accompanying text.

2. The Third Circuit's Incorrect Use of Formal Distinctions Between Expert and Nonexpert To Withhold a *Chevron* Analysis from the BIA's Interpretation of "Aggravated Felony"

The Third Circuit, as a result of finding that the INA's "aggravated felony" provision implicated a pure question of law, held that the BIA's interpretation of that term would not undergo *Chevron*'s traditional two-step approach.[314] In doing so, the Third Circuit engaged a model of agency expertise that relied on a formal distinction between pure and mixed questions of law, similar to the pre-*Chevron* approach to judicial review of agency statutory interpretation.[315] As a result, the Third Circuit mistakenly invoked a rigid model of agency expertise that the Court explicitly rejected in *Chevron* and, as a result, erred when it failed to apply *Chevron*'s two-step approach to the BIA's interpretation of the INA's "aggravated felony" provision.

3. The Third Circuit's Rigid Agency Expertise Model Failed To Consider Nontraditional Agency Expertise

In finding that the BIA did not demonstrate a sufficient level of expertise in interpreting the term "aggravated felony," a term drawn from criminal law, the Third Circuit conditioned the application of a *Chevron* analysis on a model of agency expertise that ignored the possibility that an agency could operate as an expert outside its traditional sphere of expertise.[316] As a result of its rigid approach, the Third Circuit failed to consider two ways in which the BIA has gained sufficient experience outside its traditional field of expertise to warrant an application of *Chevron*'s two-step approach: (1) the agency's past case-by-case adjudications construing the "aggravated felony" provision,[317] and (2) immigration law's close connection and overlap with criminal law.[318]

a. The BIA's Nontraditional Expertise As a Result of the Agency's Past Adjudications Interpreting Criminal Law

The BIA has interpreted the INA's "aggravated felony" provision since its addition to the statute, allowing the agency to gain a wealth of experience in construing that term and gauging how it impacts the removability process.[319] Furthermore, the Supreme Court has explicitly held that the BIA has, on the basis of past adjudications, gained enough experience and expertise in interpreting the INA's "aggravated felony" provision to warrant a traditional *Chevron* analysis.[320] Therefore, although

314. *See supra* notes 271–74 and accompanying text.
315. *See supra* note 36 and accompanying text.
316. *See supra* notes 271–75 and accompanying text.
317. *See supra* notes 170–72, 177 and accompanying text.
318. *See supra* note 119 and accompanying text.
319. *See supra* note 108 and accompanying text.
320. *See supra* notes 170–72, 177 and accompanying text.

the BIA may not traditionally be considered an expert in criminal law, the Third Circuit's rigid agency expertise model failed to consider the BIA's accumulated experience. In contrast, a correct application of the flexible agency expertise model would, as mandated by *Chevron*'s framework, grant some deference to the BIA's nontraditional expertise in interpreting the criminal term "aggravated felony."

b. The BIA's Nontraditional Expertise As a Result of Overlap Between Immigration Law and Criminal Law

Although immigration law is generally considered the BIA's traditional field of expertise, there is considerable overlap between immigration regulation and criminal law, particularly in the context of removal.[321] The removal process and its penalization of individual behavior is a legal concept analogous to the deterrent role criminal law plays in punishing behavior society has deemed illegal or immoral.[322] Furthermore, the INA has explicitly included criminal behavior as punishable by the threat of removal, evidenced by § 1227(a)'s "aggravated felony" provision.[323] Although the INA includes a wide range of criminal behavior triggering removability, the BIA continues to administer the statute and issue final rulings regarding its interpretation that bind all agencies within the DHS.[324]

The clear connection between criminal law and immigration regulation, specifically in the context of removal, demonstrates that the BIA can exhibit a sufficient level of expertise when interpreting the INA's "aggravated felony" provision, despite the term's origins in criminal law and the agency's traditional expertise in immigration law. In refusing to apply a *Chevron* analysis to the BIA's interpretations, the Third Circuit ignored the agency's nontraditional expertise in interpreting criminal law and applied an agency expertise model far more rigid than the *Chevron* Court exacted upon the EPA's interpretation of "stationary source," a term that similarly overlapped with that agency's traditional and nontraditional fields of expertise.[325] As a result, the Third Circuit failed to apply a flexible approach that would permit the court to consider criminal law's overlap with the removal process and immigration law in general, and thus incorrectly reviewed the BIA's interpretation of the term "aggravated felony" by failing to apply *Chevron*'s two-step approach to the agency's statutory construction.

CONCLUSION

Although the split between the Second and Third Circuits only implicates a single agency's interpretation of a single regulatory scheme, the *Chevron* framework's unique role as one of administrative law's most wide-reaching

321. *See supra* note 119 and accompanying text.
322. *See supra* note 119 and accompanying text.
323. *See supra* notes 131, 136 and accompanying text.
324. *See supra* notes 108, 112 and accompanying text.
325. *See* discussion *supra* Part III.B.2.

doctrines causes such a divide to have widespread implications across the entire administrative state.[326] While this Note does not seek to fundamentally alter *Chevron*'s framework, it does propose that a rationale at its periphery, agency expertise, be remodeled as a more flexible approach, supported by the *Chevron* Court's opinion and the doctrine's historic role in administrative law jurisprudence.[327]

Thus, while this Note's proposal may be modest considering the depth of *Chevron*'s framework, the application of a flexible model of agency expertise to the BIA's interpretation of the criminal term "aggravated felony" could impact the hundreds of administrative agencies that can also claim a similar nontraditional expertise. More important than its potential effect on the administrative state, however, is its resolution of a circuit split that has created inconsistency in a removal process where millions of legal residents require uniformity from the law.

326. *See supra* note 33 and accompanying text.
327. *See* discussion *supra* Part III.B.