ABOLISHING ICE IS NOT ENOUGH: USING CONSERVATIVE JUDICIAL PRINCIPLES TO PROTECT UNAUTHORIZED IMMIGRANTS FROM A "TYRANNICAL BUREAUCRACY"

Ashley Dylenski[†]

TABLE OF CONTENTS

I. ABOLISHING ICE ALONE WILL NOT CREATE A MORE HUMANE IMMIGRATION SYSTEM 531
A. Untangling the Executive Immigration Agencies & Their Functions 531
B. How Much Process is Due to Unauthorized Immigrants? 537
C. The Zero Tolerance Policy & Family Separations Could Still Have Happened Without ICE 543
II. CHALLENGING THE IMMIGRATION AGENCIES IN COURT 546
A. It is Inappropriate to Give Chevron Deference to Agency Interpretations of Immigration Law 548
B. Resurrecting the Non-Delegation Doctrine to Attack the Immigration & Nationality Act 557
C. Using Over-Delegation Principles to Attack DHS's Interpretation of the Homeland Security Act 568
CONCLUSION 573

[†] J.D. candidate, Benjamin N. Cardozo School of Law class of 2020; M.S. Pace University; B.A. Ohio State University. I would like to express my profound gratitude to Kara Nowakowski, Professor Peter Markowitz, Professor Alexander Holtzman, and Aaron Dylenski. Your critical feedback pushed my thinking and improved my writing.

Long before Donald Trump took office, scholars and activists had been decrying the brutality and opacity of our immigration system.[1] It was not until summer of 2018, however, that mainstream America took notice. Outrage ensued as President Trump's Department of Homeland Security ("DHS") implemented the "Zero-Tolerance Policy," which required children to be separated from their parents at the border so that the parents could be detained pending prosecution in federal criminal court.[2] Seeing ICE as President Trump's cruel and xenophobic foot soldiers, Americans latched onto the #abolishICE rallying cry.[3]

Some Democratic politicians also seized onto the #abolishICE momentum. Alexandria Ocasio-Cortez upset Representative Joseph Crowley in New York's Fourteenth Congressional District primary race in part by calling for the abolition of ICE.[4] Democratic Senator of New York, Kirstin Gillibrand said, "I don't think ICE today is working as intended . . . . I think you should get rid of it, start over, reimagine it and build something that actually works."[5] Representative Mark Pocan of Wisconsin's Second Congressional District attempted to do just that by introducing House Bill 6361, "Establishing a Humane Immigration Enforcement Act," to "terminate" ICE and merge its "essential functions" into existing executive agencies.[6] The Bill did not even make it out of committee.

I argue, however, that the #abolishICE movement and the corresponding bill perpetuate an oversimplification of the actual issue: ICE may be the public face of President Trump's immigration regime,[7] and

[1] Adam Cox, *Deference, Delegation and Immigration Law*, 74 U. CHI. L. REV. 1671, 1671–72 (2007); *see also* Sean McElwee, Opinion, *The Power of "Abolish ICE"*, N.Y. TIMES (Aug. 4, 2018), www.nytimes.com/2018/08/04/opinion/sunday/abolish-ice-ocasio-cortez-democrats.html ("Activists, frustrated by decades of deportations under both Republican and Democratic administrations, have been leading the call to abolish ICE.").

[2] Camila Domonoske et al., *What We Know: Family Separations and "Zero Tolerance" At the Border*, NPR (June 19, 2018), www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border.

[3] *See* McElwee, *supra* note 1; *see also* Cesar Vargas & Yesenia Mata, Opinion, *"Abolish ICE" Doesn't Mean What Conservatives Say It Does*, HUFFINGTON POST (July 09, 2018), huffingtonpost.com/entry/opinion-vargas-mata-abolish ice_us_5b4378cbe4b07b827cc30091.

[4] Bill Scher, Editorial, *The Problem with "Abolish ICE"*, REALCLEARPOLITICS (July 2, 2018), www.realclearpolitics.com/articles/2018/07/02/the_problem_with_abolish_ice.html ("After Ocasio Cortez rode the abolition position to victory, several Democratic officeholders and candidates hopped on the bandwagon . . . .").

[5] John Bowden, *Gillibrand Calls to Eliminate ICE: "Get Rid of it, Start Over"*, HILL (June 28, 2018), thehill.com/homenews/senate/394766-gillibrand-calls-to-eliminate-ice-get-rid-of-it-start-over.

[6] H.R. 6361, 115th Cong. (2018).

[7] Scher, *supra* note 4, ("ICE is the public face of Trump's antiimmigrant policy. No more ICE, no more vicious deportations. Simple. But it's not that simple. Abolishing an agency doesn't abolish

abolishing ICE may allow us to exorcise our collective outrage over seeing children in cages,[8] but ICE is a symptom of a much larger problem—as a *de facto* matter, there is no separation of powers to protect immigrants from the "tyranny" of the executive immigration agencies[9]—DHS, ICE, Customs and Border Protection ("CBP"), the Department of Justice ("DOJ"), the Executive Office for Immigration Review ("EOIR"), and the Board of Immigration Appeals ("BIA").[10] Congress has over-delegated its immigration law-making responsibilities to these agencies; in turn, these agencies have exercised broad discretion to make, enforce, and adjudicate the *Presidents'* policies; and then courts are either unable[11] or unwilling[12] to hold the agencies accountable when they violate immigrants' rights.[13]

To make our immigration system more humane, Congress must eschew the public's cry for haphazard hashtag public policy;[14] instead, it must

immigration laws, and some Abolish ICE advocates dance around questions of if and how exactly those laws would be enforced.").

[8] Nomann Merchant, *Immigrant Kids Seen Held in Fenced Cages at Border Facility*, AP NEWS (June 18, 2018), apnews.com/6e04c6ee01dd46669eddba9d3333f6d5.

[9] Professor Kevin Johnson discusses the "tyrannical bureaucracy" that has trampled on immigrants' due process and human rights. Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599, 1635–36 (2009) [hereinafter, Johnson, *Ten Principles*]; *see also* Hon. Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL. 3 (2008) ("The current court structure is marked by the absence of traditional checks and balances, a concept fundamental to the separation of powers doctrine.").

[10] David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. LAW & PUB. POL'Y 81, 101 (2013) ("[C]ongressional delegations to the Executive threaten separation of powers norms, insofar as these delegations represent a seismic transfer of immigration policymaking from Congress to the Executive. In turn, this shift threatens the very liberties that separation of powers was intended to secure.").

[11] Catherine Y. Kim, *Plenary Power in the Modern Administrative State,* 96 N.C. L. REV. 77, 99–100 (2017) ("The INA explicitly precludes judicial review over a wide swath of immigration decisions, including those relating to the 'expedited removal' of aliens alleged to be inadmissible on grounds of fraud or lack of documentation; those relating to the removal of aliens based on the commission of past crimes; those designated in the INA as being within the discretion of the Attorney General or Secretary of Homeland Security; and those relating to certain forms of relief from removal. Such insulation from judicial review ensures that agency officials have the final word in defining large swaths of our nation's immigration policy.").

[12] Cox, *supra* note 1, at 1671 ("This century-old doctrine has been augmented by developments in administrative law that often obligate judges to defer to agencies' factual and legal judgments. The *Chevron* doctrine is perhaps the best-known strand of these developments.").

[13] *See id.*

[14] In fact, activists readily admit that they use #abolishICE as a means to raise awareness about systemic problems—they do not actually believe that abolishing ICE will cure all of the ills of our immigration system. *See* Jeff Stein & David Weigel, *Democrats Ready "Abolish ICE" Legislation*, WASH. POST (July 10, 2018), https://www.washingtonpost.com/powerpost/democrats-ready-abolish-ice-legislation/2018/07/10/37b420d0-8478-11e8-8553-a3ce89036c78_story.html (quoting activist Sean McElwee as stating, "Now that we have a clear consensus that ICE must be abolished, it's time for a discussion about a humane enforcement system . . . . That means ending the criminalization of migration, creating a fast path to citizenship, limiting the scope of CBP's enforcement and ending our inhumane

reassert its authority over immigration policy-making and commit to the tedious task of legislating through compromise. Above all, any future legislation must have a clear statement of "guiding principles" that defines the goals of our nation's immigration policy; these principles may ensure that immigration policy does not completely change with each presidential election.[15] This will protect immigrants' due process interests of "fair notice, reasonable reliance, and settled expectations" because the agencies would no longer have unfettered discretion to change immigration law at the whim of the President.[16] Together, these reforms will create clear statutory parameters within which executive agencies can act. Even if the legislation is not entirely favorable to immigrants—it would at least be transparent and predictable, which would make the immigration system significantly more humane than it is today.[17]

Realistically, it seems unlikely that Congress will pass any such legislation in the near future.[18] However, I argue that there is a way for immigration lawyers and courts to force Congress along to that goal.[19] Using a two-pronged strategy, advocates in federal courts can argue that (1) the Court should reassert its power to review immigration laws by refusing to

immigrant detention system," and quoting activist Angel Padilla stating, "But what's almost more important than what's in it is recognizing what it represents—sending a signal that ICE itself is a rogue agency that operates with impunity, and we need to get rid of it. We need to get out of this enforcement culture that we've created.").

[15] Amanda Holpuch, *"I Live in Fear": Under Trump, Life for America's Immigrants Can Change in a Flash*, THE GUARDIAN (Oct. 18, 2018), www.theguardian.com/us-news/2018/oct/18/immigration-ice-deportation-undocumented-trump.

[16] De Niz Robles v. Lynch, 803 F.3d 1165, 1169 (10th Cir. 2015) (Gorsuch, J.) (citing Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994)).

[17] Johnson, *Ten Principles*, *supra* note 9, at 1622 ("Consistency and predictability in the law have long been important ingredients in any legal framework. Contrary to those characteristics, U.S. immigration laws deviate dramatically from other areas of American law. Such exceptionalism should be changed so that immigration law is brought into the mainstream of American jurisprudence.").

[18] Indeed, the bipartisan Senate bill, "Border Security, Economic Opportunities and Immigration Modernization Act," could not survive the Republican-controlled House in 2013, and the immigration debate has arguably become even more polarized since. *See* S. 744, 113th Cong. (2013) (as passed by the Senate, June 27, 2013). *See also* Scher, *supra* note 4 (noting that before abolish ICE, "Democrats were united on the ultimate goal for immigration reform: a pathway to citizenship for all the estimated 11 million undocumented immigrants currently in America, save for those with serious criminal records. This was the objective of the 2013 bill that cleared the Senate . . . but [it] was spiked by House Republicans.").

[19] Kevin R. Johnson, *Immigration and Civil Rights in The Trump Administration: Law and Policy Making by Executive Order*, 57 SANTA CLARA L. REV. 611, 615–16 (2017) [hereinafter Johnson, *Civil Rights*] ("While the judiciary engages in the equivalent of short term immigration damage control, the long-term solution to the problems of the modern American immigration system is congressional reform of the immigration laws. Deep and enduring reform of the [INA], forged during the height of the Cold War as a tool to fight communism, is necessary for the nation to effectively and fairly address the modern immigration realties of the 21st century in a manner consistent with the Constitution. Congress at some point may well be forced to modernize and improve the immigration laws.").

defer to the agencies' interpretation of immigration statutes,[20] and (2) in reviewing the statute for itself, if the Court finds a provision is "ambiguous," instead of deferring to the agency's "expertise," the court should consider the ambiguity to be an over-delegation of congressional authority, and should send the provision back to Congress to clarify the "guiding principles" and national policy goals.[21] This is a judicial strategy that scholars have called "democracy-forcing minimalism."[22]

Given this context, this Note proceeds in two parts. Part I is specifically tailored to non-specialists. Untangling the executive immigration bureaucracy is no easy task, but it is necessary to understand how dysfunctional the immigration system actually is. Therefore, Part I(A) of this Note offers a broad overview of the major immigration agencies and the laws under which they operate, which will demonstrate how immigration policy is made, enforced, and adjudicated all within the executive branch. In essence, there is no separation of powers in immigration law. Part I(B) addresses a logical follow-up question—*how can all of this power in the hands of the Executive possibly comport with due process?* In this section, I explain how for immigrants, different levels of process are due in different judicial settings, focusing specifically on the tactics employed by the executive agencies to undermine immigrants' due process rights in each setting. In Part I(C), I argue that even if there had been no ICE, the other executive immigration agencies are so vast and powerful that they still could have effectuated President Trump's family separations. Taken together, Part I demonstrates that our immigration system is so dysfunctional that abolishing ICE without any accompanying reforms will not make a more humane immigration system. To do that, we need comprehensive immigration reform that limits the power of the executive agencies. Accepting that Congress may not be willing or able to initiate that type of reform on its own, I argue that courts may have to force Congress to undertake immigration reform.

In Part II, I offer advocates three arguments that could be used to force federal courts and Congress to reassert their power in the immigration space, thereby weakening the Executive's plenary power over immigration. Drawing upon the writings of Justice Neil Gorsuch, these arguments are tailored to appeal to our increasingly conservative federal judiciary.[23] Each of these arguments is based on the premise that when too much power is concentrated in the hands of a single branch of government, the foreseeable

[20] *See infra* Part II(A).

[21] *See infra* Parts II(B) & (C).

[22] Cox, *supra* note 1, at 1674.

[23] I use the word "conservative" to denote the political ideology of the President who appointed the judges/justices. Their actual political ideology is beyond the scope of this Note.

outcome is tyranny directed against politically unpopular groups.[24] In our immigration system, as a *de facto* matter, the powers to create, enforce, and adjudicate immigration law are concentrated almost entirely in the executive branch.[25] This violates separation of power norms, which has led to tyranny against unauthorized immigrants.

In Part II(A), I argue that the Court should decline to give "*Chevron* deference" to any agency rule implicating immigration law.[26] This is because the executive bureaucracy is distinguishable from all other executive agencies. In practice, this would mean that if the Court found a statute to be ambiguous, it would not immediately have to defer to the agency's interpretation. If, upon its own analysis, the Court found that the statute had no "*guiding principle*," it would not have to send it back to the agency for revision, nor would it have to divine its own meaning from ambiguity. Instead, the Court could send the statute back to Congress for clarification as to the guiding principle.

In Part II(B), I argue that the Immigration and Nationality Act ("INA")—the statutory scheme upon which our immigration rules are based—is so ambiguous that there are no guiding principles upon which an agency can reasonably base a rule. Making matters worse, many provisions of the INA give wide discretion to agencies to make and adjudicate policies, while others simultaneously strip courts of jurisdiction to review those policies. This amounts to an over-delegation of legislative authority to the Executive. In other words, Congress has abdicated its Article I legislative obligation.[27] To resolve this, the Court should resurrect the non-delegation doctrine to invalidate over-delegated statutory provisions, then send the provisions back to Congress to clarify the guiding principles to inform agency action.

In Part II(C), I flip the non-delegation argument, and argue that in the Homeland Security Act of 2002 ("HSA"), Congress did not over-delegate its legislative authority to the agencies. In the HSA, Congress is perfectly clear that the "primary purpose" of the HSA is to prevent terror attacks. Nevertheless, DHS, ICE, and CBP have disregarded this purpose, and instead have turned their attention and resources to enforcing immigration laws, often against peaceful, productive members of society, including children.

---

[24] THE FEDERALIST NO. 47 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.").

[25] Johnson, *Ten Principles*, *supra* note 9, at 1635–36.

[26] "*Chevron* deference" is a legal framework that courts use to assess the validity of agency interpretations of congressional statutes. Broadly speaking, if a statute is ambiguous, then the court should defer to the agency's interpretation of the law, so long as it is a "permissible construction." *See infra* part II(A) for complete discussion.

[27] U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

The Court could either review the agencies actions under the Administrative Procedures Act ("APA"), or it could focus on Congress' failure to rein in the agencies, which would amount to *de facto* over-delegation. Similar to the argument above, the Court should invalidate the statutory provision, then send it back to Congress to *redefine* the boundaries of agency authority. If the Court accepts these arguments and, indeed, continuously invalidates provisions on the grounds of ambiguity and over-delegation, then Congress may be forced to negotiate more sweeping immigration reform.[28]

One might wonder whether our increasingly conservative judiciary would be amenable to overruling the *Chevron* precedent resurrecting the non-delegation doctrine. Interestingly at least five members of the Supreme Court—Chief Justice Roberts, and Justices Thomas, Alito, Gorsuch, and Kavanaugh—have signaled a willingness to forgo traditional judicial deference in order to check congressional over-delegation to the executive agencies.[29] Indeed, Justice Gorsuch has already done as much in at least two cases where he reversed the deportation orders of two unauthorized immigrants.[30] It seems immigration advocates may have an unlikely ally.

I. ABOLISHING ICE ALONE WILL NOT CREATE A MORE HUMANE IMMIGRATION SYSTEM

A. Untangling the Executive Immigration Agencies & Their Functions

To understand the systemic problems facing our immigration system (and to understand how abolishing ICE will not solve them), it is helpful to understand the structure of the executive immigration bureaucracy and the laws that established it. To start, the Constitution does not explicitly vest responsibility for immigration law-making in any one branch of government.[31] Instead, it is implied through the vesting of tangential powers.

---

[28] Johnson, *Civil Rights*, *supra* note 19, at 615.

[29] *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 60–62 (2015) (Alito, J., concurring); *id.* at 84–87 (Thomas, J., concurring in judgment); *see also* Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring in judgement); *id.* at 2139–42 (Gorsuch, J., dissenting, joined by Chief Justice Roberts and Justice Thomas); Christopher Walker*, Judge Kavanaugh on Administrative Law and Separation of Powers*, SCOTUSBLOG (July 26, 2018), www.scotusblog.com/2018/07/kavanaugh-on-administrative-law-and-separation-of-powers/; Eric Citron, *The Roots and Limits of Gorsuch's Views on Chevron Deference*, SCOTUSBLOG (Mar. 17, 2017), www.scotusblog.com/2017/03/roots-limits-gorsuchs-views-chevron-deference/.

[30] *See* De Niz Robles v. Lynch, 803 F.3d 1165 (10th Cir. 2015); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016).

[31] Cox, *supra* note 1, at 1673 ("Constitutional immigration law provides little guidance about the distribution of immigration authority between Congress and the executive. The Supreme Court has sometimes suggested that immigration power is distributed within the political branches in the same

Professor David Rubenstein explains the constitutional "nexus" between congressional and executive powers over immigration:

> Congress is vested with the power to establish a uniform rule of Naturalization, to regulate foreign commerce, to provide for the common defense, to prohibit the migration and importation of persons, and to make all laws necessary and proper for carrying out those powers. Meanwhile, the Constitution is mostly silent as to the Executive foreign affairs power. The President has the power to make Treaties, but only with the advice and consent of the Senate. Nothing in the Constitution suggests that the Executive's shaping of foreign policy may be to the exclusion of Congress. Much less is there a constitutional suggestion that, in matters involving immigration, the Executive can supplant Congress's will.[32]

Given this constitutional nexus, the Court long ago adopted the "plenary power" doctrine, under which courts exercise considerable self-restraint in adjudicating immigration claims.[33] The Court considers immigration policy a political question, which is a matter better left to the executive and legislative branches.[34] Although there is evidence that the plenary power doctrine may be falling out of favor with the courts, it is still considered a foundational elements of immigration jurisprudence.[35]

The statutorily prescribed structure of the executive immigration bureaucracy has also evolved throughout the last century. The foundation of

fashion as most other lawmaking powers . . . . On other occasions the Court has indicated that the immigration power is part and parcel of the foreign relations power. And, to round things out, the Court has from time to time suggested that the immigration power is entailed by the combination of a number of enumerated powers.").

[32] U.S. CONST. art. I, § 8, cl. 4; *id.* art. I, § 9, cl. 1; *id.* art. II, § 2, cl. 2; Rubenstein, *supra* note 10, at 107–08.

[33] Cox, *supra* note 1, at 1671 ("The history of immigration jurisprudence is a history of obsession with judicial deference. The foundational doctrine of constitutional immigration law—the 'plenary power' doctrine—is centrally concerned with such deference. Under the doctrine's earliest incarnation, the Supreme Court treated a challenge to a federal immigration policy excluding Chinese immigrants as nearly nonjusticiable, writing that the federal government's decisions about how to regulate immigration were 'conclusive upon the judiciary.'").

[34] Rubenstein, *supra* note 10, at 93 ("Federal immigration law is a renowned 'oddity' where the 'normal rules of constitutional law simply do not apply.' The Court long ago eschewed any meaningful constitutional review of the political branches' substantive immigration policies. Under the so-called 'plenary doctrine,' the Court has declared itself virtually powerless to review even those policies that facially classify by nationality, race, gender, etc.").

[35] *E.g.*, Cox, *supra* note 1, at 1674 ("Confusion about the source of immigration power creates substantial uncertainty about the distribution of that authority between Congress and the executive. Nonetheless, there are hints in the case law that courts are sometimes uncomfortable with the role that the executive branch immigration agencies play in formulating immigration policy."); *see also* Kim, *supra* note 11, at 88–89 ("In the modern era, the Supreme Court has exercised review over decisions to exclude, detain, and deport noncitizens with striking regularity. It has granted certiorari in at least one immigration case every term since 2009 and vacated a government immigration decision roughly every other year. And in the vast majority of these cases, the Court has applied ordinary standards of judicial review rather than granting plenary deference to the government.").

present day immigration law was established in the 1952 INA.[36] The INA delegated "exceedingly broad authority to develop policies governing the admission, detention, and deportation of noncitizens to a vast and sprawling immigration bureaucracy—spread across multiple agencies."[37] As discussed later in this Note, the INA was amended a number of times over the years—most notably in 1996 with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which established heavy-handed enforcement priorities.[38] To illustrate, before the IIRIRA "immigrants could earn a right to stay, those who committed crimes were given second chances, and for those who gave back, there were multiple paths to legalization."[39] After the IIRIRA, pathways to citizenship were narrowed, more unauthorized immigrants became deportable, and immigration judges ("IJs") were no longer allowed to use their discretion where the "equities" weighed against deportation.[40]

Today, there are two cabinet departments that enforce immigration laws: DHS and DOJ. The Departments State, Labor, and Health and Human Services also have roles in effectuating immigration policy; however, those agencies are outside the scope of this Note.[41] This current iteration of the executive immigration bureaucracy was created in the wake of 9/11 by the Homeland Security Act of 2002.[42] The HSA disbanded the Immigration and Naturalization Services ("INS") and established DHS.[43] Under DHS, the HSA established the United States Citizenship and Immigration Services

[36] Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C. ch. 12).

[37] Kim, *supra* note 11, at 96.

[38] *See* Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and The Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1576 (2010) [hereinafter Chacón, *A Diversion*] ("The INA had specified that noncitizens convicted of aggravated felonies were deportable. Two laws passed in 1996 . . . changed the operation of this provision in draconian ways. Not only did these laws greatly expand the definition of 'aggravated felonies,' but the IIRIRA also eliminated the ability of an immigration judge to provide relief from deportation in cases in which the equities favored that relief. Congress also added to the list of offenses other than aggravated felonies that render a noncitizen deportable . . . . For example, [it] mandated that even very minor drug crimes are grounds for exclusion and deportation, and has provided almost no relief for lawful permanent residents or unauthorized migrants charged under these provisions.").

[39] Kari Hong, *The Costs of Trumped-Up Immigration Enforcement Measures*, 2017 CARDOZO L. REV. DE NOVO 119, 123 (2017).

[40] Chacón, *A Diversion, supra* note 38, at 1576.

[41] *See generally* Megan Davy et al., *Who Does What in U.S. Immigration*, MIGRATION POL'Y INST. (Dec. 1, 2005), www.migrationpolicy.org/article/who-does-what-us-immigration#2.

[42] Homeland Security Act of 2002, Pub. Law, 16 Stat. 2135 (2002) (codified as amended in 6 U.S.C. ch. 1); *see also* Marks, *supra* note 9, at 5 ("In the post 9/11 world of international terrorism, concerns about national security and possible threats posed by uncontrolled immigration to and from our homeland gave birth to the DHS.").

[43] *See* 6 U.S.C. § 202 (2020).

("USCIS") to process applications for legal status, CBP to police the border,[44] and ICE to police the interior of the country and to detain and deport unauthorized immigrants.[45] ICE is divided into two key parts: Enforcement and Removal Operations ("ERO"), which detains and deports unauthorized immigrants, and Homeland Security Investigations ("HSI"), which investigates transnational crime.[46] When activists say #abolishICE, they most likely are referring to the ERO—the public face of ICE.[47]

Another important piece of the immigration bureaucracy is USCIS. This agency is not the focus of this Note; however, its general function and subsequent evolution under President Trump are worth mentioning. USCIS is the agency within DHS that processes immigrants' applications for asylum or residency.[48] USCIS also oversees the refugee program, international adoptions, and work visas.[49] Once an immigrant files an application with USCIS, the immigration court may pause deportation hearings until after the application has been processed.[50] Although previously reputed to operate with a "spirit of welcoming," USCIS is increasingly viewed as another arm of President Trump's enforcement machine.[51]

---

[44] Hong, *supra* note 39, at 135 ("In 2004, under Bush, the zone expanded from the actual border to 100 air miles of *any* border, including the northern border, southern border, and the oceans. This means that 197 million people, which is 66% of the U.S. population, live in this geographic zone . . . .").

[45] Franklin Foer, *How Trump Radicalized ICE*, ATLANTIC (Sep. 2018), www.theatlantic.com/magazine/archive/ 2018/09/trump-ice/565772/ ("The Immigration part of the agency's name refers mostly to deportation officers who came over from the freshly dismantled [INS]. The Customs part of the name refers to investigators imported from the Treasury Department. This was a shotgun marriage, filled with bickering and enmity from the start.").

[46] *Who We Are*, U.S. IMMIGR. & CUST. ENF'T, www.ice.gov/about (last updated Dec. 14, 2018).

[47] Stein, *supra* note 14 ("The ERO has made the ICE brand so toxic that some local governments are unwilling to aid them in their investigations into cybercrime and human trafficking. In an interview, Pocan (D-Wis.) said the legislation would allow immigration laws to be enforced but put an end to a 15-year-old agency that had diverged from its original mission. 'The ICE brand has been so damaged by the president that it can no longer accomplish its original mission,' Pocan said. 'Even ICE agents recognize that ICE doesn't do what it was intended to.'").

[48] *See What We Do*, U.S. CITIZENSHIP & IMMIGR. SERV., www.uscis.gov/about-us/what-we-do (last updated April 12, 2018).

[49] *See id.*

[50] *Cf.* Matter of L-A-B-R-, 27 I&N Dec. 405 (A.G. 2018) (appeal referred by Attorney General Jeff Sessions to himself, holding that IJs' frequent practice of continuing proceedings pending USCIS adjudication under 8 C.F.R. §1003.29 has led to the current immigration court backlog. Thus, IJs should require a stronger showing of likelihood that USCIS will grant relief.).

[51] Ted Hesson, *The Man Behind Trump's "Invisible Wall"*, POLITICO MAGAZINE (Sep. 20, 2018), www.politico.com/magazine/story/2018/09/20/uscis-director-lee-francis-cissna-profile-220141 ("Cissna has quietly carried out Trump's policies with a workmanlike dedication. From his perch atop USCIS, he's issued a steady stream of policy changes and regulations that have transformed his agency into more of an enforcement body and less of a service provider. These changes have generated blowback from immigrant advocates, businesses and even some of his own employees. Leon Rodriguez, who served as USCIS director under President Barack Obama, said the agency is sending a message 'that this is a less welcoming environment than it may have been before.'").

For example, USCIS has been reported to process and deny applications, not on the merits, but for small clerical errors, thus allowing the immigration courts to quickly reconvene deportation proceedings.[52] In addition, a 2018 policy memo instructs USCIS agents that once they deny an application for legal status, they *must* refer that person to immigration court for deportation hearings.[53] In practice, this means that because of a clerical error on a nineteen-page application,[54] USCIS must deny an unaccompanied child's petition for "Special Immigrant Juvenile Status" and place them into deportation proceedings. There they will likely be ordered deportable, taken from the safety of relatives in the United States, and sent back to a dangerous country, where they often lack adult protection—the reason many leave in the first place.[55] This is despite the fact that statute upon which this policy is based gives USCIS *discretion* to refer, but does not mandate it. This demonstrates how each President can bend immigration laws to enable their agencies to effectuate their campaign promises.

The final piece of the immigration puzzle is the DOJ. The DOJ makes immigration policy through the EOIR, which oversees the system of immigration courts.[56] That is to say that immigration court is located in the executive branch, not the judicial branch.[57] The primary function of immigration courts is to adjudicate removal proceedings.[58] Immigration

[52] U.S. CITIZENSHIP & IMMIGR. SERV., POLICY MEM. NO. 602-602-0163 (July 13, 2018), www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM_10_Standards_for_RFEs_and_NOIDs_FINAL2.pdf.

[53] U.S. CITIZENSHIP & IMMIGR. SERV., POLICY MEM. NO. 602-0050.1 (June 28, 2018), www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf ("USCIS has authority, under the immigration laws, to issue Form I-862, Notice to Appear, which is thereafter filed with the Immigration Court to commence removal proceedings under section 240 of the INA. [ICE] and [CBP] have authority to issue NTAs. Accordingly, USCIS must ensure that its issuance of NTAs fits within and supports DHS's overall removal priorities—promoting national security, public safety, and the integrity of the immigration system. This PM identifies the circumstances under which USCIS issues NTAs or refers cases to ICE.").

[54] U.S. CITIZENSHIP & IMMIGR. SERV., I-360, PETITION FOR AMERASIAN, WIDOW(ER), OR SPECIAL IMMIGRANT, www.uscis.gov/i-360 (last updated Aug. 29, 2019).

[55] *See generally* RACHEL PRANDINI & ALISON KAMHI, IMMIGRANT LEGAL RESOURCE CENTER, RISKS OF APPLYING FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) IN AFFIRMATIVE CASES (2018), www.ilrc.org/sites/default/files/resources/risks_apply_sijs_affirm_cases-20180831.pdf.

[56] *About the Office*, EXEC. OFF. IMMIGR. REV., www.justice.gov/eoir/about-office (last updated Aug. 14, 2018).

[57] Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 KAN. L. REV. 541, 543 (2011) ("The lack of decisional independence stems from the placement of immigration judges and the Board as mere employees of the Attorney General. The entire Board exists by regulation only, and the Attorney General is ultimately in charge of hiring, firing, training, and reviewing the IJ corps. The bureaucratic placement of the adjudicators signals dependence on a politically appointed prosecutor.").

[58] Stephen H. Legomsky, *Deportation and The War on Independence*, 91 CORNELL L. REV. 369, 371–72 (2006) [*hereinafter* Legomsky, *Deportation*] ("The immigration judge first determines whether the noncitizen falls within any of the specific statutory grounds for removal charged by the DHS. If so,

court presents an adversarial setting, whereby ICE attorneys argue for deportation in front of DOJ IJs.[59] The IJs are political appointees who do not have permanent job security, and are therefore incentivized to tow the party line, lest they be fired or have their decisions overruled by their boss—the Attorney General.[60] Once an IJ has ruled an unauthorized immigrant is "deportable," they are remanded into ICE custody and then deported via "ICE Air."[61]

To appeal an IJ decision, one must start at the BIA, which is also located within EOIR.[62] BIA decisions are then "binding on all DHS officers and [IJs] unless modified or overruled by the Attorney General or a federal court."[63] That means that (1) an Attorney General may refer BIA decisions to themself,[64] and then reverse any decision that contravenes their own policies;[65] and (2) for *some* claims (e.g., removal), immigrants can appeal

the immigration judge then decides whether the noncitizen is statutorily eligible for asylum or any other affirmative grounds for discretionary relief and, if so, whether to exercise that statutory discretion favorably.").

[59] *About the Office*, *supra* note 56.

[60] Legomsky, *Deportation*, *supra* note 58, at 370 ("President Bush's Attorney General, John Ashcroft, took concrete steps that collectively sent unmistakable signals to both immigration judges who preside over deportation hearings and the Board of Immigrant Appeals who review them. The message was simple: 'You rule against the government at your personal peril.' The practical effect of these actions was to drain the administrative phase of the deportation process of all meaningful decisional independence."); *see also* Liz Robbins, *In Immigration Courts, It Is Judges vs. Justice Department*, N.Y. TIMES (Sep. 17, 2018), www.nytimes.com/2018/09/07/nyregion/nyc-immigration-judges-courts.html ("[T]he [Administration's] changes seem like an attempt to turn IJ's from neutral arbiters into law enforcement agents enacting Trump administration policies."); Marks, *supra* note 9, at 4 ("By removing the mission conflict between prosecutorial and law enforcement responsibilities legitimately at the DOJ, and the requirement of neutral adjudications of immigration cases, the public's faith in the impartiality of the nation's immigration tribunals would be restored.").

[61] *ICE Air Operations Fact Sheet*, U.S. IMMIGR. & CUST. ENF'T, www.ice.gov/factsheets/ice-air-operations

("[ICE Air Operations] facilitates the transportation and removal of aliens via commercial flights; and since 2006, it has transported and/or removed hundreds of thousands of aliens using air charter services.") (last updated July, 7 2016); *see also Hidden in Plain Sight: ICE Air and the Machinery of Mass Deportation*, U. WASH: CTR. HUM. RTS. (Apr. 23, 2019), https://jsis.washington.edu/humanrights/2019/04/23/ice-air/ ("While ICE explained its 2011 switch from government planes to charter aircraft in terms of economic efficiency, the privatization of ICE Air is also clearly a reflection of political expediency: only a network built on the regular daily departures of privately-hired 737s and MD-80s can generate the numbers necessary to appease anti-immigrant sentiment and the profit required to placate campaign donors, yet conceal—at least in part—the ugly realities inherent to the project of mass deportation.").

[62] *About the Office*, BD. IMMIGR. APP., www.justice.gov/eoir/board-of-immigration-appeals (last updated Oct. 15, 2018).

[63] *Id.*

[64] *E.g.*, Matter of L-A-B-R-, 27 I&N Dec. 405 (A.G. 2018).

[65] *See* Family, *supra* note 57, at 544 ("[BIA] members adjudicate with the knowledge that their boss, a politically appointed prosecutor, may take a case away from them."); *see also* CATHOLIC LEGAL IMMIGRATION NETWORK, PRACTICE ADVISORY, SEEKING CONTINUANCES IN IMMIGRATION COURT IN THE WAKE OF THE ATTORNEY GENERAL'S DECISION IN MATTER OF L-A-B-R-, 3 (Dec. 6, 2018),

BIA decisions to federal appellate courts.[66] So although statutorily speaking, DHS makes immigration policy,[67] the DOJ's influence over immigration policy is so comprehensive that one former ICE official described former AG, Jeff Sessions, as "the '*de facto* Secretary of Homeland Security.'"[68]

B. How Much Process is Due to Unauthorized Immigrants?

One might wonder how this concentration of legislative, executive, and judicial power in the executive agencies passes muster with due process.[69] Indeed, former Immigration Judge, Hon. Dana Marks, wonders the same:

> With the stakes so high, the system cannot function properly without a structure that preserves our most honored Constitutional principles of separation of powers, impartial decision-making, and due process of law. With such fundamental rights at stake, legal commentators widely view the Immigration Court's placement as part of an enforcement culture as highly inappropriate.[70]

As it turns out, immigrants have various levels of rights in various types of courts. In the following paragraphs I explain those different settings and the rights therein. Ideally, this will give context for the legal arguments in Part II.

The Fifth and Fourteenth Amendments guarantee "all people" due process of law before a government may deprive them of "life, liberty, or

---

cliniclegal.org/sites/default/files/resources/defending-vulnerable-popluations/L-A-B-R-practice-advisory-12.6.2018.pdf (referring to *L-A-B-R-* as a "precedent decision about how immigration judges should decide certain motions for continuances in removal proceedings. . . . . [O]ne of a series of decisions former Attorney General Sessions referred to himself that collectively aim to expedite immigration proceedings and remake immigration court procedure.").

[66] INA § 242, 8 U.S.C. § 1252 (2020); *see also* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1643–44 (2010) [hereinafter Legomsky, *Restructuring*] (subject to exceptions, a "noncitizen has the right to judicial review of the BIA's decision. The exclusive procedure for obtaining such review is a petition for review in the U.S. court of appeals for the circuit in which the removal hearing was held . . . . [J]udicial review is barred for expedited removal orders, most discretionary determinations, and most cases in which the noncitizens are removable on crime-related grounds.").

[67] HSA, 6 U.S.C. § 202(5) (2020) ("The Secretary shall be responsible for . . . establishing national immigration enforcement policies and priorities.").

[68] *See* Foer, *supra* note 45; Robbins, *supra* note 60 ("[T]he changes seem like an attempt to turn judges from neutral arbiters into law enforcement agents enacting Trump's policies."); *see also* Marks, *supra* note 9, at 3–4.

[69] U.S. CONST. amend. V; *id.* amend. XIV, § 1; Kim, *supra* note 11, at 90 ("As the Court has stated, the denial of constitutional protections to a category of individuals creates 'an underclass present[ing] most difficult problems for a Nation that prides itself on adherence to principles of equality under the law.' If Equal Protection and Due Process rights are fundamental and universal, it is difficult to see why they should not apply in the immigration context.").

[70] Marks, *supra* note 9, at 20.

property."[71] Due process requires governments to implement safeguards in the judicial process to ensure that people are not arbitrarily deprived of their rights. Different types of judicial proceedings have different procedures in place to ensure due process. Judge Henry Friendly created an influential and oft-cited list of ten procedures that generally tend to protect due process. The top four are, "(1) an unbiased tribunal, (2) notice of the proposed action and the grounds asserted for it, (3) opportunity to present reasons why the proposed action should not be taken, (4) the right to present evidence," etc.[72]

The Supreme Court has long held that unauthorized immigrants are entitled to due process in deportation proceedings.[73] As recently as 2001, in *Zadvydas v. Davis*, the Supreme Court affirmed that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence is lawful, unlawful, temporary or permanent."[74] In 2018, in *Jennings v. Rodriguez*, the Supreme Court declined to reverse this precedent.[75] Thus, the question now is how much process is due given their "particular situations?"[76] In *Morrisey v. Brewer*, the Supreme Court states that the process someone is due is based upon two considerations: (1) the "extent to which an individual will be 'condemned to suffer grievous loss,'" and (2) "whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment."[77] Given all of the "grievous losses" unauthorized immigrants face in deportation proceedings—their jobs, their homes, their families, and their safety—it stands to reason that they would be due a great deal of procedural

[71] U.S. CONST. amend. V; *id.* amend. XIV, § 1.

[72] *See* Hon. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

[73] Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.").

[74] Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

[75] Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

[76] Morrisey v. Brewer, 408 U.S. 471, 480 (1972) (internal citations omitted).

[77] *Id.* at 480.

protections.[78] This, however, is not the reality, especially for those apprehended at the border as opposed to the interior of the country.[79]

To start, immigration courts need not be located in the judicial branch in order to satisfy due process.[80] In 1903, in *Yamataya v. Fisher*, the Supreme Court held that Congress may authorize removal proceedings to be conducted "exclusively through executive officers,"[81] with only one caveat—"when executing the provisions of a statute involving the liberty of persons, [executive officers may not] disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution."[82] Specifically an unauthorized immigrant cannot be "taken into custody and deported without giving him *all* opportunity to be heard upon the questions involving his right to be and remain in the United States."[83] Thus, with some glaring exceptions (i.e., expedited removals),[84] our immigration court system seems to be organized to give unauthorized immigrants sufficient due process to comply with Supreme Court decisions:

[78] Johnson, *Civil Rights*, *supra* note 19, at 645–46 ("The Fifth Amendment guarantees Due Process rights to all immigrants, including undocumented immigrants, physically present in the United States. The Supreme Court has generally held that, before they can be removed from the United States, noncitizens physically present in the country—no matter the length of time or immigration status (i.e., undocumented immigrants have due process rights)—are entitled to a hearing that comports with Due Process. The Court has consistently found that, because of the significant interests of the noncitizen physically present in the United States at stake, a removal hearing with full Due Process rights is required by the Constitution. Consequently, the Supreme Court on several occasions has ruled that, even when Congress appeared to eliminate all judicial review of an order, the Constitution still requires some kind of judicial review when removing a noncitizen from the country.").

[79] Katie Brenner & Charlie Savage, *Due Process for Undocumented Immigrants, Explained*, N.Y. TIMES (June 25, 2018), www.nytimes.com/2018/06/25/us/politics/due-process-undocumented-immigrants.html.

[80] *See* Yamataya v. Fisher, 189 U.S. 86 (1903) (also commonly known as the "Japanese Immigrant Case").

[81] *Id*. at 98.

[82] *Id*. at 100.

[83] *Id.* at 101 (emphasis added).

[84] Expedited removal is a procedure created in 1996 by the IIRIRA, 8 U.S.C. § 1225, which allows low-level immigration officers to make an immediate determination on the deportability of an immigrant. *See* AMERICAN IMMIGRATION COUNCIL, A PRIMER ON EXPEDITED REMOVAL 1 (2019), www.americanimmigrationcouncil.org/research/primer-expedited-removal ("One of the major problems with expedited removal is that the immigration officer making the decision virtually has unchecked authority. When an immigration official encounters someone they believe may be subject to expedited removal, the burden of proof is on the individual to prove otherwise. This means that an individual believed to be subject to expedited removal will have the burden of proving to an immigration official that they have been physically present in the United States for two or more years or that they were legally admitted or paroled into the United States."); *see also* Brett Samuels, *Sanders: "Just Because You Don't See a Judge Doesn't Mean You Don't Receive Due Process,"* HILL (June 25, 2018), thehill.com/homenews/administration/394029-white-house-just-because-you-dont-see-a-judge-doesnt-mean-you-dont (quoting former Press Secretary Sarah Sanders defending President Trump's use of expedited removal during a press conference stating, "Just because you don't see a judge doesn't mean you don't receive due process.").

they have "all opportunity to be heard" in front of an immigration judges, the BIA, and possibly a federal appellate court.[85]

In addition, the Supreme Court has held that withholding criminal constitutional protections for immigrants in deportation proceedings does not violate due process.[86] Under existing law, being physically present in the United States without authorization is a civil violation—not a criminal offense.[87] Thus, despite the gravity of what unauthorized immigrants stand to lose in deportation hearings, the Supreme Court has long held that deportation is not a punishment, but a civil remedy.[88]

This designation gives unauthorized immigrants even fewer due process protections than one would expect to see in a criminal proceeding.[89] For example, in criminal trials, defendants have the right to a speedy trial;[90] however, in immigration court people may be detained for years before ever seeing a judge.[91] Second, in criminal trials, defendants must be advised of their rights;[92] by contrast, immigrants are not consistently advised of their rights during arrest and pre-trial detention.[93] Third, in criminal trials, if

[85] In 2017, only about two percent of deportations were ever appealed to the federal courts. In 2017, ICE deported 226,119 people. *See* ICE, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT, www.ice.gov/removal-statistics/2017 (last updated Dec. 13, 2017). In 2017, the U.S. Courts of Appeals received 6,153 appeals from BIA decisions. *See* U.S. COURTS, U.S. COURTS OF APPEALS JUDICIAL BUSINESS 2017, www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2017 (last visited Apr. 2, 2020).

[86] Arizona v. United States, 567 U.S. 387, 388 (2012).

[87] *Id.* at 396.

[88] *See* Wong Wing v. United States, 163 U.S. 228, 236 (1896).

[89] Chacón, *A Diversion*, *supra* note 38, at 1574 ("[T]he immigration consequences of detention and removal are of a punitive nature that belies their designation as civil . . . but the protections available in civil proceedings have been differentiated from those protections available in criminal proceedings. The Court long ago decided that deportation was a civil remedy, not a criminal punishment.").

[90] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.").

[91] *See* Jennings v. Rodriguez, 138 S. Ct. 830, 838 (2018) (reversing the Ninth Circuit's interpretation of immigration law to mean that immigrants can only be detained for six months without a bail hearing; holding, "In sum, U.S. immigration law authorizes the Government to detain certain aliens seeking admission into the country under §§ 1225(b)(1) and (b)(2). It also authorizes the Government to detain certain aliens already in the country pending the outcome of removal proceedings."); *see also* Jennifer Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. 243, 262–64 (2017) [hereinafter Chacón, *Bully Pulpit*]; *see also* John Burnett, *Big Money as Private Immigrant Jails Boom*, NPR (Nov. 21, 2017), www.npr.org/2017/11/21/565318778/big-money-as-private-immigrant-jails-boom ("Immigration courts currently have a backlog of 700,000 cases, which means that someone might wait several years before ever seeing a judge.").

[92] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).

[93] *See* Plaintiffs' Reply in Support of Motion for Stay of Removal, Ms. L. v. ICE, No. 18-cv-00428-DMS-MDD, USDC, SDC (July 25, 2018), www.aclu.org/sites/default/files/field_document/mslviceplaintiffsreplyin supportofmotionforstayofremoval.pdf; *see also* Chacón, *Bully Pulpit*, *supra* note 91, at 263–64 ("In the past, ICE officials have been encouraged to pressure detained immigrants without counsel to stipulate to their removal. Most of these individuals faced deportation due to minor civil immigration infractions.

defendants cannot afford a lawyer, the government will provide one for them;[94] but in immigration court, people may have attorneys, but they are not entitled to them at government expense.[95] Lastly, in criminal trials, judges can suppress evidence that was obtained pursuant to an illegal search;[96] however, in immigration court, the ICE attorney can use ill-begotten evidence to prove its case.[97]

Finally, in most state and federal *criminal* trials, unauthorized immigrants retain the same constitutional protections as citizens. (There is no guarantee, however, that ICE will not be waiting outside the courtroom to detain unauthorized immigrants once court is adjourned). Yet, in *criminal* immigration proceedings, unauthorized immigrants have few due process rights.[98] In addition to their civil cases in immigration court, if immigrants are detained while crossing the border without authorization, CPB agents can refer them to the U.S. Marshalls to be prosecuted by the DOJ for "entry-related offenses" in federal district courts along the Southern border.[99] The enforcement of these entry-related laws is rife with due process issues. First and foremost, these offenses were used as the justification for separating families at the border: the parents committed a crime and the kids cannot go to federal prison, so they must be forcibly taken and put into HHS custody.[100] Making this more cruel and unconscionable is that enforcement of these sections of law is discretionary.[101] Indeed, while the "Zero Tolerance Policy"

ICE has sometimes provided misleading or incomplete information to immigrants to encourage them to sign stipulated removal orders. Many people capitulate to the practice in order to avoid an indefinite period of detention."); Tal Kopan, *Sessions Resumes Immigrant Legal Advice Program Under Pressure from Congress*, CNN (Apr. 25, 2018), www.cnn.com/2018/04/25/politics/immigration-legal-advice-program-resumed/index.html.

[94] U.S. CONST. amend. VI; *see also* Gideon v. Wainwright, 372 U.S. 335 (1963).

[95] Chacón, *A Diversion, supra* note 38, at 1574 (noting that from 2000–2008, "over 800,000 noncitizens went through removal proceedings without access to counsel; 84% of detained noncitizens lack counsel."); *see also* Johnson, *Civil Rights*, *supra* note 19, at 647–48 ("Not surprisingly, noncitizens represented by counsel in removal proceedings are much more likely to successfully resist removal than those who go unrepresented. Powerful arguments have been made that Due Process requires that noncitizens be guaranteed counsel in removal proceedings, just as all defendants, including noncitizens, are in criminal prosecutions.").

[96] U.S. CONST. amend. IV.

[97] *See* AM. IMMIGR. COUNCIL, TWO SYSTEMS OF JUSTICE 1 (2013), www.americanimmigrationcouncil.org/sites/default/files/research/aic_twosystemsofjustice.pdf.

[98] *See* AM. IMMIGR. COUNCIL, PROSECUTING PEOPLE FOR COMING TO THE UNITED STATES 2 (2020), www.americanimmigrationcouncil.org/sites/default/files/research/prosecuting_people_for_coming_to_the_united_states.pdf.

[99] 8 U.S.C. §§ 1325–1326; *see also id*.

[100] *See "Zero Tolerance" at the Border: Rhetoric vs. Reality*, TRAC: IMMIGRATION (July 20, 2019), https://trac.syr.edu/immigration/reports/520/.

[101] *See* Caitlin Dickerson, *Some Democrats Want to Decriminalize Illegal Border Crossings. Would It Work?,* N.Y. TIMES (July 31, 2019), www.nytimes.com/2019/07/31/us/border-crossing-decriminalization.html.

was in effect in April and May of 2018, only about thirty percent of adult border patrol arrests were referred for criminal prosecution.[102]

An additional due process concern is that entry-related offenses can be prosecuted in mass trials.[103] Reports indicate that trials have been conducted with up to eighty defendants at once, and defendants are often represented by one public defender, who has only a few minutes to meet with each client.[104] The accused often take plea deals in which they waive the right to appeal these convictions.[105] Worse still, to ease the strain placed on federal courts in the Southern District of California, CPB has *loaned* its own lawyers to serve as substitute federal prosecutors.[106]

A third due process concern is that these convictions create criminal records that reflect poorly on immigrants' subsequent applications to USCIS.[107] In other words, DHS can order USCIS agents to deny legal status to immigrants with criminal records (even for a single offense), then simultaneously order CBP to take the exact actions necessary to give the immigrant a criminal record in the first place.

The above descriptions of the executive immigration bureaucracy, the laws governing them, and of the immigrants' due process rights, illustrate that our immigration policy-making, enforcement, and adjudication is so tightly bound up in the executive branch that it arguably poses a separation

---

[102] *"Zero Tolerance" at the Border*, *supra* note 100 ("Thus, the so-called zero-tolerance policy didn't as a practical matter eliminate prosecutorial discretion. Since less than one out of three adults were actually prosecuted, CBP personnel had to choose which individuals among those apprehended to refer to federal prosecutors. The Administration has not explained its rationale for prosecuting parents with children when that left so many other adults without children who were not being referred for prosecution.").

[103] *See* Chantal Da Silva, *Leaked Photo Reveals "Mass Trial" of Immigrants in Texas*, NEWSWEEK (June 4, 2018), www.newsweek.com/leaked-photo-reveals-mass-trial-immigrants-texas-957216 ("Sessions also announced the Trump administration's new policy of separating families caught crossing into the U.S. illegally, with parents being sent to federal jails, while their young ones are kept in shelters overseen by [HHS].").

[104] AM. IMMIGR. COUNCIL, *supra* note 98, at 3; *see also* Da Silva, *supra* note 103 ("The journalist said public defenders are only given a handful of minutes with each defendant and that defendants are sometimes forced to answer a judge's question in unison, rather than being able to make their case on an individual basis.").

[105] *Id.* at 2 ("Prosecutors who propose this type of plea deal often offer it only if the migrant agrees to waive certain rights, even beyond the right to a trial, including the right to later challenge the conviction. In addition, the process moves so quickly that, in many cases, charged migrants accept a plea agreement, plead guilty, and are sentenced in a matter of hours.").

[106] Dickerson, *supra* note 103 ("[P]rosecutions have overwhelmed many of the nation's federal courts. In the Southern District of California, for example, the court converted part of a garage to make space for more illegal entry prosecutions, and created a separate courtroom that is staffed in part by government lawyers who are on loan from Customs and Border Protection, rather than local federal prosecutors, to handle the increased workload.").

[107] AM. IMMIGR. COUNCIL, *supra* note 98, at 1 ("With high conviction rates for these federal offenses, many migrants are subjected to mandatory incarceration in federal prison for months or longer. For these individuals, a conviction can impede current and future attempts to migrate lawfully or obtain asylum.").

of powers crisis.[108] Congress' inaction has arguably enabled a "tyrannical bureaucracy" that trampled on immigrants' due process and human rights, most infamously, through the family separations that President Trump ordered in the spring of 2018.[109]

C. The Zero Tolerance Policy & Family Separations Could Still Have Happened Without ICE

Abolishing ICE may be cathartic for those of us who were gutted by the sounds of preschoolers wailing for their parents,[110] and it may grant immigrants temporary reprieve from arrest and deportation, but it oversimplifies a systemic problem—we have gotten to this point because Congress has failed to check executive agency power over immigration.[111] This is not to excuse ICE's inhumane, racist, and traumatizing enforcement tactics,[112] but to point out that executive agencies have amassed so much

[108] *See* Rubenstein, *supra* note 10, at 93 (arguing the executive branch has consolidated power over immigration law because of "(1) the Court's abdication of any meaningful constitutional review of the federal political branches' substantive immigration policies; (2) Congress's vast conferral of policymaking power to the Executive; and (3) the Executive's potential usurpation of Congress's lawmaking function under the auspices of prosecutorial discretion and foreign affairs.").

[109] Johnson, *Ten Principles, supra* note 9, at 1635–36.

[110] Ginger Thompson, *Listen to Children Who've Just Been Separated From Their Parents at the Border*, PROPUBLICA (June 18, 2018), www.propublica.org/article/children-separated-from-parents-border-patrol-cbp-trump-immigration-policy ("The person [who made the recording] estimated that the children on the recording are between 4 and 10 years old. It appeared that they had been at the detention center for less than 24 hours, so their distress at having been separated from their parents was still raw. Consulate officials tried to comfort them with snacks and toys. But the children were inconsolable."); *see also* Domonoske, *supra* note 2 ("According to the Texas Civil Rights Project, . . . multiple parents reported that they were separated from their children and not given any information about where their children would go . . . . [I]n some cases, the children were taken away under the pretense that they would be getting a bath.").

[111] Hong, *supra* note 39, at 119 ("[E]ven if President Trump were to leave office tomorrow, an enforcement-only immigration policy would not end. The legal framework has been pursued because of an underlying narrative that immigrants are harming the country and draining resources . . . .").

[112] *See* Peter L. Markowitz, *Abolish ICE…and Then What?* 129 YALE L.J. 130, 134–36 (2019) ("ICE's abusive tactics are well documented. The barbarism of separating toddlers from their parents, holding them in cages, and forcing them to defend themselves in complex legal proceedings against trained government lawyers is a daily reality. In addition, there is an established and ongoing pattern of 'egregious medical neglect in [immigration] detention facilities across the country.' Not surprisingly, ICE's mistreatment of detainees has led to a startling pattern of deaths in ICE custody."); *see also* Jonathan Blitzer, *A Veteran ICE Agent Disillusioned with the Trump Era, Speaks Out*, NEW YORKER (July 24, 2017), www.newyorker.com/news/news-desk/a-veteran-ice-agent-disillusioned-with-the-trump-era-speaks-out ("'I have officers who are more likely now to push back,' the agent said. 'I'd never have someone say, 'Why do I have to call an interpreter? Why don't they speak English?' Now I get it frequently. I get this from people who are younger. That's one group. And I also get it from people who are ethnocentric: 'Our way is the right way–I shouldn't have to speak in your language. This is America.' It all adds up, the agent said, 'to contempt that I've never seen so rampant towards the aliens.'"); Chacón, *Bully Pulpit*, *supra* note 91, at 264 ("Internal disciplinary processes have also failed to keep up with abuses

power over immigration policy and enforcement that even if Congress did abolish ICE, there would still be a robust immigration infrastructure to step into its shoes, and a legal framework to carry out the same policies.[113]

To illustrate, even without ICE, President Trump still could have enforced family separations.[114] ICE did not author the "Zero Tolerance Policy"—that was former Attorney General Jeff Sessions, acting as the head of the DOJ.[115] ICE did not separate families at the border—that was CBP.[116] ICE did not put children in shelters staffed by alleged child abusers—that was the Office of Refugee Resettlement ("ORR"), which is part of HHS.[117] ICE *was* responsible for detaining the parents, but DHS could have contracted with municipal or private prisons to do the same.[118] Thus, even without ICE, the immigration agencies could arguably still have effectuated the "Zero Tolerance Policy."

This demonstrates that until Congress passes robust legislative reforms designed to curtail executive agency authority over immigration, our

and violations. Unless the Administration is committed to rooting out abuses in these agencies, there is little that constrains abusive agents."); Foer, *supra* note 45 ("[A]necdotal evidence suggests that ICE has been operating more often in the vicinity of sensitive locations: Agents arrested a father after he dropped off his daughter at school, and detained a group soon after it left a church shelter."); Hong, *supra* note 39, at 122 ("ICE is arresting crime victims at courthouses, patients in hospital beds, and persons seeking legal status at their routine check-ins, and even at interviews where they are requesting status. This cruel and arbitrary enforcement is generating a climate of fear."); Johnson, *Civil Rights, supra* note 19, at 620 ("[M]ore than 95 percent of the noncitizens removed annually from the U.S. during the Obama years were from Mexico and Central America. That incredibly high number represents a much larger percentage of Latina/os than found in the nation's overall immigrant population.").

[113] Arizona v. United States, 567 U.S. at 388, 396 (2012) ("A principal feature of the removal system is the broad discretion exercised by immigration officials."); *see also* Vargas, *supra* note 3 ("There already exist, however, other capable law enforcement agencies that investigate terrorism, transnational drug rings, human trafficking and violent gangs. With the creation of ICE, Congress duplicated an already bloated bureaucracy.").

[114] HSA, 6 U.S.C. § 202(5) (2002) ("The Secretary shall be responsible for . . . establishing national immigration enforcement policies and priorities.").

[115] OFF. INSPECTOR GEN., SPECIAL REVIEW: INITIAL OBSERVATIONS REGARDING FAMILY SEPARATION ISSUES UNDER THE ZERO TOLERANCE POLICY 2 (Dep't Homeland Sec. 2018), www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf (Jeff Sessions directed all Federal prosecutors along the Southwest Border to work with DHS "to adopt immediately a zero-tolerance policy" requiring that all improper entry offenses be referred for criminal prosecution "to the extent practicable.").

[116] *Id.*

[117] *See* Michael Grabell et al., *In Immigrant Children's Shelters, Sexual Assault Cases are Open and Shut*, PROPUBLICA (Dec. 21, 2018), www.propublica.org/article/boystown-immigrant-childrens-shelter-sexual-assault.

[118] *See* Burnett, *supra* note 88; *see also* Hong, *supra* note 39, at 128 ("The executive orders call for the deputizing of local and state law enforcement personnel and a promise to penalize non-cooperating jurisdictions by withholding federal funding from them.").

inhumane immigration system will remain unchanged.[119] To truly create a more humane immigration system Congress must reassert its plenary power over immigration, thereby challenging the executive immigration bureaucracies' ability to make, enforce, and adjudicate immigration law.[120] The more explicit Congress is about the scope of protections and goals of immigration policy, the less wiggle room the executive agencies will have to make rules that contravene congressional intent in favor of the Presidents' immigration policies.[121] Specific legislative proposals are beyond this student Note. Brilliant scholars and specialized lawyers have already spent years preparing a comprehensive body of legislative proposals[122] to guide Congress when it finally musters the political will.[123]

What I hope to contribute in the meantime, is a legal argument that immigration advocates may use to appeal to an increasingly conservative federal judiciary, specifically Supreme Court Justice Neil Gorsuch.[124] If adopted, these arguments may actually force Congress into revisiting immigration reform.[125]

---

[119] Hong, *supra* note 39, at 119 ("[E]ven if President Trump were to leave office tomorrow, an enforcement-only immigration policy would not end. The legal framework has been pursued because of an underlying narrative that immigrants are harming the country and draining resources . . . .").

[120] Kim, *supra* note 11, at 96 ("Nowhere is the administrative exercise of policymaking authority more evident than in the immigration context. As the Supreme Court recently acknowledged, the 'broad discretion exercised by immigration officials' constitutes '[a] principal feature' of our immigration system.").

[121] Johnson, *Ten Principles, supra* note 9, at 1639 ("We need in truly comprehensive immigration reform is a clear statement of goals, and a carefully crafted bill that includes provisions directed at achieving these goals in a fair and balanced fashion. True, the immigration laws serve multiple purposes and, by necessity, reflect congressional compromises and trade-offs. However, reforms to the laws should keep the overall goals in mind and at least attempt to strike a clear and appropriate balance.").

[122] *E.g.*, Markowitz, *supra* note 112; *see also* Chacón, *A Diversion, supra* note 38; Family, *supra* note 57; Hong, *supra* note 39; Johnson, *Ten Principles*, *supra* note 9; Legomsky, *Restructuring*, *supra* note 66; Marks, *supra* note 9.

[123] Congress could resurrect the 2013 "Border Security, Economic Opportunities and Immigration Modernization Act," which was authored by a bi-partisan group of senators. S. 744, 113th Cong. (2013) (as passed by Sen. on June 27, 2013).

[124] Mark Joseph Stern, *The Supreme Court May Revive a Legal Theory Last Used to Strike Down New Deal Laws,* SLATE (Mar. 5, 2018), slate.com/news-and-politics/2018/03/supreme-court-may-revive-non-delegation-doctrine-in-gundy-v-united-states.html.

[125] Johnson, *Civil Rights*, *supra* note 19, 615–16 ("While the judiciary engages in the equivalent of short term immigration damage control, the long-term solution to the problems of the modern American immigration system is congressional reform of the immigration laws. Deep and enduring reform of the [INA], forged during the height of the Cold War as a tool to fight communism, is necessary for the nation to effectively and fairly address the modern immigration realties of the 21st century in a manner consistent with the Constitution. Congress at some point may well be forced to modernize and improve the immigration laws.").

II. CHALLENGING THE IMMIGRATION AGENCIES IN COURT

Over the last three decades, the executive branch has consolidated power to make, enforce, and adjudicate immigration law.[126] When compared with President Trump, Presidents Bush and Obama were arguably more self-conscious about over-exercising that power.[127] President Trump, however, has demonstrated that the former Presidents' decency and respect for the Constitution may have been the only things keeping the over-use of that power in check.[128] In contrast, by espousing nativist and racist ideas,[129] interpreting immigration laws in a light least favorable to immigrants,[130] enforcing his policies to the outer boundaries of statutory authority,[131] and

[126] *See* Rubenstein, *supra* note 10, at 101.

[127] *E.g.* Chacón, *Bully Pulpit*, *supra* note 91, at 261 ("Julie Myers Wood, who directed ICE under President George W. Bush, has suggested that they avoided [broad use of expedited removals] out of concern that a broader application of the law would raise constitutional due process problems."); *see also* Foer, *supra* note 45 ("In the face of congressional inaction, Obama set about steering ICE toward a more compassionate strategy. He wanted to give the agency a set of explicit and rigid priorities for whom it would detain and deport. Previously, almost any undocumented immigrant had been fair game. Now Obama set about focusing ICE's efforts on serious criminals and recent arrivals. By the middle of his second term, the administration had figured out how to translate its priorities into bureaucratic reality. It supplied ICE with clear procedures—with checklists and paperwork—to ensure that the organization hewed closely to the new goals."); *cf.* Benjamin Hart, *Trump's Draconian Immigration Policies Highlight Obama's Missteps*, N.Y. MAG. (June 20, 2018), nymag.com/intelligencer/2018/06/trumps-immigration-policies-highlight-obamas-missteps.html ("If President Trump really does implement mass deportations, it will be with the help of an enforcement machine Obama helped construct, or at least maintained.").

[128] *See* Hart, *supra* note 127 ("To state the obvious, President Trump's immigration policy differs vastly from his predecessor's. Trump's approach is animated . . . by capricious cruelty. The Obama administration did not intentionally target longtime residents of the United States for removal; it did not separate parents from their children to extract concessions from the opposition party; it did not attempt to crack down on legal immigration to satisfy its base; it was not, in short, guided by the revanchist nativism that rules the day in the Trump White House.").

[129] Chacón, *Bully Pulpit*, *supra* note 91, at 244 ("Words have consequences. [President Trump's] bombastic enforcement promises, when combined with seeming indifference to certain Constitutional rights and administrative realities, have apparently encouraged agents at the lowest administrative levels to exercise their own power in a manner insufficiently constrained by law.").

[130] *See* Hong, *supra* note 39, at 126 ("The Trump administration abandoned any pretense of having a humane enforcement policy. The new written priority for deportation are those who were convicted of 'any criminal offense' (including DHS's own example of a traffic violation for driving without a license), an 'arrest' (even though the charges were dropped or dismissed), those who committed conduct that may be a crime (which is up to the immigration officer to decide), those with final orders of removal (even though they may be fighting those cases . . . in the federal courts), and those who 'pose a risk to public safety' (which is without current definition).").

[131] *See, e.g.*, Sec'y John Kelly, *Enforcement of the Immigration Laws to Serve the National Interest*, DHS POLICY MEM. (Feb. 20, 2017), www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf ("Congress has defined the Department's role and responsibilities regarding the enforcement of the immigration laws of the United States. Effective immediately, and consistent with Article II, Section 3 of the United States Constitution and Section 3331 of Title 5, United States Code, Department personnel shall faithfully execute the immigration laws of the United States against all removable aliens. Except as specifically noted above, the Department no longer will exempt

then coordinating efforts across agencies,[132] President Trump has laid bare the shocking amount of power the Executive branch actually wields over immigration.

Noted dean and professor, Kevin Johnson, argues that "by leaving the courts virtually no choice but to address the constitutionality of the new administration's immigration policy initiatives, President Trump may unintentionally help facilitate the judicial expansion of the Constitutional rights of immigrants and forever change the fundamentals of American immigration law."[133] It seems, however, that the best way to "facilitate the judicial expansion" of those rights is not by litigating immigrants' constitutional rights head-on.[134] Instead, I argue that immigrants' rights are tangential to those that really animate the current conservative members of the Supreme Court: congressional over-delegation to executive agencies and "*Chevron* deference."[135]

The broad framework of the argument would start by noting that Congress and the Executive have historically shared plenary power to craft immigration law and policy.[136] However, in the past three decades Congress has increasingly over-delegated law-making responsibility to the President and executive agencies.[137] Meanwhile, since 1984, the Supreme Court has ceded its own power to the agencies by self-imposing *Chevron* deference, by which it defers to an agency's interpretation of an ambiguous statute, even if it disagrees with that interpretation.[138]

---

classes or categories of removable aliens from potential enforcement. In faithfully executing the immigration laws, Department personnel should take enforcement actions in accordance with applicable law.").

[132] Foer, *supra* note 45 ("Where immigration is concerned, Trump has installed a group of committed ideologues with a deep understanding of the extensive law-enforcement machinery they now control.").

[133] Johnson, *Civil Rights*, *supra* note 19, at 665.

[134] Kim, *supra* note 13, at 89 ("The prevailing theoretical explanation for this doctrinal shift [away from plenary power] has characterized it as a belated integration of public law norms, asserting the universal application of a robust set of Equal Protection and Due Process rights into the immigration context. While this explanation undoubtedly possesses normative appeal, the Court's decisions do not consistently conform to it . . . .").

[135] *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., dissenting, joined by Thomas, J., joined in part by Alito and Kavanaugh JJ.); Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 56 (2015) (Alito, J., concurring); *id.* at 66 (Thomas, J., concurring in judgment); *see also* Christopher Walker, *Judge Kavanaugh on Administrative Law and Separation of Powers*, SCOTUSBLOG (July 26, 2018), www.scotusblog.com/2018/07/kavanaugh-on-administrative-law-and-separation-of-powers/; Eric Citron, *The Roots and Limits of Gorsuch's Views on Chevron Deference*, SCOTUSBLOG (Mar. 17, 2017), www.scotusblog.com/2017/03/roots-limits-gorsuchs-views-chevron-deference/.

[136] Cox, *supra* note 1, at 1671.

[137] Kim, *supra* note 11, at 101 ("[T]he power to promulgate national immigration policy is increasingly exercised less by Congress, and more by the officials populating our nation's administrative agencies.").

[138] Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984).

Taken together, the Court has weakened its ability to check executive agencies policies, while Congress has given executive agencies significant discretion make their own immigration policies. Over-delegation and *Chevron* deference have merged to create troublesome separation of powers issues, which have foreseeably led to due process violations against unauthorized immigrants.[139] This is not just my argument—it is also that of Supreme Court Justice Neil Gorsuch.[140] In *De Niz Robles v. Lynch*, then Tenth Circuit Judge, Neil Gorsuch—in finding *for an unauthorized immigrant against an executive agency*—said the following:

> The framers anticipated an Executive charged with enforcing the decisions of the other branches—not with exercising delegated legislative authority, let alone exercising that authority in a quasi-judicial tribunal empowered to overrule judicial decisions. Indeed, one might question whether Chevron step two muddles the separation of powers by delegating to the Executive the power to legislate generally applicable rules of private conduct.[141]

The implication of this excerpt is that immigration advocates operating within an increasingly conservative judiciary may consider challenging agency power by arguing that the Court should bring separation of powers norms into alignment with the Founders' intent. To do that, they could argue that the Court could both (1) jettison *Chevron* deference when reviewing executive rules interpreting immigration statutes, and (2) revive the non-delegation doctrine. I expand on each of these arguments in the following three sub-sections.

A. It is Inappropriate to Give Chevron Deference to Agency Interpretations of Immigration Law

One way to check executive power over immigration law is by asking the Court to be more critical when reviewing an executive agency's immigration rule.[142] To do this, the Court could choose to weaken *Chevron* deference, a doctrine of judicial restraint established in *Chevron U.S.A., Inc. v. NRDC*.[143] *Chevron* deference, dictates the standard of review a judge should use when an agency rule is being challenged. Agencies make rules based off of their interpretations of Congressional statutes. When a petitioner

---

[139] *See* Rubenstein, *supra* note 10, at 93.

[140] *See* De Niz Robles v. Lynch, 803 F.3d 1165 (10th Cir. 2015) (Gorsuch, J.); *see also* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, (10th Cir. 2016) (Gorsuch, J., concurring).

[141] *De Niz Robles*, 803 F.3d at 1167.

[142] *See* John S. Kane, *Refining Chevron—Restoring Judicial Review to Protect Religious Refugees*, 60 ADMIN L. REV. 513 (2008) (arguing that Courts should not give *Chevron* deference to BIA appeals of religious refugee cases.); *see also* Chacón, *Bully Pulpit*, *supra* note 91, at 244 ("To operate as an effective check on administrative excesses, however, courts may need to reassert their power to do so.").

[143] Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984).

challenges a rule made by an executive agency, the court has self-imposed the application of the "*Chevron* two-part test." In step one, a court must determine whether a statute is ambiguous.[144] If yes, then the court should proceed to the second step, which is to determine whether the agency's interpretation of that statute is based on a "permissible construction" of the words of the statute.[145] If it is, then the court should defer to the agency's interpretation of the statute, even if the Court disagrees.[146]

To illustrate, in a challenge to the "Zero Tolerance Policy," DHS could defend the policy by pointing out that the INA is ambiguous, and the policy was based on permissible constructions of several statutory provisions in the INA and federal criminal law. Thus, the argument goes, the Court should give deference to the agency's interpretation of those laws and should not invalidate its rules. Indeed, the Court in *Chevron* placed that very limit on itself, because it assumed that "a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[147]

This is precisely the type of argument that then Tenth Circuit Judge Neil Gorsuch responded to in 2015 in *De Niz Robles v. Lynch*[148] and in 2016 in *Gutierrez-Brizuela v. Lynch*.[149] In those cases, two provisions of the INA rendered the petitioners "simultaneously eligible and ineligible for relief."[150] In 2005, the Tenth Circuit held that 8 U.S.C. § 1255(i) was the controlling provision.[151] In reliance on the Tenth Circuit precedent, De Niz Robles and Gutierrez-Brizuela had filed petitions for legal residency.[152] Their petitions were denied, and the BIA found both men deportable, citing the opposing statute 8 U.S.C. Section 1182(a)(9)(C).[153] In essence, the BIA overruled a federal court like "some sort of super court of appeals."[154]

---

[144] *Chevron*, 467 U.S. at 843 ("If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

[145] *Id.*

[146] *Id.*

[147] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

[148] De Niz Robles v. Lynch, 803 F.3d 1165 (10th Cir. 2015).

[149] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016) (Gorsuch, J., concurring). The difference between *De Niz Robles* and *Gutierrez-Brizuela*, is that in *De Niz Robles*, the BIA applied its new rule retroactively, which although disturbing, is not relevant to the present argument.

[150] *See* INA § 245, 8 U.S.C. § 1255(i)(2)(A); *see also* INA § 212, 8 U.S.C. § 1182(a)(9)(C); *De Niz Robles*, 803 F.3d at 1167.

[151] *De Niz Robles*, 803 F.3d at 1167 (citing Padilla-Caldera v. Gonzales*,* 426 F.3d 1294, 1300–01 (10th Cir. 2005)).

[152] *Id.* at 1167 (citing In re Briones, 24 I&N Dec. 355 (BIA 2007)).

[153] *Id.* at 1168; *Gutierrez-Brizuela,* 834 F.3d at 1144.

[154] *Gutierrez-Brizuela,* 834 F.3d at 1150.

Upon appeal in federal court the BIA argued that the two conflicting statutes created ambiguity, and therefore, under *Chevron* deference, the BIA's policy choice should control.[155] The Tenth Circuit—*finding in favor of the unauthorized immigrants*—differentiated these cases from *Chevron*, thereby avoiding a head-on challenge with it.[156] However, Justice Gorsuch was sufficiently frustrated with being overruled by an agency that he issued a separate concurrence, after writing the opinion of the court, which condemned *Chevron* deference directly:

> There's an elephant in the room with us today . . . . *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth.[157]

Implicit in Justice Gorsuch's writing is that unauthorized immigrants are entitled to a surprising level of due process and equal protection. He writes:

> The due process concerns are obvious: when Mr. Gutierrez-Brizuela made his choice, he had no notice of the law the BIA now seeks to apply. And the equal protection problems are obvious too: if the agency were free to change the law retroactively based on shifting political winds, it could use that power to punish politically disfavored groups or individuals for conduct they can no longer alter.[158]

Citing *De Niz Robles* and *Gutierrez-Brizuela*, journalist Mark Joseph Stern points out that Justice Gorsuch has "a knack for reintroducing conservative principles in cases where they lead to a liberal outcome, even though the underlying rationale tilts the law rightward."[159]

It is not clear whether the current Supreme Court would be willing to completely abandon *Chevron* deference to the executive agencies.[160] In

---

[155] *De Niz Robles*, 803 F.3d at 1167; *Gutierrez-Brizuela,* 834 F.3d at 1145.

[156] *De Niz Robles*, 803 F.3d at 1180; *Gutierrez-Brizuela,* 834 F.3d at 1148.

[157] *Gutierrez-Brizuela,* 834 F.3d at 1149.

[158] *See Gutierrez-Brizuela,* 834 F.3d at 1146, 1152 ("Under *Chevron* the people aren't just charged with awareness of and the duty to conform their conduct to the fairest reading of the law that a detached magistrate can muster. Instead, they are charged with an awareness of *Chevron*; required to guess whether the statute will be declared 'ambiguous' (courts often disagree on what qualifies); and required to guess (again) whether an agency's interpretation will be deemed 'reasonable.' Who can even attempt all that, at least without an army of perfumed lawyers and lobbyists? And, of course, that's not the end of it. Even if the people somehow manage to make it through this far unscathed, they must always remain alert to the possibility that the agency will reverse its current view 180 degrees anytime based merely on the shift of political winds and *still* prevail.").

[159] Stern, *supra* note 124.

[160] *See* Kisor v. Wilkie, 139 S. Ct. 2400 (2019) (Roberts, C. J., concurring in part) ("One further point: Issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by

2019, in *Kisor v. Wilkie*, a five to four majority declined to overrule a similar standard of judicial deference, known as "*Auer* deference."[161] Thus, in the interim, I suggest that advocates try to weaken *Chevron* deference by arguing that the Court should not give *Chevron* deference to any *agency interpretation of an immigration statute*. This is because, as the argument goes, immigration law and the agencies enforcing them are distinguishable from the rest of the executive bureaucracy.

First, immigration rules made at one agency have sweeping implications for policies, conduct, and even ethos across multiple agencies and cabinet departments.[162] This makes immigration rulemaking a profoundly complex process.[163] Using the "Zero Tolerance Policy" to illustrate, Attorney General Jeff Sessions issued a policy from the DOJ that impacted the State Department, HHS, and DHS.[164] For example, agents from the Bureau of Consular Affairs within the State Department were suddenly tasked with comforting inconsolable children who CBP had just been taken from their parents.[165] The ORR created procedures to keep track of the separated children, but those procedures were disregarded by the CBP officials that separated them, which created a "chaotic scramble" to reunite families by a judge ordered deadline.[166] When the conduct and priorities of this many executive agencies are implicated by a single rule made in a completely different cabinet department, the Court could reasonably forgo *Chevron* deference to review how the rule is implemented at each agency.

The second way in which immigration agencies are distinguishable from others is that immigration agencies, specifically ICE and the BIA, have a well-documented history of errors and incompetence, resulting in violations of the constitutional rights of citizens and immigrants alike. ICE has a history of erroneously deporting people who are lawfully present in the United States, including citizens with limited English proficiency and mental

Congress. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ("I do not regard the Court's decision today to touch upon the latter question.").

[161] *Id.*

[162] Kim, *supra* note 11, at 96.

[163] *Id.* at 184 ("Nowhere is the administrative exercise of policymaking authority more evident than in the immigration context. The [INA] delegates exceedingly broad authority to develop policies governing the admission, detention, and deportation of noncitizens to a vast and sprawling immigration bureaucracy—spread across multiple agencies including the immigration courts and the [BIA] within the [DOJ], the Bureau of Consular Affairs and Office of Visa Affairs within the State Department, and [USCIS], [CBP], and [ICE] within the [DHS].").

[164] *See e.g.* Hesson, *supra* note 51 (demonstrating how DHS and DOJ policies impact the ethos at USCIS); *see also* Thompson, *supra* note 110; (demonstrating how DHS and DOJ policies impact the Bureau of Consular Affairs).

[165] Thompson, *supra* note 110.

[166] Caitlin Dickerson, *Trump Administration in Chaotic Scramble to Reunify Migrant Families*, N.Y. TIMES (July 5, 2008), www.nytimes.com/2018/07/05/us/migrant-children-chaos-family-separation.html.

disabilities that prevented them from adequately responding to questions, citizens not born in hospitals, residents with valid status, visitors with valid tourist visas, and business travelers.[167] Professor Kari Hong details ICE's lack of subject matter expertise:

> Between 2008 and 2012, before Trump took office, ICE had mistakenly detained 834 citizens with the intent to deport them. Within the first month after President Trump assumed office, ICE officers detained a French Holocaust historian scheduled to speak at a conference because they mistakenly did not know the exception regarding when someone can work on a tourist visa; and stopped the citizen son of Mohammed Ali, allegedly asking him whether he is Muslim, which occurred while there was a national stay on the travel ban.[168]

BIA judges have similarly been criticized for their lack of expertise. Professor Stephen Legomsky notes that appellate judges from both ends of the political spectrum complain about the systemic problem of "sloppy, poorly reasoned" opinions from IJs.[169] IJs have been maligned as "fundamentally incompetent, bias, or both."[170] Professor Adam Cox, citing the opinions of Judge Richard Posner states:

> In recent years, Posner has more and more frequently concluded that both [IJs] and the [BIA] are inept. Time and time again he has complained that "the adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice." Among other rebukes, he has labeled the immigration courts' decisions arbitrary, unreasoned, irrational, inconsistent, and uninformed.[171]

This pattern of institutional incompetence counsels against giving *Chevron* deference when reviewing an immigration policy.[172]

The third way in which immigration agencies are distinguishable from other agencies is that Congress has given them broad discretion to give relief

---

[167] AM. CIVIL LIBERTIES UNION, AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM 44–58 (Dec. 2014), www.aclu.org/sites/default/files/field_document/120214-expeditedremoval_0.pdf.

[168] Hong, *supra* note 39, at 138.

[169] Legomsky, *Restructuring*, *supra* note 66, at 1643–44 (Immigration Court adjudications result in "dubious and inconsistent outcomes; a lack of confidence in the results felt by parties, reviewing courts, and commentators; an extraordinary surge of requests for judicial review of the final administrative decisions; substantial duplication of effort; and lengthy delays.").

[170] *Id.* at 1682.

[171] Cox, *supra* note 1, at 1679–80.

[172] Johnson, *Ten Principles*, *supra* note 9, at 1625; *cf.* Marks, *supra* note 9, at 6 ("Immigration Judges—who must be attorneys and are appointed by the Attorney General—are a unique and highly qualified specialty corps of judges. The collective expertise of the Immigration Judge corps in this challenging legal specialty is unparalleled.").

or to deport whomever they choose.[173] In 2012, in *Arizona v. United States*, Justice Stevens noted, "A principal feature of the removal system is the broad discretion exercised by immigration officials."[174] These "vast reservoirs of discretion" afforded to the immigration agencies has resulted in "inconsistent treatment of noncitizens."[175] Meanwhile the agencies are also subject to less judicial oversight than other agencies.[176] One reason for this lack of judicial oversight is because the IIRIRA includes significant jurisdiction stripping statutes that prevent courts from reviewing agency decisions (e.g. expedited removal).[177] Jurisdiction stripping provisions ensure that "agency officials have the final word in defining large swaths of our nation's immigration policy."[178]

Advocates could use these jurisdiction stripping statutes, however, to argue that since Congress was so explicit about jurisdiction stripping in some provisions and not others, it is reasonable to believe that where Congress did not limit the Court's jurisdiction, that it did not intend for the Court to give Chevron deference to the agency rule. Moreover, as discussed above, "the decisions of the agencies have been the subject of increased, often biting, criticism, which suggests that deference by the courts may not be justified and, indeed, that rigorous judicial review, not court stripping, is needed."[179] Thus, this combination of significant discretion and limited judicial oversight warrants more judicial oversight, and less *Chevron* deference.

The fourth reason the immigration agencies are distinguishable from other agencies is the relative difficulty of the subject matter at issue. Judge

---

[173] AM. IMMIGR. INST., PROSECUTORIAL DISCRETION: HOW TO ADVOCATE FOR YOUR CLIENT 1 (2015) www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/pd_overview_final.pdf ("In immigration cases, this discretion can be exercised in a variety of settings, including but not limited to: investigations, arrests, detention, the initiation of removal proceedings, the pursuit of an appeal, and even the execution of final removal orders. In some cases, a favorable grant of prosecutorial discretion may be the only avenue available to a client seeking to remain in the United States."); *see also* USCIS, POLICY MANUAL ch. 5, www.uscis.gov/policy-manual/volume-9-part-a-chapter-5 (last updated Apr. 7, 2020).

[174] Arizona v. United States, 567 U.S. 387, 395–96 (2012).

[175] Johnson, *Ten Principles*, *supra* note 9, at 1628.

[176] *See* Kim, *supra* note 11, at 96 ("In the immigration context, however, the governing statute employs exceptionally broad and ambiguous language.").

[177] 8 U.S.C § 1225 (2020).

[178] *See* Kim, *supra* note 11, at 99–100 ("Congress has further expanded the power of immigration agencies by insulating many of their decisions from any form of judicial review. The INA explicitly precludes judicial review over a wide swath of immigration decisions, including those relating to the 'expedited removal' of aliens alleged to be inadmissible on grounds of fraud or lack of documentation; those relating to the removal of aliens based on the commission of past crimes; those designated in the INA as being within the discretion of the Attorney General or Secretary of Homeland Security; and those relating to certain forms of relief from removal. Such insulation from judicial review ensures that agency officials have the final word in defining large swaths of our nation's immigration policy.").

[179] *See* Johnson, *Ten Principles*, *supra* note 9, at 1624.

Patricia Wald writes that when an agency regulates a highly technical or scientific topic, it is "asking great deal" of federal 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, so that we can participate as equals in their good governance."[180] It is asking a great deal, in part, because agency rule-makers are "experts"—they often have advanced degrees in mathematics, statistics, and the sciences.[181] This superior training enables them to craft regulatory schemes that can be "lengthy, detailed, technical, complex, and comprehensive response to a major social issue," as was the case in *Chevron, U.S.A., Inc. v. NRDC, Inc*.[182] Where judges may not have such specialized training, Justice Stevens thought it reasonable to give *Chevron* deference to the agency's interpretation of the statute.[183]

In contrast, it may take an expert to navigate the INA, but that is because the structure of the law is "byzantine" and "chaotic," not because the subject matter technical or scientific.[184] Interpreting immigration statutes and rules is well within the institutional competence of the federal courts; indeed immigration appeals made up ten percent of the Court of Appeals docket in 2019.[185] Thus, it is unnecessary (and perhaps even insulting) to ask a judge to blindly give *Chevron* deference to immigration agency rule-makers.[186] To be sure, the men who developed President Trump's immigration policies do not have any more advanced educational backgrounds than those of typical federal judges.[187] Since there is no reason to question the competence of

[180] Patricia M. Wald, *The "New Administrative Law"—With the Same Old Judges in It?*, 1991 DUKE L.J. 647, 658 (1991).

[181] *See* Harold H. Bruff, *Specialized Courts In Administrative Law*, 43 ADMIN. L. REV. 329, 330 (1991).

[182] Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 848 (1984).

[183] *Cf.* Kane, *supra* note 142, at 538 ("As a logical matter, the expert agency's necessary act of resolving the complexity into sufficient simplicity so that a decision can be made and properly evaluated obviates the need to rely on technicians to make the actual decision. That the information considered in making a choice is 'technical' does not necessarily mean that the choice itself is. The choice itself, as in *Chevron,* may be more a matter of social policy than science.").

[184] *See* Legomsky, *Restructuring*, *supra* note 66, at 1638.

[185] Immigration appeals made up over ten percent of the Federal Court of Appeals docket in 2019. *See U.S. Courts of Appeals Judicial Business 2017*, UNITED STATES COURTS, www.uscourts.gov/us-courts-appeals-judicial-business-2019 (last visited Apr. 11, 2020).

[186] *See* Cox, *supra* note 1, at 1682 ("[I]f we assume that [Judge Richard] Posner has accurately concluded that the immigration courts are incompetent, an important question remains: should a federal appellate judge respond to the incompetence of the immigration courts by refusing to give deference to the agency's factual and legal judgments—in other words, by creating a de facto doctrine of administrative law exceptionalism for immigration law?").

[187] Kris Kobach, an original architect of President Trump's immigration policies "is a graduate of Harvard, Yale Law School, and Oxford, where he received a doctorate in political science." He served in the DOJ after 9/11, taught law at the University of Missouri-Kansas City, and worked as a lawyer at the Federation for American Immigration Reform. He is currently the Secretary of State of Kansas. *See*

federal judges to interpret the meaning of immigration law, there is no need to give *Chevron* deference to the immigration agencies' rules.

The final way that immigration agencies are distinguishable from other agencies is their enforcement target: vulnerable and disenfranchised minority groups with limited resources to defend themselves.[188] In deportation proceedings only thirty-seven percent of immigrants have attorneys; and only a small fraction of those attorneys' services are rendered *pro bono*.[189] Agency action against this minority group often results in significantly more draconian punishments than other civil cases, including family separation, indefinite incarceration, deportation to violent countries, home foreclosure, loss of employment, etc.[190] Indeed, Judge Marks once described immigration court hearings as "like holding death penalty cases in traffic court."[191] In few other circumstances in agency law are the stakes so high for people that are so weak.

In contrast, with few exceptions, the primary enforcement targets of non-immigration agencies are institutions: corporations and businesses,[192]

Jonathan Blitzer, *Trump's Ideas Man for Hard-Line Immigration Policy*, NEW YORKER (Nov. 22, 2016), newyorker.com/news/news-desk/trumps-ideas-man-for-hard-line-immigration-policy. Stephen Miller majored in political science at Duke. After graduation he worked as a speech writer for Congresswoman Michele Bachmann, he later took a position as communications director for Jeff Sessions. He then joined the Trump campaign as a senior advisor. *See* Jonathan Blitzer, *How Stephen Miller Manipulates Donald Trump to Further His Immigration Obsession*, NEW YORKER (Feb. 21, 2020), www.newyorker.com/magazine/2020/03/02/how-stephen-miller-manipulates-donald-trump-to-further-his-immigration-obsession. Lee Francis Cissna, former head of the USCIS, has a B.S. in physics and political science from MIT, an M.A. from Columbia in International Affairs, and a J.D. from Georgetown. He worked for the State Department and the Senate Judiciary Committee. *See* Hesson, *supra* note 51.

[188] Niall McCarthy, *The Massive Wage Gap Between U.S. Citizens And Immigrants [Infographic]*, FORBES (Mar. 7, 2017), www.forbes.com/sites/niallmccarthy/2017/03/07/the-massive-wage-gap-between-u-s-citizens-and-immigrants-infographic/#66746b263e65.

[189] *See* INGRID EAGLY ET AL., AM. IMMIGR. COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 6 (2016), www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

[190] *See generally* Hong, *supra* note 39; *see also* Marks, *supra* note 9, at 6; Adinaa, *What Happens to My Business if I Get Deported?,* CAMINO FINANCIAL (Sep. 13, 2019), www.caminofinancial.com/what-happens-to-my-business-if-i-get-deported/; Reema Khrais, *What Happens to Your House When You Get Deported?*, MARKETPLACE (Aug. 10, 2017), www.marketplace.org/2017/08/10/little-noticed-effect-deportations-foreclosures/.

[191] Julia Preston, *Lawyers Back Creating New Immigration Courts*, N.Y. TIMES (Feb. 8, 2010), www.nytimes.com/2010/02/09/us/09immig.html.

[192] For example, the Securities and Exchange Commission ("SEC"), Department of Labor, Occupational Safety and Health Administration ("OSHA"), Environmental Protection Agency ("EPA"), Department of Transportation, Food and Drug Administration ("FDA"), U.S. Patent and Trademark Office, all perform this type of enforcement.

schools and universities,[193] state and municipal governments,[194] etc. These institutional enforcement targets tend to have more political clout and financial resources by which to defend their interests.[195] They have corporate lawyers, public relations firms, and lobbyists.[196] Moreover, unlike remedies for immigration infractions, non-immigration agencies administer remedies that are proportionate to the offense. In the first instance, for example, the institutional rule violators may be brought to the table to negotiate a resolution agreement or a financial remedy.[197] If no agreement is reached, agencies may bring actions to enjoin the institutions, revoke industry licenses, force disgorgement of "ill-gotten gains," or withhold federal funding.[198] Only in the most egregious circumstances does a violation of a rule result in prison time.[199] In this way, the gulf between the power of the parties, their resources, and the severity of the sanctions they face makes immigration law distinguishable from other agencies.

In summary, immigration law is different from other bodies of law, and the agencies interpreting them are distinguishable from others in the executive bureaucracy. Taken together these distinguishing factors implicate

[193] The Department of Education ("DOE"), USDA National School Lunch Program, Federal Trade Commission, SEC, Consumer Financial Protection Bureau, DOJ, Department of Treasury, and Department of Veterans Affairs, among others, all oversee schools and educational programs.

[194] The DOE, EPA, OSHA, Department of Labor, DOJ, Federal Elections Commission, Department of Transportation, Department of Housing and Urban Development all perform enforcement of state and local governments.

[195] *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2437–38 (2019) (Gorsuch J., concurring in judgement) ("[The founders] knew that when political actors are left free not only to adopt and enforce written laws, but also to control the interpretation of those laws, the legal rights of 'litigants with unpopular or minority causes or . . . who belong to despised or suspect classes' count for little. Maybe the powerful, well-heeled, popular, and connected can wheedle favorable outcomes from a system like that—but what about everyone else? They are left always a little unsure what the law is, at the mercy of political actors and the shifting winds of popular opinion, and without the chance for a fair hearing before a neutral judge. The rule of law begins to bleed into the rule of men.").

[196] Brody Mullins et al, *Colleges Flex Lobbying Muscle,* WALL ST. J. (Nov. 8, 2015), www.wsj.com/articles/colleges-flex-lobbying-muscle-1447037474; *see also* Ezra Klein, *Corporations Now Spend More Lobbying Congress Than Taxpayers Spend Funding Congress*, VOX (July 15, 2015), www.vox.com/2015/4/20/8455235/congress-lobbying-money-statistic.

[197] *See, e.g.*, CONG. RES. SERV., TITLE IX AND SEXUAL HARASSMENT: PRIVATE RIGHTS OF ACTION, ADMINISTRATIVE ENFORCEMENT, AND PROPOSED REGULATIONS 20 (Apr. 12, 2019), fas.org/sgp/crs/misc/R45685.pdf; *see also Basic Information on Enforcement,* ENVTL. PROTECTION AGENCY, www.epa.gov/enforcement/basic-information-enforcement (last visited Apr. 15, 2020); *Enforcement Info Center*, OFFICE OF ENTERPRISE ASSESSMENTS, U.S. DEPT. OF ENERGY, www.energy.gov/ea/information-center/enforcement-infocenter; *Inspections, Compliance, Enforcement, and Criminal Investigations,* U.S. FOOD AND DRUG ADMIN., www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations (last visited April 15, 2020). *See generally Justice Manual,* U.S. DEPT. OF JUSTICE, www.justice.gov/jm/justice-manual (last visited April 15, 2020).

[198] *See, e.g.*, *About the Division of Enforcement*, U.S. SECS. & EXCH. COMM'N, www.sec.gov/enforce/Article/enforce-about.html (last visited Apr. 15, 2020); *see also* EPA, *supra* note 197; FDA, *supra* note 197; DOJ, *supra* note 197.

[199] *See e.g.* EPA, *supra* note 199; *see also* SEC, *supra* note 199; DOJ, *supra* note 199.

the need for more judicial oversight and less deference to the immigration agencies. Thus, the Court should decline to apply *Chevron* deference to agency interpretations of immigration statutes.

If the Court did weaken *Chevron* for immigration agencies, that would mean that the Court could freely review agency action using whatever interpretive framework it deems appropriate. Weakening *Chevron* does not mean that immigrants would always win against the agencies. Upon its own analysis—even without deference—the Court could find that the agency's interpretation is correct, and the unauthorized immigrant would be no better off.[200] However, if agencies know that courts will review their interpretation of statutes, they may hew more closely to legislative intent of the statute.[201] Plus, immigrants could more consistently count on a neutral arbiter to shield them from unfettered agency discretion. Finally, if the courts were to encounter an ambiguous statute, they would not have to immediately defer to the agency's policy-making expertise. Instead, they could send the statute back to Congress to amend and clarify its guiding principles. This would recalibrate separation of power norms and protect the personal liberties of unauthorized immigrants, which why I argue that advocates should seek to weaken *Chevron* deference, specifically as it relates to immigration rulemaking.

B. Resurrecting the Non-Delegation Doctrine to Attack the Immigration & Nationality Act

Eliminating *Chevron* deference would shift power from the immigration agencies back to the courts, but it would not force Congress to reassert its own power. For Congress to take its power back from the executive immigration agencies, it must stop over-delegating legislative authority to them. However, if Congress sees that the Court is actively policing immigration agencies, it may feel disinclined to re-assert itself.[202] Thus, the Court should resurrect the non-delegation doctrine, which would

[200] Gutierrez-Brizuela, 834 F.3d at 1158 ("Of course, courts could and would consult agency views and apply the agency's interpretation when it accords with the best reading of a statute. But *de novo* judicial review of the law's meaning would limit the ability of an agency to alter and amend existing law.").

[201] *See* Cox, *supra* note 1, at 1685 ([Judge Posner's] oversight might spur the [BIA] by raising the cost of shoddy administrative adjudication. The immigration courts often must spend additional resources to revisit decisions that have been overturned by appellate courts, and the appellate court opinions themselves can be quite embarrassing to the agency (as many of Judge Posner's are). These costs might have disciplining effects.").

[202] *See* Cox, *supra* note 1, at 1686.

force Congress to rewrite immigration with more clearly defined guiding principles and national policy goals. In the following two sections, I suggest two non-delegation arguments by which to check executive immigration power.

Broadly speaking, delegation is a tool by which one branch of government cedes power to another. In the context of this Note, Congress delegates broad rulemaking authority to the executive agencies to make immigration policy.[203] That is, Congress writes general legislation, then delegates the job of writing rules and regulations to executive agencies.[204] Congress legislates this way because either (1) it trusts the agencies' subject matter experts to best implement the law,[205] or (2) it cannot reach a consensus,[206] or (3) individual representatives would prefer to avoid taking positions on politically sensitive topics.[207]

The Constitution does not explicitly prohibit delegation, and the Court has recognized that some delegation is necessary to efficiently execute the law.[208] Nevertheless, it has mostly declined to review Congress' delegation, relying instead on Congress to self-regulate how much it delegates.[209] The Court has held a statutory delegation will pass constitutional muster so long

[203] Kim, *supra* note 11, at 96 ("The [INA] delegates exceedingly broad authority to develop policies governing the admission, detention, and deportation of noncitizens to a vast and sprawling immigration bureaucracy—spread across multiple agencies.").

[204] *Id.* at 101 ("[T]he power to promulgate national immigration policy is increasingly exercised less by Congress, and more by the officials populating our nation's administrative agencies.").

[205] Cox, *supra* note 1, at 1672 ("*Chevron* deference is often defended on the ground that administrative agencies have greater expertise and more democratic accountability than courts.").

[206] *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting) ("Congress concluded that something had to be done about these 'pre-Act' offenders too. But it seems Congress couldn't agree what that should be. The treatment of pre-Act offenders proved a 'controversial issue with major policy significance and practical ramifications for states.' . . . So Congress simply passed the problem to the Attorney General."); *see also* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 595-96 (2002).

[207] Nadine Strossen, *Delegation as a Danger to Liberty*, CARDOZO L. REV. 861, 863 (1999) ("[D]elegation allows legislators and the President to shift much of the blame for unpopular government policies to the agencies. Therefore, an important deterrent to enacting unpopular laws does not deter unpopular regulations.").

[208] *See* American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946) ("Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules."); *see also* Mistretta v. United States, 488 U.S. 361, 415 (1989) ("Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.").

[209] *Mistretta*, 488 U.S. at 416 (citing J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928)) ("[T]he limits of delegation 'must be fixed according to common sense and the inherent necessities of the governmental co-ordination . . . .' Congress is no less endowed with common sense than we are, and better equipped to inform itself of the 'necessities' of government; and . . . the factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political—including, for example, whether the nation is at war.").

as the statute conveys "an intelligible principle to which the person or body authorized to [act] is directed to conform."[210] If the statute does not meet that minimum standard, then it is said be an over-delegation of constitutional authority to the Executive, which violates the non-delegation doctrine.

A substantial hurdle to winning an over-delegation argument is finding a way to resurrect the non-delegation doctrine.[211] The non-delegation doctrine has not *explicitly* been used to overturn a statute since 1935.[212] Moreover, it was only used in two extreme circumstances,[213] "one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy."[214] Thus, the court has admittedly rendered the "no intelligible principle" test meaningless, because in practice it "almost never" feels qualified to "second-guess Congress."[215]

In conjunction with ending *Chevron* deference, Justice Gorsuch has also signaled a desire to resurrect the non-delegation doctrine, most recently in his 2019 dissent in *Gundy v. United States*.[216] In *Gundy*, an eight-Justice Court confronted the non-delegation doctrine directly, but declined to resurrect it.[217] At issue was the 2006 Sex Offender Registration and

---

[210] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (citing J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

[211] *See* Rubenstein, *supra* note 10, at 103 ("[A]s every student of administrative law quickly comes to learn, the so-called 'nondelegation' doctrine is a misnomer. Virtually nothing fails the intelligible principle test, leaving the breadth of Congress's delegations virtually unchecked. Accordingly, reliance on the nondelegation doctrine as a sweeping defense of the structural concerns raised above rings hollow: The underenforced nondelegation norm is itself a slippage of separation of powers."); *cf.* Lauren Gilbert, *Obama's Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. 255, 283 ("While there has been scholarship over the years calling for a revival of the non-delegation doctrine, it seems unlikely that the Court would do so in an immigration matter, where Congress, since the late nineteenth century, has exercised plenary authority to regulate immigrants and to delegate power, as it sees fit, to the Executive, with only limited judicial review. Moreover, the argument laid out earlier that the President also has inherent authority rooted in his foreign affairs power is relevant here as well."); Cox, *supra* note 1, at 1674 ("Nondelegation principles are still alive and well . . . . For example, courts today sometimes restrict delegation by refusing to apply standard deference doctrines in situations where there is reason to think that Congress, rather than an administrative agency, should be forced to make a particular policy choice.").

[212] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001).

[213] Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); A. L. A. Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935).

[214] *Whitman*, 531 U.S. at 474.

[215] Mistretta v. United States, 488 U.S. 361, 416 (1989) (noting that "it is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law. As the Court points out, we have invoked the doctrine of unconstitutional delegation to invalidate a law only twice in our history, over half a century ago.") (cited by Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001)); *see also* Gilbert, *supra* note 211, at 282–83.

[216] Gundy v. United States, 139 S. Ct. 2116 (2019).

[217] *Id.* at 2121.

Notification Act ("SORNA").[218] In it, Congress delegated to the Attorney General the power to determine who is required to register as a sex offender.[219] Using that delegated authority, the Attorney General determined that individuals who were convicted before the Act was passed were, nevertheless, still required to register on the national sex offender registry.[220]

The plurality, including Justices Kagan, Ginsburg, Breyer, and Sotomayor held that the Attorney General's determination was based on a valid delegation of constitutional authority.[221] Interestingly, however, are the whereabouts of the other Justices. Justice Alito concurred in the judgement, but signaled a willingness to revisit non-delegation in a less "freakish" case.[222] Justice Kavanagh did not take part in the deliberations or decision.[223] Justice Gorsuch wrote for the dissent, and was joined by Chief Justice Roberts and Justice Thomas.[224] Citing Justice Cardozo in *A. L. A. Schechter Poultry Corp v. United States*, Justice Gorsuch writes:

> In a future case with a full panel, I remain hopeful that the Court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code. That "is delegation running riot."[225]

If you are not yet convinced of his Justice Gorsuch's commitment to reviving the non-delegation doctrine, please reference his recommended reading list from *De Niz Robles v. Lynch* below.[226]

Justice Gorsuch's writings in *De Niz Robles*, *Gutierrez-Brizuela*, and *Gundy*, offer a window into how we might resurrect the non-delegation doctrine. Advocates could argue that the current "intelligible principle"

---

[218] Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, 120 Stat. 590, (codified as amended at
34 U. S. C. § 20913 (2020)).

[219] 34 U. S. C. § 20913(d).

[220] *Gundy*, 139 S. Ct. at 2122.

[221] *Id.* at 2124.

[222] *Id.* at 2130–2131.

[223] *Id.* at 2130.

[224] *Id.* at 2131.

[225] *Id.* at 2148 (citing A. L. A. Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935)).

[226] De Niz Robles v. Lynch, 803 F.3d 1165, n.5 (10th Cir. 2015) ("Thoughtful scholars have presented arguments along similar lines, recently and notably." (citing PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 285-321 (2014). *See also* BOGDAN IANCU, LEGISLATIVE DELEGATION: THE EROSION OF NORMATIVE LIMITS IN MODERN CONSTITUTIONALISM 230-51 (2012); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 99-106 (1993); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State,* 89 COLUM. L. REV. 452, 478-81 (1989); Linda D. Jellum, *"Which Is to Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers,* 56 UCLA L. REV. 837, 897-98 (2009); Nadine Strossen*, Delegation as a Danger to Liberty,* 20 CARDOZO L. REV. 861, 861-70 (1999))).

standard is *not*, in fact, "constitutionally sufficient."[227] If it was, then we would not be in our current separation of powers predicament.[228] As Justice Gorsuch points out in *Gundy*, the phrase "intelligible principle" was never intended to be a stand-alone test.[229] It was descriptive remark that has "mutated" into something with "no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked."[230] In other words, the Constitution demands more from our Congress than a mere "intelligible principle."

As alluded to by Justice Gorsuch in *Gutierrez-Brizuela v. Lynch*, the Court has already suggested two other standards that are presumably higher than the "intelligible principle."[231] In *American Power & Light Co. v. SEC*, the Court held that Congress must "clearly delineate the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."[232] The court insinuated in *Whitman v. American Trucking Associations* that for legislation impacting the "national economy," Congress should give "substantial guidance" to the agencies to which it is delegating.[233] Since the higher standards are already baked into previous opinions that are still good law, they may appeal to those justices who would otherwise be disinclined to overrule precedent.

Requiring a statute with a "guiding principle" that "clearly delineates the general policy" that undergirds the legislation, as opposed to a mere "intelligible principle," would place boundaries around agency action. In addition, a "guiding principle" could help the Court more easily identify whether an agency had exceeded its discretion. Finally, in some cases, requiring a "guiding principle" might negate the need for *Chevron* deference. The Court would first ask whether the statutes is ambiguous. If yes, then step two would be to confirm whether there is a guiding principle on which an agency can reasonably base a rule. If no, then the Court should send it back to Congress to amend; not to defer to the agencies.[234] In these ways, redefining the "intelligible principle" test as to require a "guiding principle"

---

[227] *See* American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946); *see also* Gundy v. United States, 139 S. Ct. 2116, 2138–39 (2019) (Gorsuch, J. dissenting).

[228] *See* Kim, *supra* note 11, at 101 ("Administrative exercises of such exceedingly broad discretion, not only in the immigration context but also across the regulatory state, present a significant departure from the separation of powers contemplated by our constitutional framers.").

[229] *Gundy*, 139 S. Ct. at 2139.

[230] *Id.*

[231] *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1154–55 (2015).

[232] American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946).

[233] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2001).

[234] Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. 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.").

that "clearly delineates the general policy" that undergirds the legislation, would naturally bring agency authority into alignment with the Constitution. This would protect the due process interests of "fair notice, reasonable reliance, and settled expectations" in that agency policies would not change so drastically with the election of each new president.[235]

From this broad outline of the non-delegation argument, I turn specifically to congressional over-delegation to agencies through the INA. An over-delegation argument challenging a provision of the INA may begin by showing that Congress has failed to give the executive agencies any meaningful guidance as to the principles undergirding our immigration system.[236] We know the function of the INA—to determine who has legal grounds for being present in the United States, and who is deportable. What we do not know is what policy goal these functions are supposed achieve. Is our policy goal to welcome asylees and refugees, to protect national security, to manage the efficient flow of the migrant workforce? To what end should the executive agencies direct their energies? In other words, we know what the executive agencies can do, we just do not know why they are doing it. This lack of "guiding principle" that "clearly delineates the general policy" represents an over-delegation of congressional law-making authority to the executive agencies.

For context, Professor Stephen Legomsky describes the opacity of the INA:

> The sheer size and chaotic layout of the principal statute and related sources of law bewilder specialists and non-specialists alike. The labyrinth known as the [INA] governs the admission of noncitizens to the United States, their expulsion from the United States, and a host of miscellaneous decisions. Its five hundred pages conspire with more than one thousand pages of administrative regulations issued by a variety of federal departments, as well as precedent decisions of administrative tribunals, executive officers, and courts, to create a byzantine network of substantive and procedural rules of law. The organization of the statute further confounds non-specialists because qualifications to many of its most important provisions appear in distant and unexpected places.[237]

Not only is the INA "chaotic" and "byzantine," but each successive amendment to the original 1952 INA has telegraphed different immigration

---

[235] De Niz Robles v. Lynch, 803 F.3d 1165, 1169 (10th Cir. 2015) (citing Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994)).

[236] Johnson, *Ten Principles, supra* note 9, at 1639 ("We need in truly comprehensive immigration reform is a clear statement of goals, and a carefully crafted bill that includes provisions directed at achieving these goals in a fair and balanced fashion. True, the immigration laws serve multiple purposes and, by necessity, reflect congressional compromises and trade-offs. However, reforms to the laws should keep the overall goals in mind and at least attempt to strike a clear and appropriate balance.").

[237] Legomsky, *Restructuring*, *supra* note 66, at 1638.

ethos.[238] To illustrate, the 1965 Immigration Act amended the original 1952 INA to make it more sensitive to racial equality and family reunification.[239] It created a "nuanced system that rewarded those who contributed to our country and served as a check on those who caused more harm than good."[240]

In 1996, the IRIRA signaled another shift in guiding principles by amending the INA to be "tough on immigration."[241] Still, enforcement was only "tough" at the border—interior enforcement was not a priority until after 9/11.[242]

Our guiding principles changed again with the passage of the HSA in 2003.[243] The "primary purpose" of the HSA was to create the DHS, which was charged with preventing terrorist attacks.[244] Since DHS has turned its might toward enforcing the INA in the interior of the country, it would seem that our current guiding principle is to prevent unauthorized immigrants from terrorizing the United States.[245] Each successive layer of amendments and new laws operates on top of the others, in some cases without repealing the prior conflicting statutes.[246] This has created a lack of clarity as to the actual

---

[238] *See* Chacón, *Bully Pulpit*, *supra* note 91, at 244 ("The policies that President Trump has espoused and the resulting concern of affected communities have deep roots in the past. Old laws and policies have generated the vulnerabilities that the . . . Administration now seeks to exploit. Understanding the Trump Administration's emerging immigration policies and the reactions to them therefore requires looking backward as well as forward.").

[239] Mariano-Florentino Cuellar, *The Political Economies of Immigration Law*, 2 U.C. IRVINE L. REV. 1, 9 (2012) ("With the enactment of the 1965 Immigration Act, the federal government began administering a new system providing a higher number of visas, removing national origin quotas, and establishing family unity . . . as a core principle of immigration law. With its pragmatic accommodation for heightened legal immigration and its realization of the ideal of removing the national origin quotas that had so defined immigration law in the preceding half-century, the 1965 law was a landmark achievement.").

[240] Hong, *supra* note 39, at 142.

[241] *Id.* ("The experiment in ratcheting up immigration enforcement was not a thoughtful, considered proposal to an existing problem. Instead, IIRIRA was at best a political calculation by each party to woo voters who were concerned with the optics of being tough on immigration . . . crime, welfare fraud, and gay marriages."); *see also* Chacón, *Bully Pulpit*, *supra* note 91, at 247 ("In 1996, Congress passed a series of laws that amended the existing [INA], [which] narrowed existing pathways to legal status and vastly expanded grounds for deportation . . . .").

[242] Chacón, *Bully Pulpit*, *supra* note 91, at 248.

[243] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

[244] Homeland Security Act, § 101(b)(1).

[245] Chacón, *Bully Pulpit*, *supra* note 91, at 247 (noting that Obama's presidency "saw the deportation of over two million, the annual detention of approximately 400,000 foreign nationals (and hundreds of U.S. citizens), the . . . expansion of family detention centers, unprecedented levels of spending on border enforcement, and record prosecutions of immigration crimes. By every measure, immigration enforcement reached its historic peak in the Obama years. The Migration Policy Institute dubbed the resulting enforcement complex a 'formidable machinery.'").

[246] Cox, *supra* note 1, at 1637 ("Piecemeal reform has tended to measurably increase the complexity of U.S. immigration laws, with the accretion of complex provisions upon complex provisions making the laws complex, obtuse, and, at times, unintelligible. In the end, such piecemeal reform has left the law

policy goals of our immigration. In other words, not only is there no "guiding principle," there is not even an "intelligible" one.

In 2013, a bipartisan group of respected senators tried to bring clarity to our guiding principles in the "Border Security, Economic Opportunities and Immigration Modernization Act."[247] The Bill itself tacitly acknowledged that the INA is incoherent and unjust stating, "The passage of this Act recognizes that the primary tenets of its success depend on securing the sovereignty of the United States of America and establishing a *coherent and just* system for integrating those who seek to join American society."[248] Despite the Bill's attempt to forge a compromise, it could not muster support in the House of Representatives.[249]

Without guiding principles from Congress, the presidents and their agencies are left to decide for themselves what policies goals to implement, which parts of the INA to enforce to meet those goals, and to what extent they will enforce them. Not only is this because there is no "guiding principle," but also because multiple provisions of the INA allow immigration officials and agents almost unfettered discretion to grant or withhold relief.[250]

To illustrate, Professor Catherine Kim points to section 208 of the INA, which "explicitly delegate[s] to immigration agencies wide discretion to *exclude* aliens who otherwise fall within statutory categories for admission," while section 112 gives immigration agencies discretion to "*admit* those who otherwise fall within statutory categories for exclusion."[251] In essence, the INA gives individual ICE agents discretion to ignore the INA, and thus, Congress. In another example, Professor Lauren Gilbert points to the broad delegation of discretion in section 103(a)(3) of the INA, which "gives the Secretary broad authority to 'establish such regulations; . . . issue such instructions; and perform such other acts as she deems necessary for carrying

overly complex and overwritten, pulling it in many different directions, often with little overall cohesion and coherence.").

[247] Border Security, Economic Opportunities and Immigration Modernization Act, H.R. 744, 113th Cong. (2013) (as passed by Sen. on June 27, 2013).

[248] H.R. 744, 113th Cong. § 2(1) (2013) (emphasis added).

[249] Scher, *supra* note 4 (noting that before #abolishICE, "Democrats were united on the ultimate goal for immigration reform: a pathway to citizenship for all the estimated 11 million undocumented immigrants currently in America, save for those with serious criminal records. This was the objective of the 2013 bill that cleared the Senate . . . but was spiked by House Republicans.").

[250] Chacón, *Bully Pulpit*, *supra* note 91, at 264 ("By largely removing courts—even administrative courts—from the equation in many removal proceedings, these accelerated removal practices put much greater power in the hands of agents of ICE and CBP. Individuals in removal proceedings are often unrepresented, and the remedies for constitutional violations in policing are even weaker in removal proceedings than in criminal proceedings. Internal disciplinary processes have also failed to keep up with abuses and violations.").

[251] Kim, *supra* note 11, at 98.

out [her] authority under the provisions of this Act.' If anything pushed the constitutional envelope, it was arguably this provision of the INA."[252] Professor Gilbert argues that there are no guiding principles accompanying this over-delegation of power.[253]

This dearth of congressional guiding principles, combined with this abundance of agency discretion has gotten us to where we are today: the Executive owns immigration policy.[254] That's why we can go from DACA[255] to "Zero Tolerance Policy" in a matter of months with no congressional input.[256] Presidents make campaign promises about immigration; cherry pick discretionary provisions in our incoherent, unjust, and "chaotic" body of immigration law; and then use their agencies to enact their policies with warp speed.[257] Former Attorney General Jeff Sessions announced his intention to do just that, saying, "This is not business as usual . . . . This is the Trump era."[258]

Indeed, two weeks after President Trump took office he signed a spate of draconian executive orders directed at immigrants: (1) the Muslim travel ban, (2) 15,000 new CPB and ICE agents, (3) the extension of the expedited removal powers, (4) the designation of more immigrants as "priorities" for removal, (5) withholding federal funding for "sanctuary cities," (6) delegation of immigration enforcement to local police departments, and (7) an "exploratory study" of the construction of the wall.[259] The courts enjoined some of these orders, not necessarily because they violated the INA,[260] but

[252] Gilbert, *supra* note 211, at 282.

[253] *Id.*

[254] Rubenstein, *supra* note 10, at 101–2 ("The accumulation of immigration power in the Executive renders the power more fickle and potentially more arbitrary. Executive immigration policy is subject to significant change with each new presidential inauguration. Indeed, the political moment of a new presidency is not even necessary, as executive policy can change on a whim even within a President's tenure. To be sure, movements in policy are to be expected and sometimes encouraged. But here I draw a critical distinction between policy shifts generated through the constitutionally prescribed lawmaking process, on the one hand, and policy shifts occasioned though unilateral executive (in)action, on the other. Because nonbinding executive policymaking is generally less deliberative and transparent than the legislative process, it is also potentially more arbitrary and dangerous.").

[255] Johnson, *Civil Rights*, *supra* note 19, at 625–26.

[256] *Id.* at 630 ("Rather than seeking to prod Congress to act on immigration, President Trump in his initial days in office focused on executive action, just as President Obama had. The executive orders issued by President Trump allowed him to move quickly on his campaign promises to increase immigration enforcement.").

[257] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151 ("[W]hen unchecked by independent courts exercising the job of declaring the law's meaning, executives throughout history had sought to exploit ambiguous laws as license for their own prerogative."); *see also* Kim, *supra* note 11, at 97–98.

[258] *See* Da Silva, *supra* note 103.

[259] Chacón, *Bully Pulpit*, *supra* note 91, at 255.

[260] *Id.* at 257 ("[T]he new Administration relies on inflated rhetoric to promote enforcement practices that exceed formal legal authority but take on a quasi-legal character because of their widespread and unchecked nature.").

because the executive agencies changed the policies without following rulemaking procedures mandated by the Administrative Procedures Act ("APA");[261] for example, they did not allow time for public comments.[262] Discussing the practical outcome of these policy reversals, one ICE officer said, "There has been a significant increase in non-criminal arrests [under President Trump] because we weren't allowed to arrest them in the past administration . . . . You see more of an uptick in non-criminals because we're going from zero to 100 under a new administration."[263]

Congressional over-delegation has upset separation of powers norms to such an extent the immigration agencies have become what Dean Kevin Johnson calls a "tyrannical bureaucracy."[264] This tyrannical bureaucracy has caused immigrants to live in constant fear of indeterminate detention, deportation, and family separation, which has destabilized entire communities.[265] Indeed, people who have lived in peace in the United States for decades have seen their fortunes suddenly reversed, becoming targets for deportation under President Trump.[266] In *Gutierrez-Brizuela v. Lynch*, Justice Gorsuch wondered how unauthorized immigrants are supposed to "organize their affairs with some assurance that the rug will not be pulled from under them tomorrow, the next day, or after the next election."[267]

Immigrants' inability to rely on consistent application and interpretation of the law represents a violation of their due process rights.[268]

---

[261] Administrative Procedures Act of 1946, 79 Pub. L. No. 404, 60 Stat. 237 (1946).

[262] Fred Barbash & Deanna Paul, *The Real Reason the Trump Administration is Constantly Losing in Court*, WASH. POST (Mar. 19, 2019), www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9_story.html (noting that "Federal judges have ruled against the Trump administration at least 63 times over the past two years, an extraordinary record of legal defeat that has stymied large parts of the president's agenda on the environment, immigration and other matters. In case after case, judges have rebuked Trump officials for failing to follow the most basic rules of governance for shifting policy, including providing legitimate explanations supported by facts and, where required, public input.").

[263] *See* Marcelo Rocahbrun, *ICE Officers Told to Take Action Against All Undocumented Immigrants Encountered While on Duty*, PROPUBLICA (July 7, 2017), www.propublica.org/article/ice-officers-told-to-take-action-against-all-undocumented-immigrants-encountered-while-on-duty.

[264] Johnson, *Ten Principles, supra* note 9, at 1631.

[265] Foer, *supra* note 45 ("Ample data, however, show that increased fear has caused immigrant families to alter their life routines. One study by the Kaiser Family Foundation found that undocumented immigrants tried to limit their driving in order to lower the chance of an inadvertent interaction with the police. Many immigrant parents now keep their kids indoors as much as they can. One woman told Kaiser she noticed that once-vibrant playgrounds in her neighborhood were suddenly vacant.").

[266] *See* Holpuch, *supra* note 15; *see also* Peter L. Markowitz, Opinion, *Understanding What Makes Trump's Immigration Orders Truly Chilling*, N.Y. DAILY NEWS (Feb. 24, 2017), www.nydailynews.com/opinion/trump-chilling-immigration-orders-article-1.2981758 ("As a crime, unlawful entry makes her—like the vast majority of undocumented immigrants—now a priority for deportation, even though she has never been charged or convicted.").

[267] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1158 (2015).

[268] *See Id.*

To be sure, this logic could also implicate DACA. One could argue that the INA does not convey a guiding principle of forgiveness or acceptance or empathy upon which President Obama could have based that policy.[269] DACA, therefore, is a policy created as a direct result of congressional over-delegation to the Executive via the INA. By defying separation of powers norms, Congress (and President Obama) created an unreasonable due process risk for unauthorized immigrants in that neither could promise that their fortunes would not be reversed by the next administration.

When faced with the misdeeds of this tyrannical immigration bureaucracy, advocates could make a traditional APA challenge to the agency's rules, but they might also consider challenging the statutes upon which the rules were based. As to the latter, advocates could argue that (1) the initial grant of statutory discretion under the INA was unbounded by guiding principles and national policy goals, and (2) that Congress has watched idly as each new administration has effectively warped the INA to effectuate its campaign promises.[270] Congress' failure to reassert itself to correct the agencies actions has amounted to a *de facto* over-delegation of legislative power to the agencies. Both are an "abdication" of Congress' Article I responsibility.

In sum, advocates could argue that the Court should resurrect the non-delegation doctrine arguing that the "intelligible principle" test is too low of a standard to protect the separation of powers.[271] Courts should instead conceptualize this standard instead as a "guiding principle," that lays out our national goals and immigration policy. In this sense, Congress could still delegate and the Court could still avoid having to rule statutes unconstitutional outright. Instead, it could send individual provisions or whole statutory schemes back to Congress with a different constitutional message: *this statute does not have a guiding principle with clearly delineated policy goals; the agencies have too much discretion to make their own policies; the Constitution requires that you please clarify*.[272]

---

[269] *See* Gilbert, *supra* note 211, at 277.

[270] *Id.* at 257 ("The current crisis in American politics and the American legal system is as much a crisis of federalism as it is of separation of powers. Nowhere has this been more evident than in the area of immigration policy. Over the last decade, repeated attempts in Congress at both comprehensive immigration reform ("CIR") and more targeted proposals, including the DREAM Act and AgJobs, met with defeat in Congress despite bipartisan support. Anti-immigrant forces in and out of Congress used a range of tactics to defeat reform, from the Senate filibuster, to use of the broadcast media, to mobilization of supporters to shut down Congressional phone lines.")

[271] Rubenstein, *supra* note 10, at 103.

[272] *See* Michael Kagan, *Jennings v. Rodriguez Might Not Be About Immigration After All*, YALE J. REG.: NOTICE & COMMENT (Mar. 2, 2018), www.yalejreg.com/nc/jennings-v-rodriguez-might-not-be-about-immigration-after-all/ ("Ever since *Zadvydas v. Davis* (2001), the doctrine of constitutional avoidance has been a key tool in judicial efforts to expand immigrant rights. In that case, the Court found a way to avoid indefinite detention of immigrants who had been found deportable by reading a six-month

By forcing Congress to revisit the individual provision or statutory scheme, the Court would force our elected officials to forge our national values and policy goals through the hard work of compromise.[273] Scholars have referred to this type of judicial intervention a "democracy-forcing minimalism."[274] Ideally, over time, this would force Congress to more thoughtfully draft legislation with guiding principles that are sufficient to constrain agency rule-making.[275] Even if those guiding principles or national policies were not totally favorable to unauthorized immigrants, they would still have fair notice, reasonable reliance, and more settled expectations, which are the very interests due process is meant to protect.[276]

C. Using Over-Delegation Principles to Attack DHS's Interpretation of the Homeland Security Act

Up to this point, I have argued that there is "no intelligible principle" underpinning the INA and, therefore, its regulations represent an over-delegation of congressional law-making authority to the executive agencies. In this section, however, I flip the argument: in the HSA, Congress conveyed more than an intelligible principle on which agencies could reasonably base their policies—it conveyed a guiding principle with clear policy goals. DHS's "primary mission" is preventing terrorism.[277]

Over the last two decades, however, DHS (through ICE and CBP) has disregarded that guiding principle and has instead used its enforcement powers to terrorize non-violent immigrants.[278] By targeting non-violent immigrants for interior enforcement, DHS is exceeding its statutory authority

limitation into the statute, so as to avoid directly deciding whether indefinite detention would be constitutional."); *see also* Johnson, *Civil Rights*, *supra* note 19, at 661 ("Ensuring judicial review of immigration decisions can best be understood as an effort by the Court to avoid invoking the plenary power doctrine with its harsh outcomes that are in tension with modern constitutional norms. This pattern of constitutional avoidance implicitly recognizes that noncitizens in fact possess certain constitutional rights.").

[273] *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151 (2015) ("When the political branches disagree with a judicial interpretation of existing law, the Constitution prescribes the appropriate remedial process. It's called legislation. Admittedly, the legislative process can be an arduous one. But that's no bug in the constitutional design: it is the very point of the design. The framers sought to ensure that the people may rely on judicial precedent about the meaning of existing law until and unless that precedent is overruled or the purposefully painful process of bicameralism and presentment can be cleared.").

[274] Cox, *supra* note 1, at 1674.

[275] *Id.* at 1685.

[276] De Niz Robles v. Lynch, 803 F.3d 1165, 1169 (10th Cir. 2015) (citing Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994)).

[277] Homeland Security Act, § 101(b)(1).

[278] H.R. 6361, § 2(1–3) ("Only a fraction of ICE resources and personnel are dedicated to ICE's original mission of tracking terrorism and transnational crime syndicates domestically and internationally, creating serious challenges for national security. The [HSI] division of ICE, which fights human trafficking, drug smuggling and trade fraud and is critical to national security, has been deprioritized.").

granted by the HSA. Advocates could argue that this is a violation of the APA and attack the DHS, or they could go after Congress using a modified non-delegation argument. That is, Congress' inaction in the face of a rogue DHS agency action has had a similar effect as if Congress had over-delegated back in 2002—the agencies can make and enforce inhumane, anti-immigrant policies and then claim *Chevron* deference to prevent the Court from overruling them. Since Congress is unable or unwilling to address this *de facto* over-delegation to ICE and DHS, then advocates could challenge Congress' *de facto* over-delegation in the HSA, which would give the Court the opportunity to invalidate it in part, which may force Congress to reassert its power by amending it.

Advocates could argue that Congress did not intend for ICE to become the immigration enforcement behemoth as we know it today. After 9/11, legislators (both Democrats and Republicans) were primarily concerned about immigration enforcement as it related to terrorism.[279] The text of the HSA and transcripts from the congressional hearings leading up to the passage of the HSA support this proposition. Bill Scher reminds us that in 2002, Congress and the President created DHS to prevent repeat terrorist attacks, not to prevent immigration *per se*: "The vote in 2002 was not a stand-alone vote on creating ICE; it was the vote for the bureaucratic reorganization that created [DHS], which created ICE out of a piece of the former INS. Nothing about the shift portended a more aggressive deportation policy, and it did not generate any controversy at the time."[280]

Indeed, text of the HSA is clear—the "primary mission" of ICE is to prevent terror. Title one of the HSA creates the DHS; Section 101(b)(1) states, "In general the *primary mission* of the Department is to—(A) prevent acts of terror; (B) reduce the vulnerability of the United States to terrorism; and (C) minimize the damage, and assist in the recovery, from terrorist attacks that do occur within the United States . . . ."[281] Section 101 does not once mention "immigration," "immigrant," or "migrant."[282] Moreover, if there is any lingering question whether "primary mission," was the exact language Congress intended to use, one only need look at the House testimony of Professor Peter Swire. Professor Swire explicitly recommended striking the phrase "primary mission."[283] He feared that this language would

[279] *See* Marks, *supra* note 9, at 5 ("In the post 9/11 world of international terrorism, concerns about national security and possible threats posed by uncontrolled immigration to and from our homeland gave birth to the DHS.").

[280] Scher, *supra* note 4.

[281] Homeland Security Act, § 101(b)(1) (emphasis added).

[282] Homeland Security Act, § 101.

[283] *Administrative Law, Adjudicatory Issues, And Privacy Ramifications Of Creating A Department Of Homeland Security: Hearing on H.R. 5005 Before the Subcomm. on Commercial & Admin. Law, H.*

subordinate all other DHS functions as "secondary" to fighting terrorism. The legislators disregarded this feedback, keeping the language of "primary mission," which demonstrates that representatives intended the "primary mission" of DHS to be terror prevention—not immigration enforcement.[284]

A survey of the Congressional Record supports this proposition. Between both Houses of Congress, there were seventy-eight hearings leading up to the passage of the HSA.[285] Seventeen of those hearings contain "terror" or "terrorism" in the title; eleven contain "weapons of mass destruction," "biological," "nuclear," or "chemical" in the title; ten of these hearings relate to "ports," "railways," "airlines," or "infrastructure."[286] Only five of those seventy-eight hearings held prior to the passage of the HSA were related to immigration.[287] One of those five hearings, a House hearing entitled, *Risk to Homeland Security from Identity Fraud and Identity Theft*, reveals that legislators were afraid of unauthorized immigration to the extent that it meant we did not know the identities of the people within our borders—specifically terrorists.[288] The hearing recounted the ease by which terrorists and unauthorized immigrants were able to obtain fraudulent social security numbers and drivers licenses,[289] and how two unauthorized immigrants helped at least one of the 9/11 hijackers obtain a Virginia driver's license.[290] This focus on fraudulent identity demonstrates that the primary mission of the DHS—even as related to immigration—was the prevention of terrorism.

In addition to the identity fraud hearing, both the Senate and the House held hearings to discuss how to restructure the immigration bureaucracy to avoid the same mistakes of 9/11. They were concerned that the terrorists were mostly here legally because the intelligence community did not communicate with the INS about possible terror threats.[291] They also discussed how INS responsibilities would be distributed amongst the newly

Comm. of the Judiciary, 107 Cong. 28 (2002) (Testimony of Peter P. Swire, Professor of Law, Ohio State University).

[284] Homeland Security Act, § 101(b)(1).

[285] *Table of Contents*, ARNOLD & PORTER LLP LEGISLATIVE HISTORY: HOMELAND SECURITY ACT LEGISLATIVE HISTORY (2003), Westlaw (collecting legislative history materials).

[286] *Id*.

[287] *Id.*

[288] *Risk to Homeland Security from Identity Fraud and Identity Theft, Joint Hearing Before Subcomm. on Immigr., Border Security and Claims and Subcomm. on Crime, Tourism and Homeland Security, H. Comm. on the Judiciary,* 107 Cong. (2002).

[289] *Risk to Homeland Security from Identity Fraud and Identity Theft, supra* note 288, at 3–6.

[290] *Id.* at 9–11.

[291] *Immigration Reform and the Reorganization of Homeland Defense: Hearing on H.R. 5005 Before the Subcomm. on Immigr., S. Comm. on the Judiciary*, 107 Cong. (2002); *see also Role of Immigration in the Department of Homeland Security Pursuant to H.R. 5005, The Homeland Security Act of 2002: Hearing on H.R. 5005 Before the Subcomm. on Immigr. Border Security, and Claims, H. Comm. on the Judiciary*, 107 Cong. 2–3 (2002).

created executive agencies, whether USCIS should be located in the DOJ or DHS, and whether the authority to issue visas should remain with the State Department.[292]

At both of these hearings, there was very little discussion about the need to quell unauthorized immigration for its own sake. In fact, at least two staunchly Republican politicians expressed only mild concern over unauthorized immigration, but nevertheless validated the importance of immigration to the American identity. The first of these statements was made by Republican Senator from Kansas, Sam Brownback, in the Senate hearing on Immigration Reform:

> As we consider not just restructuring the INS, but reconfiguring large segments of our Federal Government, we must . . . keep in mind that enforcing immigration laws is complex, and immigration enforcement goes well beyond any gatekeeper function. Not only do we need to intercept terrorists, but we also need to *investigate fraud, remove criminal aliens, and enforce employment-related immigration laws*.[293]

From this, one can infer that Senator Brownback *did* intend for there to be interior enforcement, but *only* for the removal of fraudsters, criminals, and those violating labor laws. The second statement was made during a House hearing of the Select Committee on Homeland Security. Republican Governor, Tom Ridge, who was acting as President Bush's Secretary of Homeland Security, stated:

> Consistent with [President Bush's] long-standing position, the Administration's proposal would reorganize the INS by separating units for services from enforcement. The Department would build an immigration services organization that would administer our immigration law in an efficient, fair, and *humane* manner. *The Department would make certain that America continues to welcome visitors and those who seek opportunity within our shores while excluding terrorists and their supporters.*[294]

Again, the language of the testimony is unmistakable. As far as Secretary Ridge and President Bush were concerned, the intent of the HSA was to prevent terrorism, while being "humane" to immigrants.[295] From the statements of these Republican politicians, one can infer that, although unauthorized immigration was an important issue, a robust immigration debate could be saved for another day—the "primary mission" of the HSA was to prevent terrorism.

---

[292] *See generally Immigration Reform and the Reorganization of Homeland Defense*, *supra* note 291.

[293] *Immigration Reform and the Reorganization of Homeland Defense: Hearing on H.R. 5005 Before the Subcomm. on Immigr., S. Comm. on the Judiciary*, 107 Cong. 4 (2002) (emphasis added).

[294] *H.R. 5005, The Homeland Security Act of 2002, Days 1 and 2 Before the H. Select Comm. on Homeland Security,* 107 Cong. 21 (2002) (emphasis added).

[295] *H.R. 5005, The Homeland Security Act of 2002*, *supra* note 294.

From the record, Congress quite clearly did not anticipate that the HSA would take an interior enforcement body of less than 2,000 INS agents before 9/11,[296] and morph it into a law enforcement behemoth of 20,000 ICE agents with a budget of six billion dollars.[297] From the record, it is quite clear that Congress did not intend to create immigration regime that could arrest a ten-year-old Texas girl with cerebral palsy whose ambulance was stopped as she was being transported to the hospital for surgery;[298] or an "elderly couple visiting their pregnant daughter-in-law and her husband at a military base in New York for the Fourth of July holiday;"[299] or a New York pizza delivery driver who had applied for a green card, and has two daughters in the United States;[300] or a nineteen-year-old New York high school student who was arrested hours before his senior prom;[301] or three cooks at a Michigan restaurant who were arrested after ICE agents ate breakfast at the restaurant in which they worked.[302]

Even if DHS argued that it was performing its primary mission—it had ramped up interior enforcement to root out terrorist sympathizers like the ones who sold identification documents to the 9/11 hijackers—that argument could easily be exposed as a pretext. First, the anti-immigrant rhetoric of this administration bears no resemblance to the anti-terrorism rhetoric of 2003.[303] Second, one of HSI's missions is to combat identity fraud like that above; nevertheless, HSI—the arm of ICE that investigates identity fraud—has been deprioritized under this administration.[304] Finally, it is well-established that unauthorized immigrants commit almost no acts terrorism; rather, it is right-wing extremism that accounts for the overwhelming acts of terrorism on American soil.[305] To be sure, in 2018 of the fifty lethal terrorist attacks that

---

[296] Chacón, *A Diversion, supra* note 38, at 1572.

[297] *Who We Are*, *supra* note 46.

[298] Vivian Yee & Caitlin Dickerson, *10-Year-Old Immigrant is Detained After Agents Stop Her on Way to Surgery*, N.Y. TIMES (Oct. 25, 2018), www.nytimes.com/2017/10/25/us/girl-cerebral-palsy-detained-immigration.html.

[299] Holpuch, *supra* note 15.

[300] *Id.*

[301] Michael P. McKinney et al., *ICE Agents Arrest High Schooler Hours Before Prom*, USA TODAY (June 9, 2017), www.usatoday.com/story/news/nation-now/2017/06/09/high-school-student-immigration-arrest/385457001/.

[302] Darcie Moran, *ICE Says Three Men Arrested at Ann Arbor Restaurant Were in US Illegally*, MLIVE.COM (May 25, 2017), www.mlive.com/news/ann-arbor/2017/05/ice_3_detained_in_ann_arbor_re.html.

[303] *See* Chacón, *Bully Pulpit*, *supra* note 91, at 244.

[304] H.R. Res. 6361, § 2(1-3).

[305] *See* Johnson, *Civil Rights, supra* note 19, at 632 ([F]or more than a century, innumerable studies have confirmed two simple yet powerful truths about the relationship between immigration and crime: immigrants are less likely to commit serious crimes or be behind bars than the native-born, and high rates of immigration are associated with lower rates of violent crime and property crime."); *see generally* ANTI-DEFAMATION LEAGUE, MURDER AND EXTREMISM IN THE UNITED STATES IN 2018 (2019);.

occurred in the United States, every single one was perpetrated by a home-grown, right-wing terrorist.[306]

Since neither President Bush nor Congress intended for the HSA to be used against non-violent unauthorized immigrants, and since targeting non-violent unauthorized immigrants is not logically related to preventing terrorism, DHS, ICE and CPB have arguably exceeded their rulemaking authority. While the INA may be an unintelligible and ambiguous mess, the HSA is not; the guiding principle and policy goal undergirding the HSA is to keep Americans safe from terrorism. Thus, not only are DHS's enforcement policies and tactics inconsistent with that principle, they might actually be encouraging right-wing terrorism.[307] By exceeding their authority under the HSA, these agencies have violated both separation of power norms and the individual liberties of unauthorized immigrants. Meanwhile, Congress has failed to do anything to re-assert its power over the agencies and force their compliance with the HSA.

The Court has two options to redress this problem: (1) it could find DHS's policies to be a violation of the APA and force it to amend its rules to bring them into compliance with the HSA, or (2) it could find Congress' failure to defend the HSA amounts to *de facto* over-delegation, then send the HSA back to Congress for amendments that would clarify the boundaries of agency powers. These solutions may appeal to the current members of the Court who are partial to judicial restraint.[308] This is because they would not be required to rule on the constitutionality of the rules or statutes themselves (i.e. whether they violate due process),[309] and they would not have to undo the plenary powers doctrine. Instead they would insist that the political branches adhere with more fidelity to the division of labor outlined in Articles I and II of the Constitution.

CONCLUSION

On June 30, 2018, I joined hundreds of New Yorkers at the Brooklyn Courthouse to protest President Trump's unfathomably cruel policy of separating families at the border. I had just had a child of my own, and the images and stories from the border sickened me. Accordingly, I made a sign

[306] *See* ANTI-DEFAMATION LEAGUE, *supra* note 305, at 10.

[307] Richard J. McAlexander, *Terrorism Does Increase with Immigration — But Only Homegrown, Right-Wing Terrorism*, WASH. POST (July 19, 2019), www.washingtonpost.com/politics/2019/07/19/immigration-does-lead-more-terrorism-by-far-right-killers-who-oppose-immigration/.

[308] *See, e.g.*, Jennings v. Rodriguez, 138 S. Ct. 830 (2018); *see also* Kagan, *supra* note 272.

[309] *See* Mistretta v. United States, 488 U.S. 361, 415 (1989) (noting "the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.").

that said, "Our govt snatched a nursing baby off her mother."[310] At the protest, dozens of other signs poked above the crowd, many saying, "Abolish ICE!" That was the first time that I took notice of the idea. I was intrigued by the position—*could it be so simple?* My search for answers eventually turned into the topic for this Note.

As it turns out, it is not so simple. Abolishing ICE would not have stopped President Trump from implementing the "Zero Tolerance Policy." Abolishing ICE will not make the immigration system more transparent or accountable. Abolishing ICE will not abolish the laws that enable ICE's behavior. Abolishing ICE will not reset the separation of powers or create a national consensus as to what the policy goals and guiding principles of our immigration system should be. This is not to argue that if we cannot do it all, then we should just do nothing. I am merely urging caution. If Congress abolishes ICE without implementing any additional reforms, then any gains will be temporary until another agency picks up right where ICE left off.

For example, as of right now, CBP has the authority to enforce the same laws as ICE within one-hundred miles of all the borders, which includes oceans and international airports.[311] Sixty-six percent of the United States population lives in that geographic area.[312] That means that even if Congress did abolish ICE, President Trump or his successor could redeploy any number of the 19,555 CBP agents into that one-hundred mile wide "border" region where they would ostensibly still have access to tens of thousands of unauthorized immigrants.[313]

To truly make a more humane immigration system, Congress must eschew hashtag public policy, and instead negotiate comprehensive, nuanced, and pragmatic immigration reform. Dean Kevin Johnson writes, "One thing should be clear. Absent some hard work and deep thinking, we will not be able to achieve passage of anything like comprehensive immigration reform in the United States."[314] If Congress is unable or unwilling to work hard and think deeply about our immigration system's goals and guiding principles, then advocates and courts should step in and force them to do so.

---

[310] Cora Currier, *Nursing Mother Describes Forced Separation From Infant at the Border: "They Said It Wasn't Their Problem the Baby Wasn't Eating,"* THE INTERCEPT (Sep. 7, 2018), theintercept.com/2018/09/07/asylum-seekers-child-separation-border-patrol/.

[311] Hong, *supra* note 39, at 135 ("In 2004, under Bush, the zone expanded from the actual border to 100 air miles of any border, including the northern border, southern border, and the oceans. This means that 197 million people, which is 66% of the U.S. population, live in this geographic zone . . . .").

[312] *Id.*

[313] AM. IMMIGR. COUNCIL, THE COST OF IMMIGRATION ENFORCEMENT AND BORDER SECURITY 1–2 (2019), www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security.

[314] Johnson, *Ten Principles*, *supra* note 9, at 1639.

Advocates need not be discouraged that their clients may be facing an increasingly conservative federal judiciary.[315] The recent writings from the conservative members of the Supreme Court demonstrate that they also would like Congress to do more hard work and deep thinking.[316] Thus, while immigration advocates are zealously crafting arguments to vindicate the rights of their clients in federal court, they should also consider making the arguments that animate our more conservative justices: overturning *Chevron* deference and resurrecting the non-delegation doctrine. Indeed, in *Gundy v. United States*, the three dissenters—Chief Justice Roberts, and Justices Gorsuch and Thomas—proved so committed to those doctrinal principles that they were willing to apply them even if it meant finding in favor of individuals convicted of sex-related offenses.[317] Certainly unauthorized immigrants are more favorable than that category.

When facing an agency rule that is based on a debatable reading of an ambiguous immigration statute, advocates should argue that the Court should not give the agency's interpretation *Chevron* deference. In fact, the Court should never give rules based on immigration laws *Chevron* deference. Immigration laws and agencies are distinguishable from other agencies in the executive bureaucracy—and not necessarily in a good way.[318] If the Court determined that it was no longer obliged to give deference to agency interpretation of immigration laws, then it could apply whatever legal framework it wanted to evaluate the ambiguous statute.

This is where the non-delegation argument becomes operative. If the Court finds, for example, that a statutory provision of the INA is ambiguous—meaning it has no "guiding principle" or goal upon which an agency could reasonably craft a policy—then the Court would have two options: (1) scour the INA for a statement of legislative intent in order to infer a guiding principle into the ambiguous provision, or (2) refuse to divine legislative intent out of a "byzantine" law. In the latter case, the non-delegation doctrine outright, and rule that in writing an ambiguous provision, Congress did not convey a guiding principle, which is an over-delegation of legislative authority.

---

[315] *President Donald J. Trump Is Appointing a Historic Number of Federal Judges to Uphold Our Constitution as Written*, THE WHITE HOUSE (Nov. 6, 2019), www.whitehouse.gov/briefings-statements/president-donald-j-trump-appointing-historic-number-federal-judges-uphold-constitution-written/.

[316] *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2143–44 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.)

[317] *Gundy*, 139 S. Ct. at 2144.

[318] Johnson, *Ten Principles*, *supra* note 9, at 1622 ("Consistency and predictability in the law have long been important ingredients in any legal framework. Contrary to those characteristics, U.S. immigration laws deviate dramatically from other areas of American law. Such exceptionalism should be changed so that immigration law is brought into the mainstream of American jurisprudence.").

In this way, the anti-*Chevron* and non-delegation arguments dovetail into a single message from the courts to Congress: *We are taking our power back from the executive branch*. Eventually, ideally, the Court will strike down enough provisions of the INA to prompt Congress to undertake the hard work and deep thinking that required to truly reform our immigration system. Even if the new laws were not as sympathetic as immigrants would hope, they would still benefit from inherent protections afforded by careful maintenance of separation of powers.