

Immigration Law After *Chevron*'s Demise

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* Associate Dean for Faculty Research and Development and Professor of Law, Widener Law Commonwealth. Thank you to Kristin Hickman, Nancy Morawetz, Shoba Sivaprasad Wadhia, and Jonathan Weinberg for their insightful comments. My appreciation to the editors and staff of the Oregon Law Review for their helpful, careful, and thoughtful treatment of this Article. Thank you also to participants of the International Association of Regulation & Governance conference at University of Pennsylvania Carey Law School and of the *Crimmigration through Time, Space, and Culture* symposium at Lewis & Clark Law School. I am grateful for the support of Widener Law Commonwealth's summer research grant program.

ABSTRACT

The Supreme Court held in Loper Bright v. Raimondo that the Administrative Procedure Act does not require federal courts to defer to reasonable agency interpretations of ambiguous statutes, negating Chevron deference. This Article examines Loper Bright in the context of immigration law by focusing on the opportunities and challenges it presents to immigration law implementation. The opportunities for improvement stem from Loper Bright's promise of independent judicial interpretation of statutory language, including the appropriate inclusion of humanitarian concerns. The challenges are comprised of various ways that the judicial and legislative branches might attempt to blunt Loper Bright's potential positive effects on immigration law. The importance of this examination is magnified by the boundary-pushing changes to the interpretation of immigration law already underway during the second Trump administration.

Loper Bright's promise of independent judicial interpretation of statutes could better police the implementation of immigration law if courts take humanitarian concerns into account when exercising their independent judgment about the meaning of immigration statutes. Implementing immigration law invokes deep humanitarian concerns. Federal immigration agencies exercise law enforcement functions that deprive liberty in the most fundamental ways. The goal in removal cases is to force an individual out of the United States to another country, potentially separating the individual from close family. The government takes control over individuals, often unexpectedly, forcibly relocating them to isolated detention centers that are often indistinct from criminal facilities. Individuals have reported abuse while in agency custody. Additionally, immigration policies can put individuals at risk even if the government has not taken formal custody of the person. For example, requiring an individual to wait at the Mexican border for processing forces that person to wait in dangerous conditions. Narrowing asylum access pushes individuals into life-threatening conditions at home.

Loper Bright allows a court to examine the merits of the agency's legal conclusion, including how humanitarian concerns should affect statutory interpretation within the bounds of congressional intent. This is true even if a reviewing court applies the persuasiveness factors from the Supreme Court's 1944 opinion in Skidmore v. Swift & Co. Skidmore fits into the Loper Bright regime because Skidmore provides factors for a court to use to assess whether it is persuaded by the agency's interpretation. Skidmore tells us that the validity of the

agency's legal conclusion is something a court may consider when deciding whether the agency's interpretation is persuasive. An agency interpretation that ignores humanitarian concerns is not valid when contrary to congressional intent.

The potential positive effects of Loper Bright will be lost if Courts or Congress neuter Loper Bright in immigration cases. Courts should resist the temptation to exclude immigration law from Loper Bright. If anything, immigration law presents an area of administrative law where the arguments for nondeferential court oversight are strongest. The implementation of immigration law is brutal, and the implications for individual liberty are severe. Similarly, Congress should not pursue actions to divorce immigration law from Loper Bright, such as enacting additional restrictions on judicial review or a Chevron-like standard of review for immigration cases.

INTRODUCTION

Immigration law has not fared well under administrative law principles. In 1946, Congress created the Administrative Procedure Act (APA), which supplies rules and principles to govern federal administrative agencies.¹ In previous work, I have argued that the development of the APA was motivated by regulatory concerns that are fundamentally different from the concerns that underlie the regulation of migrants.² The sphere of influence of the APA has resulted in an immigration benefits system that is susceptible to distortion based on political will³ and a removal (deportation) system that is deeply troubled and fails to satisfy the goals of administrative process design.⁴

The Supreme Court's shift away from *Chevron* deference⁵ opens the door for administrative law to help immigration law. In *Loper Bright v. Raimondo*, the Supreme Court held that the APA requires courts to exercise independent judgment in determining the meaning of statutes.⁶ Thus, courts are no longer obligated to defer to reasonable federal

¹ Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) ("AN ACT [t]o improve the administration of justice by prescribing fair administrative procedure.").

² Jill E. Family, *Regulated Immigrants: An Administrative Law Failure*, 66 HOW. L.J. 1, 5–20 (2022).

³ Jill E. Family, *An Invisible Border Wall and the Dangers of Internal Agency Control*, 25 LEWIS & CLARK L. REV. 71, 105–10 (2021).

⁴ Family, *supra* note 2, at 24–30 (discussing the administrative process design goals of efficiency, accuracy, and acceptability); see also Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 632–44 (2009).

⁵ See generally *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁶ *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024).

agency interpretations of ambiguous statutes as they were under *Chevron*.⁷ This increase in the power of the courts to determine the meaning of statutes presents an opportunity for administrative law in immigration law. Judicial review of immigration statutes, unchained from agency interpretations, has the potential to provide or strengthen guardrails surrounding the administration of immigration law. The importance of this opportunity is amplified by the second Trump administration's efforts to remake immigration law.⁸

To take advantage of this opening, courts must acknowledge that *Loper Bright* applies to immigration agency statutory interpretation. Courts must also incorporate humanitarian concerns into statutory interpretation when consistent with statutory intent. Congressional intent in creating immigration law often includes humanitarian concerns, perhaps more often than one might think based solely on current narratives about immigration. Courts do not need to craft further reform; the Supreme Court's opinion in *Loper Bright* provides all the necessary tools. If courts follow *Loper Bright* and apply a complete understanding of the *Skidmore* factors that may guide a court's independent statutory interpretation,⁹ courts will be able to incorporate humanitarian concerns into the review of ambiguous immigration statutes.

Additionally, to allow the benefits of this opportunity, Congress should not respond to *Loper Bright* in ways that neuter its effect in immigration law. Congress should not further restrict judicial review in immigration cases. It also should not legislate a more deferential review standard for immigration cases.

Part I provides background by explaining the structure of immigration agency adjudication, the functions of the immigration system, and the humanitarian implications of the system. Part II sets out the Supreme Court's move from *Chevron* to *Loper Bright*. Part III explores the opportunities and challenges for immigration law presented by *Loper Bright*.

⁷ See generally *Chevron*, 467 U.S. 837.

⁸ See *infra* notes 73–75, 218–20 and accompanying text.

⁹ See generally *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

I
THE IMPLEMENTATION OF IMMIGRATION LAW RAISES
HUMANITARIAN CONCERNS

The implementation of immigration law always raises humanitarian concerns because it implicates liberty and the livelihood of human beings. These concerns did not originate with either Trump administration. The actions of the Trump administrations, however, have heightened these concerns.

A. The Immigration Agencies and Liberty

A network of administrative agencies, most with law enforcement missions,¹⁰ work together to implement immigration law.¹¹ Each of the agencies has a profound impact on individual liberty. The Department of Homeland Security houses U.S. Customs and Border Protection (CBP), as well as Immigration and Customs Enforcement (ICE).¹² These two agencies police the border (CBP)¹³ and effectuate removal from the interior (ICE).¹⁴ The Executive Office for Immigration Review, part of the Department of Justice, supervises the immigration courts and the Board of Immigration Appeals.¹⁵ Both the immigration courts and the Board adjudicate removal cases.¹⁶ United States Citizenship and Immigration Services (USCIS), also a part of the

¹⁰ Professor Emily Chertoff has argued that agencies that use physical violence require a different approach under administrative law. Emily R. Chertoff, *Violence in the Administrative State*, 112 CALIF. L. REV. 1941, 1941–42 (2024).

¹¹ All these agencies are engaged in a system where individual liberty is intertwined with questions of alienage, ethnicity, and race. Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 L. & CONTEMP. PROBS. 1, 17–18 (2009); Gabriel J. Chin, *A Nation of White Immigrants: State and Federal Racial Preferences for White Noncitizens*, 100 B.U. L. REV. 1271, 1279–89 (2020); Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1, 10–16 (2002); see also *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996, 1007–09 (D. Nev. 2021) (finding that 8 U.S.C. § 1326(a), which provides criminal penalties for illegal reentry into the United States, was enacted with a discriminatory purpose), *rev'd*, 68 F.4th 1133 (9th Cir. 2023).

¹² U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/> [<https://perma.cc/L48K-WE2Q>] (last visited Aug. 9, 2025); U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/> [<https://perma.cc/WZN8-XVLS>] (last visited Aug. 9, 2025).

¹³ U.S. CUSTOMS & BORDER PROT., *supra* note 12.

¹⁴ U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 12.

¹⁵ EXEC. OFF. FOR IMMIGR. REV., <https://www.justice.gov/eoir> [<https://perma.cc/4AEH-2Z5T>] (last visited Aug. 9, 2025).

¹⁶ Family, *supra* note 4, at 600–08.

Department of Homeland Security, adjudicates applications for legal immigration benefits.¹⁷

CBP describes itself as “one of the world’s largest law enforcement organizations.”¹⁸ CBP staffs the U.S. ports of entry and screens individuals who present themselves for admission to the United States.¹⁹ Additionally, it commands the border areas between the ports of entry, tracking and capturing individuals who attempt to enter the United States between the ports of entry.²⁰ The Border Patrol is made up of over 20,000 agents and has a budget of \$1.4 billion.²¹ CBP’s duties include control over children. Some children arrive unaccompanied, while others arrive with adults.²²

CBP has an immense amount of control over individual liberty, and it exercises that control not only by detaining migrants—the ultimate expression of restraint on physical liberty—but also by pushing migrants into dangerous situations.²³ As far as direct control, nonprofit organizations and journalists have documented allegations of cruelty and abuse by CBP officers.²⁴ A group of nonprofit organizations has

¹⁷ U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/> [https://perma.cc/7BDW-4KG2] (last visited Aug. 9, 2025).

¹⁸ *About CBP*, U.S. CUSTOMS & BORDER PROT. (June 27, 2025), <https://www.cbp.gov/about> [https://perma.cc/HR7J-ZERY].

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Executive Assistant Commissioners’ Offices*, U.S. CUSTOMS & BORDER PROT. (Sep. 29, 2025), <https://www.cbp.gov/about/leadership-organization/executive-assistant-commissioners-offices> [https://perma.cc/U3AU-TBLQ].

²² Amelia Cheatham & Diana Roy, *U.S. Detention of Child Migrants*, COUNCIL ON FOREIGN RELS. (Mar. 27, 2023, at 15:11 ET), <https://www.cfr.org/backgrounders/us-detention-child-migrants> [https://perma.cc/YPC6-2JVP].

²³ This is dangerous in addition to the violence migrants face on their journey to the U.S. border. Salil Shetty, *Most Dangerous Journey: What Central American Migrants Face when They Try to Cross the Border*, AMNESTY INT’L (Feb. 20, 2014), <https://www.amnestyusa.org/updates/most-dangerous-journey-what-central-american-migrants-face-when-they-try-to-cross-the-border/> [https://perma.cc/N6KX-TWEH].

²⁴ Adam Isacson, *Introduction: Abuses at the U.S.-Mexico Border: How to Address Failures and Protect Rights*, WOLA (Aug. 2, 2023), <https://www.wola.org/analysis/introduction-accountability-for-abuses-at-the-u-s-mexico-border-how-to-address-failures-and-protect-rights/> [https://perma.cc/8BT7-6RHR]; KATY MURDZA & WALTER EWING, AM. IMMIGR. COUNCIL, *THE LEGACY OF RACISM WITHIN THE U.S. BORDER PATROL* 13–19 (2021), https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/the_legacy_of_racism_within_the_u.s._border_patrol.pdf [https://perma.cc/UN3W-J4AF]; Noah Schramm, *Border Patrol’s Abusive Practice of Taking Migrants’ Property Needs to End*, ACLU (Feb. 13, 2024), <https://www.aclu.org/news/immigrants-rights/border-patrols-abusive-practice-of-taking-migrants-property-needs-to-end> [https://perma.cc/G4BT-Z8HX]; Greg Grandin, *The Border Patrol Has Been a Cult of Brutality Since 1924*, THE

created a clearinghouse of cases alleging CBP abuses.²⁵ The cases allege excessive use of force, unlawful confiscation of property, and racial profiling, among other abuses.²⁶ The Inter-American Commission on Human Rights concluded that CBP committed “acts of torture” in its treatment of a migrant in 2010.²⁷ Additionally, a complaint filed with the Department of Homeland Security’s Office for Civil Rights and Civil Liberties objected to CBP’s use of open-air detention camps along the border.²⁸ The complaint alleged a lack of adequate food, shelter, medical care, and restroom facilities.²⁹

In addition to the dangers of detention, migrants often face dangerous conditions in the border area. For example, efforts to restrict access to the U.S. border force migrants into perilous conditions in Mexico.³⁰ Human Rights Watch has concluded that “[o]utsourcing US immigration enforcement to Mexico has led to serious abuses and forced hundreds of thousands to wait in appalling conditions to seek protection.”³¹ Additionally, one United Nations organization documented 686 deaths and disappearances at the United States-

INTERCEPT (Jan. 12, 2019, at 09:00 ET), <https://theintercept.com/2019/01/12/border-patrol-history/> [<https://perma.cc/MZC6-TACV>].

²⁵ *Exposing and Challenging Abuses at the Border and Beyond*, HOLD CBP ACCOUNTABLE (last visited Aug. 9, 2025), <https://holdcbpaccountable.org/> [<https://perma.cc/3LQL-SNPR>].

²⁶ *Id.*

²⁷ *IACHR Publishes Merits Report on the Case of Anastasio Hernández Rojas (United States)*, IACHR (May 1, 2025), https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2025/085.asp&utm_content=country-usa [<https://perma.cc/N7FB-SP8L>].

²⁸ *CBP Violations of Custody Standards and Human Rights of Individuals Detained in Open-Air Detention Sites in the San Diego Sector Require Immediate Attention to Save Lives*, SBCC (Dec. 11, 2023), <https://cgrs.uclawsf.edu/legal-document/cbp-violations-custody-standards-and-human-rights-individuals-detained-open-air> [<https://perma.cc/FGD6-DUGW>].

²⁹ *Id.*; see also *RE: CBP Violations of Custody Standards and International Human Rights by Failing to Provide Water, Food, Shelter, Sanitation and Medical Assistance to Migrants Detained in Open-Air Corridor Between Border Wall Layers Near San Ysidro Port of Entry*, SBCC (May 13, 2023), https://assets.nationbuilder.com/alliancesandiego/pages/3468/attachments/original/1684125230/SBCC_Complaint_to_CRCL_5.13.23.pdf?1684125230 [<https://perma.cc/R5QP-G3WJ>].

³⁰ *Mexico: Asylum Seekers Face Abuses at Southern Border*, HUM. RTS. WATCH (June 6, 2022, at 00:00 ET), <https://www.hrw.org/news/2022/06/06/mexico-asylum-seekers-face-abuses-southern-border> [<https://perma.cc/BG6B-PUTC>].

³¹ *Id.*

Mexico border in 2022.³² This makes the border the “deadliest land route for migrants worldwide on record.”³³

ICE also describes itself as a law enforcement agency.³⁴ ICE implements immigration removal from the nation’s interior.³⁵ In Fiscal Year 2023, ICE made over 170,000 arrests and recorded over 273,000 detentions.³⁶ ICE oversees a network of over 190 detention facilities,³⁷ including facilities for families with children. While this is technically civil detention, the conditions of confinement often are indistinguishable from criminal detention.³⁸ Individuals are held in prison and prisonlike conditions despite the fact that, as of September 2025, 71.5% of immigration detainees have no criminal record.³⁹ In Fiscal Year 2023, ICE completed over 142,000 removals of individuals from the United States.⁴⁰

Similar to CBP, ICE is a federal agency that focuses on restraints on physical liberty. ICE captures individuals and transfers them to detention. Individuals are sometimes seized from the street, surrounded by masked and armed officers.⁴¹ There are serious concerns about

³² *US-Mexico Border World’s Deadliest Migration Land Route*, IOM (Sept. 12, 2023), <https://www.iom.int/news/us-mexico-border-worlds-deadliest-migration-land-route> [<https://perma.cc/KCD9-SSET>].

³³ *Id.*

³⁴ *Immigration Enforcement*, U.S. IMMIGR. & CUSTOMS ENF’T (Mar. 7, 2025), <https://www.ice.gov/mission> [<https://perma.cc/KFL8-XSAL>] (referring to a vision of ICE as the Department of Homeland Security’s “premier law enforcement agency”).

³⁵ *Id.*

³⁶ U.S. IMMIGR. & CUSTOMS ENF’T, FISCAL YEAR 2023: ICE ANNUAL REPORT 12, 19 (2023), <https://www.ice.gov/doclib/eoy/iceAnnualReportFY2023.pdf> [<https://perma.cc/MR4S-VVMZ>].

³⁷ *Id.*

³⁸ César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1370, 1383–88 (2014); Dora Schriro, *Improving Conditions of Confinement for Criminal Inmates and Immigrant Detainees*, 47 AM. CRIM. L. REV. 1441, 1442, 1444–45 (2010); AMERICAN BAR ASS’N, ABA CIVIL IMMIGRATION DETENTION STANDARDS 1 (2014), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/abaimmdetstds.pdf [<https://perma.cc/7JTY-Q9CE>].

³⁹ *Immigration Detention Quick Facts*, TRAC (Sept. 21, 2025), <https://tracreports.org/immigration/quickfacts/detention.html> [<https://perma.cc/4CJW-PXKS>].

⁴⁰ *ICE Releases Fiscal Year 2023 Annual Report*, U.S. IMMIGR. & CUSTOMS ENF’T (Dec. 29, 2023), <https://www.ice.gov/news/releases/ice-releases-fiscal-year-2023-annual-report> [<https://perma.cc/6ARK-C6LU>].

⁴¹ *Surveillance Video Shows Moment Tufts Student Is Arrested by Federal Agents*, CNN, <https://www.cnn.com/2025/03/26/us/video/tufts-student-detained-rumeyisa-ozturk-ice-digvid> [<https://perma.cc/3LNZ-XCWL>] (last visited Aug. 9, 2025); *Bodycam Video Shows Residents Trying to Stop ICE Agents from Arresting Woman*, CNN, <https://www.cnn.com/2025/05/17/us/video/worcester-massachusetts-police-bodycam-ice-arrest-woman-digvid> [<https://perma.cc/MUR3-GKX5>] (last visited Aug. 9, 2025).

abuse and neglect in ICE detention.⁴² Federal inspectors have documented instances of inadequate medical care, use of excessive force, and unsanitary conditions.⁴³ Individual detainees are forcibly separated from family during detention.⁴⁴ In addition to detaining individuals, ICE physically removes individuals from the country, including by operating flights to foreign countries.⁴⁵ The act of removal, no matter the transportation method, involves physical restraint, including handcuffs and shackles.⁴⁶

United States Citizenship and Immigration Services (USCIS) also is a part of the Department of Homeland Security, but its mission does not focus on direct physical control. USCIS adjudicates applications for legal immigration status.⁴⁷ In the process, USCIS exerts control over who receives lawful permission to live in the United States, either temporarily or long-term and either with or without permission to work. Despite the fact that USCIS itself does not seize and hold individuals, its work has a deep effect on individual liberty. USCIS must place individuals in removal proceedings in some circumstances.⁴⁸ Individuals face potential apprehension when appearing at a USCIS office for a benefits appointment.⁴⁹ Even if a USCIS decision does not result in a removal proceeding, its decisions determine whether close

⁴² Tom Dreisbach, *Government's Own Experts Found 'Barbaric' and 'Negligent' Conditions in ICE Detention*, NPR (Aug. 16, 2023, at 05:01 ET), <https://www.npr.org/2023/08/16/1190767610/ice-detention-immigration-government-inspectors-barbaric-negligent-conditions> [<https://perma.cc/P97H-8Q5Z>]; see generally Alina Das, *The Law and Lawlessness of U.S. Immigration Detention*, 138 HARV. L. REV 1186 (2025).

⁴³ Dreisbach, *supra* note 42.

⁴⁴ Jonah E. Bromwich, *U.S. Fights to Keep Mahmoud Khalil from Holding His Month-Old Child*, N.Y. TIMES (May 21, 2025), https://www.nytimes.com/2025/05/21/nyregion/mahmoud-khalil-detention-hearing-baby-meeting.html?smid=nytcore-ios-share&referring_source=articleShare&sgrp=c&pvid=E82DB86C-062B-45C2-A1DF-5DE7A4702B06 [<https://perma.cc/FRA6-A7WV>].

⁴⁵ *Removal*, U.S. IMMIGR. & CUSTOMS ENF'T (Mar. 6, 2025), <https://www.ice.gov/remove/removal> [<https://perma.cc/UA65-5FJU>].

⁴⁶ See, for example, REBECCA A. SHARPLESS, SHACKLED: 92 REFUGEES IMPRISONED ON ICE AIR 29 (2024), for a description of the experience of individuals in the process of removal, including being shackled for over 30 hours.

⁴⁷ *What We Do*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 27, 2020), <https://www.uscis.gov/about-us/mission-and-core-values/what-we-do> [<https://perma.cc/VB5H-DC9N>].

⁴⁸ *Policy Memorandum*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 28, 2025), https://www.uscis.gov/sites/default/files/document/policy-alerts/NTA_Policy_FINAL_2.28.25_FINAL.pdf [<https://perma.cc/KD3K-PS9K>].

⁴⁹ See, e.g., Sharon Otterman & Ana Ley, *Columbia Activist Arrested by ICE at His Appointment for Citizenship*, N.Y. TIMES (Apr. 14, 2025), <https://www.nytimes.com/2025/04/14/nyregion/columbia-student-palestinian-arrested-ice.html> [<https://perma.cc/SZK4-XPFQ>].

family will be able to live together and whether applicants who claim they need humanitarian protection will receive that protection. Additionally, USCIS operates a Fraud Detection and National Security directorate whose mission is “to combat fraud, detect national security and public safety threats, and maximize law enforcement and Intelligence Community partnerships.”⁵⁰

The Executive Office for Immigration Review (EOIR), a part of the Department of Justice, includes the immigration courts and the Board of Immigration Appeals.⁵¹ Immigration judges and board members are employees of the Department of Justice.⁵² Immigration judges preside over immigration court hearings, which are trial-level administrative agency adjudications.⁵³ The Board of Immigration Appeals is an appellate administrative agency adjudicative body.⁵⁴ In immigration court, an ICE attorney represents the government and pursues the government’s charge of removal.⁵⁵ The immigration judge also is an executive branch employee, but there is some separation of functions because the immigration judge works for a different federal agency. Both the Department of Homeland Security and the Department of Justice, however, are law enforcement agencies, and the president controls both. While EOIR does not arrest or detain, it plays a crucial role in deciding who will continue to be detained and who will be removed. It therefore dramatically affects liberty.

The failures of the immigration system orchestrated by these agencies are numerous. The documented and alleged agency abuses are extremely concerning. The risks imposed on migrant safety by these agencies are very dangerous. These agencies have overwhelming power, including the ability to transfer individuals to prisons in foreign countries, such as El Salvador.⁵⁶ Each immigration agency dramatically affects liberty interests.

⁵⁰ *Fraud Detection and National Security Directorate*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 28, 2025), <https://www.uscis.gov/about-us/organization/directorates-and-program-offices/fraud-detection-and-national-security-directorate> [https://perma.cc/E4C5-NM5G] (click on dropdown box labeled “Mission”).

⁵¹ *About the Office*, EXEC. OFF. FOR IMMIGR. REV. (May 29, 2025), <https://www.justice.gov/eoir/about-office> [https://perma.cc/6DYA-HEPJ].

⁵² Family, *supra* note 4, at 599.

⁵³ EXEC. OFF. FOR IMMIGR. REV., *supra* note 51.

⁵⁴ *Id.*

⁵⁵ *Office of the Principal Legal Advisor*, U.S. IMMIGR. & CUSTOMS ENF’T (Mar. 3, 2025), <https://www.ice.gov/about-ice/opla> [https://perma.cc/3REG-ATU7].

⁵⁶ Zolan Kanno-Youngs et al., *Behind Trump’s Deal to Deport Venezuelans to El Salvador’s Most Feared Prison*, N.Y. TIMES (May 1, 2025), <https://www.nytimes.com/2025>

B. The Dysfunctional Immigration System

In addition to profound effects on individual liberty, the implementation of immigration law suffers because the system does not function well. From an administrative process design perspective, the system is not meeting the goals of efficiency, accuracy, and acceptability.⁵⁷

Removal adjudication is pathologically inefficient. The backlog in immigration court is about 3.5 million cases as of August 2025.⁵⁸ This backlog has increased three times in size since 2019.⁵⁹ In 2023, 682 immigration judges each shouldered a caseload of 4,500 pending cases.⁶⁰

Accuracy problems stem from a lack of attorney representation, the variability in decision-making from immigration judge to immigration judge, and the system's reliance on detention. In 2023, only thirty percent of immigrants in immigration court were able to find representation.⁶¹ The lack of representation negatively affects fairness since individuals with representation have better outcomes.⁶² It also affects efficiency since represented cases move faster.⁶³ The result in any given case also may depend on the assignment of the immigration judge. Scholars have documented wide disparities in asylum grant rates from immigration judge to immigration judge, for example.⁶⁴

/04/30/us/politics/trump-deportations-venezuela-el-salvador.html [https://perma.cc/5BDL-T692].

⁵⁷ Family, *supra* note 4, at 632–44.

⁵⁸ *Immigration Court Quick Facts*, TRAC (June Aug. 2025), https://tracreports.org/immigration/quickfacts/eoir.html#eoir_backlog [https://perma.cc/8ECU-6JK5].

⁵⁹ *Immigration Court Backlog*, TRAC (Aug. 2025), <https://tracreports.org/phptools/immigration/backlog/> [https://perma.cc/7GVT-AW6P]. The backlog at the Board of Immigration Appeals is also unwieldy at 113,000 pending administrative appeals. Britain Eakin, *New Judges Inadequate Fix for Immigration Board Backlog*, LAW360 (Apr. 5, 2024, at 21:44 ET), <https://www.law360.com/articles/1822311/new-judges-inadequate-fix-for-immigration-board-backlog> [https://perma.cc/KD8F-2U5U].

⁶⁰ *Immigration Court Backlog Tops 3 Million; Each Judge Assigned 4,500 Cases*, TRAC (Dec. 18, 2023), <https://tracreports.org/reports/734/> [https://perma.cc/H5WC-5MRE].

⁶¹ *Too Few Immigration Attorneys: Average Representation Rates Fall from 65% to 30%*, TRAC (Jan. 24, 2024), <https://tracreports.org/reports/736/> [https://perma.cc/5KGU-9K58].

⁶² Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 57 (2015).

⁶³ *Id.* at 9–10, 32.

⁶⁴ Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 376 (2007); see also Rikha Sharma Rani, *Trapped at the Border? Hope for a Female Judge*, POLITICO (June 15, 2018), <https://www.politico.com/magazine/story/2018/06/15/immigration-court-judge-women-218824/> [https://perma.cc/E76A-D5E4].

Additionally, success may depend on whether an individual is detained pending a hearing.⁶⁵ Detention can make it harder for an individual to find legal representation or to otherwise prepare for a hearing.

Immigration courts also face serious concerns about the acceptability of their decision-making. The structure of immigration courts fails to provide adequate decisional independence for adjudicators.⁶⁶ Congress has provided for some separation of functions by placing removal adjudicators (immigration judges) within the Department of Justice and by placing removal enforcement (ICE attorneys) within the Department of Homeland Security. Immigration judges, however, are not administrative law judges.⁶⁷ They are attorney-employees of the Department of Justice and lack the job protections of administrative law judges.⁶⁸ The conditions of immigration judge employment are controlled by the Department of Justice.⁶⁹ Immigration judges are sensitive to political considerations⁷⁰ and subject to the political policy preferences of the presidential administration. For example, the first Trump administration asserted its influence over immigration judges by instituting case completion goals, eliminating tools that allowed immigration judges to independently manage their dockets, and removing an immigration judge from a case when the administration was displeased by the immigration judge's approach to the case.⁷¹

The second Trump administration continues to flex its influence over immigration adjudicators. It has expressed its distaste of due process for immigrants.⁷² It has taken actions to weaken the administrative adjudication system by reducing the size of the Board of

⁶⁵ Aditi Shah, *Without Access to Counsel, Detained Immigrants Face Increased Risks of Prolonged Detention and Unlawful Deportation*, ACLU (June 22, 2022), <https://www.aclu.org/news/immigrants-rights/without-access-to-counsel-detained-immigrants-face-increased-risks-of-prolonged-detention-and-unlawful-deportation> [https://perma.cc/Q9TV-MM59].

⁶⁶ Family, *supra* note 2, at 26–27.

⁶⁷ *Id.* at 24.

⁶⁸ *Id.*

⁶⁹ *Id.* at 26–27.

⁷⁰ Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control over Immigration Adjudication*, 108 GEO. L.J. 579, 587–88 (2020).

⁷¹ Family, *supra* note 2, at 27.

⁷² Ximena Bustillo, *Trump Wants to Bypass Immigration Courts. Experts Warn It's a 'Slippery Slope.'* NPR (Apr. 29, 2025, at 05:15 ET), <https://www.npr.org/2025/04/29/g-s1-63187/trump-courts-immigration-judges-due-process> [https://perma.cc/DH9X-HKG4].

Immigration Appeals⁷³ and firing immigration judges.⁷⁴ Even if immigration judges ignore the signals from the White House and act independently, their decisions are always subject to attorney general review.⁷⁵ The attorney general may certify any case to herself for adjudication.⁷⁶

The benefits adjudication system is similarly troubled by backlogs and concerns about the quality of adjudication.⁷⁷ An example of a benefits adjudication failure is the first Trump administration's efforts to build an "invisible border wall" through its control over USCIS.⁷⁸ The Trump administration built what it labeled "workarounds" to the Immigration and Nationality Act that used agency bureaucracy to tighten the availability of legal immigration opportunities.⁷⁹ These bureaucratic maneuvers included increased denial rates, processing delays, de facto changes to the burden of proof, increased procedural burdens, and use of agency guidance documents to narrow the availability of immigration benefits.⁸⁰

Congress has limited the federal courts' review of this troubled system. Congress has preserved judicial review over questions of law in removal cases, but it has eliminated judicial review over questions of fact and discretionary determinations in some removal cases.⁸¹ Additionally, Congress has imposed timing restrictions,⁸² a consolidation requirement,⁸³ a restriction on injunctive relief,⁸⁴ and a restriction on challenges to prosecutorial discretion.⁸⁵

⁷³ Reducing the Size of the Board of Immigration Appeals, 90 Fed. Reg. 15525, 15526 (Apr. 14, 2025) (to be codified at 8 C.F.R. pt. 1003), <https://www.govinfo.gov/content/pkg/FR-2025-04-14/pdf/2025-06294.pdf> [<https://perma.cc/7FR2-NKAQ>].

⁷⁴ Ximena Bustillo, *Trump Fires More Immigration Judges Even as He Aims to Increase Deportations*, NPR (Apr. 22, 2025, at 14:15 ET), <https://www.npr.org/2025/04/22/nx-s1-5372681/trump-immigration-judges-fired> [<https://perma.cc/A425-HCCX>].

⁷⁵ 8 U.S.C. § 1103(g)(2); 8 C.F.R. § 1003.1(h)(1) (2025).

⁷⁶ 8 U.S.C. § 1103(g)(2); 8 C.F.R. § 1003.1(h)(1) (2025).

⁷⁷ *Two Years Later: The Status of AILA's Recommendations to Reduce Barriers to USCIS Benefits and Services*, AILA (May 9, 2023), <https://www.aila.org/library/two-years-later-the-status-of-aila-recommendations> [<https://perma.cc/W6N5-86RD>].

⁷⁸ Family, *supra* note 3, at 81.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ 8 U.S.C. § 1252(a)(2).

⁸² *Id.* § 1252(b)(1).

⁸³ *Id.* § 1252(b)(9).

⁸⁴ *Id.* § 1252(f)(1).

⁸⁵ *Id.* § 1252(g).

In addition to these restrictions, cases are diverted from judicial review. These diversions short-circuit immigration court proceedings and any judicial review that would follow.⁸⁶ Most removal charges are, in fact, not heard in immigration court.⁸⁷ The majority are presided over by front-line agency officials who work for the Department of Homeland Security.⁸⁸ The separation of functions that exists in immigration court is absent. The adjudication takes place within the Department of Homeland Security through much more informal interactions with individual agency employees.⁸⁹

One type of diversion is expedited removal. Expedited removal eliminates a hearing before an immigration judge and allows the executive branch to conduct removals with only limited administrative review within the Department of Homeland Security.⁹⁰ A Department of Homeland Security officer may place a foreign national in expedited removal if the officer believes the individual lacks proper documentation or has made a misrepresentation.⁹¹ Additionally, the individual must have been in the United States for less than two years.⁹² These individuals are not allowed “further hearing or review” unless the foreign national indicates an intention to apply for asylum.⁹³ If an individual does indicate an intention to apply for asylum, Congress has provided for a “credible fear” interview with the potential of placing the individual into the immigration court system and out of expedited removal.⁹⁴

If an individual is removed under expedited removal, there is no hearing before an immigration judge and thus, no possibility of judicial review of an immigration judge’s decision. Those who wish to

⁸⁶ Family, *supra* note 4, at 611–32; *see also* Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475, 497–99 (2013); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 6–7 (2014); Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 193–94 (2017); Jennifer Lee Koh, *When Shadow Removals Collide: Searching for Solutions to the Legal Black Holes Created by Expedited Removal and Reinstatement*, 96 WASH. U. L. REV. 337, 360–61 (2018); Jennifer Lee Koh, *Barricading the Immigration Courts*, 69 DUKE L.J. ONLINE 48, 49–50 (2020).

⁸⁷ Family, *supra* note 4, at 611–32.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ 8 U.S.C. § 1225(b).

⁹¹ *Id.* § 1225(b)(1)(A)(i).

⁹² *Id.* § 1225(b)(1)(A)(iii)(II).

⁹³ *Id.* § 1225(b)(1)(A)(i).

⁹⁴ *Id.* § 1225(b)(1)(A)(ii).

challenge the agency's application of the expedited removal provisions in a particular case will be disappointed. Congress has narrowed judicial review to questions of whether the individual is a U.S. citizen, a lawful permanent resident, or already has been granted asylum.⁹⁵ For any individual subject to expedited removal who is not a U.S. citizen, a permanent resident, or an already adjudicated refugee, judicial review effectively is absent.

The immigration agencies possess profound power over individual liberty. The system implemented by these agencies is dysfunctional. This troubled scheme has moved from the regime of *Chevron* to *Loper Bright*. The next Part explains the Supreme Court's move from *Chevron* to *Loper Bright*.

II

THE MOVE FROM *CHEVRON* TO *LOPER BRIGHT*

The APA does not include explicit direction whether courts should review an agency's legal conclusions de novo or with deference. The APA directs a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law . . . contrary to constitutional right . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . ."⁹⁶ *Chevron* filled this void with a complex regime of sometimes mandatory deference to agency interpretation. In *Loper Bright*, the Supreme Court rejected *Chevron*'s approach and determined that the APA requires a court's independent determination of the meaning of statutes.⁹⁷ In the process, the Court renewed focus on the Supreme Court's decision in *Skidmore*.⁹⁸

A. Court Deference to Agency Legal Conclusions: A Short History

Skidmore has had three lives. The first life began in 1944, when the Supreme Court decided *Skidmore*. *Skidmore*'s first life predates *Chevron* deference and belongs to an era when courts were not obligated to defer to agency legal conclusions.⁹⁹ After *Chevron*, in 1984, *Skidmore*'s second life began as a fallback analysis when

⁹⁵ 8 U.S.C. § 1252(e)(2).

⁹⁶ 5 U.S.C. § 706(2).

⁹⁷ *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394 (2024).

⁹⁸ See generally *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

⁹⁹ Adam Crews, *Navigating the New Loper Bright Regime*, 34 WIDENER COMMONWEALTH L. REV. 43, 44–45 (2024).

Chevron deference did not apply.¹⁰⁰ In 2024, *Skidmore* entered its third life as an important part of *Loper Bright*.¹⁰¹ *Skidmore*'s first and second lives help clarify *Skidmore*'s third life.

At *Skidmore*'s origin, the Supreme Court explained a court's task in evaluating agency legal conclusions as follows:

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.*¹⁰²

According to this description, a reviewing court should be focused on thoroughness, validity, consistency, and other unnamed persuasive factors. During *Skidmore*'s first life it "was a leading expression of the [Supreme] Court's policy toward judicial review"¹⁰³

Professor Ron Levin examined, during *Skidmore*'s first life, the role of *Skidmore* in Supreme Court review of agency legal conclusions.¹⁰⁴ Professor Levin characterized the influence of an agency's preferred legal conclusion in a pre-*Chevron* world as one input among many.¹⁰⁵ He concluded that the Court was more deferential to agency fact-finding than legal conclusions and that the Court viewed itself as the final arbiter of the meaning of statutes.¹⁰⁶ As far as when the Court might have been persuaded by an agency's legal conclusion during *Skidmore*'s first life, Professor Levin identified a preference for longstanding administrative interpretations, as well as for consistently followed agency interpretations.¹⁰⁷ Expertise also was a positive factor, as was whether the agency helped to draft the statute.¹⁰⁸

¹⁰⁰ See, e.g., *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000); *U.S. v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

¹⁰¹ *Loper Bright*, 603 U.S. at 387–89, 393–94, 401–03, 431–33.

¹⁰² *Skidmore*, 323 U.S. at 140 (emphasis added).

¹⁰³ Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1239 (2007).

¹⁰⁴ Ronald M. Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239, 267–70 (1986).

¹⁰⁵ *Id.* at 268.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 269–70.

¹⁰⁸ *Id.*

Skidmore's second life began in 1984, when the Supreme Court decided *Chevron*. In *Chevron*, the Court explained that federal courts should defer to reasonable agency interpretations of ambiguous statutes.¹⁰⁹ Over time, however, the Supreme Court determined that not every agency interpretation of an ambiguous statute was worthy of *Chevron* deference and that the *Skidmore* factors should apply instead. The significance of this complex scheme is less important after *Loper Bright*, but courts' implementation of *Skidmore* principles during *Chevron's* reign is still relevant because *Skidmore* is poised for new attention after *Loper Bright*.¹¹⁰

Chevron deference applied only to agency interpretations that had the force of law.¹¹¹ Agency statutory interpretations that resulted from formal adjudication or notice and comment rulemaking were likely to meet the force of law requirement.¹¹² Agency legal conclusions reached through more informal agency procedures, such as opinion letters or dispersed rulings, likely did not satisfy the force of law requirement and thus would be subject to the *Skidmore* persuasiveness factors instead.¹¹³

The Supreme Court added a twist to the *Chevron* analysis in 2022 by explaining that certain questions of law are “major” and therefore a court did not need to show *Chevron* deference to the agency's interpretation, even if the interpretation carried the force of law.¹¹⁴ If the subject of the statutory interpretation was a “major question,” then the courts were to look for a clear statement from Congress that it intended for the agency to have the power it gave to itself via the statutory interpretation.¹¹⁵

In *West Virginia v. Environmental Protection Agency*, the Supreme Court applied the major questions doctrine and held that whether the

¹⁰⁹ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

¹¹⁰ See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 388, 393, 402, 431–32 (1944).

¹¹¹ *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000); *U.S. v. Mead Corp.*, 533 U.S. 218, 226–227 (2001).

¹¹² *Christensen*, 529 U.S. at 587; *Mead Corp.*, 533 U.S. at 226–27.

¹¹³ *Christensen*, 529 U.S. at 587; *Mead Corp.*, 533 U.S. at 226–27; *Barnhart v. Walton*, 535 U.S. 212, 221–22 (2002).

¹¹⁴ *West Virginia v. Env't Prot. Agency*, 597 U.S. 697, 732 (2022).

¹¹⁵ *Id.* The future of the major questions doctrine after *Loper Bright* is up for debate. See BENJAMIN M. BARCZEWSKI, CONG. RSCH. SERV., *LOPER BRIGHT ENTERPRISES V. RAIMONDO AND THE FUTURE OF AGENCY INTERPRETATIONS OF LAW* 30–33 (2024); Kristin E. Hickman & Amy J. Wildermuth, *Harmonizing Delegation and Deference After Loper Bright*, 100 N.Y.U. L. REV. (forthcoming 2025) (manuscript at 37–38) (on file with the Oregon Law Review). The potential challenge of the major questions doctrine to independent judicial interpretation of immigration statutes is addressed *infra* Part II.

Clean Air Act allowed the Environmental Protection Agency (EPA) to require coal-powered power plants to either reduce their own production or to subsidize production with cleaner energy sources was a “major question.”¹¹⁶ According to the Court, “cases in which the ‘history and the breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.”¹¹⁷ Once the EPA’s interpretation received this “major question” label, the Court insisted on a clear statement from Congress that it intended its statute to be interpreted as the agency had interpreted it.¹¹⁸ Even though the statutory language was ambiguous, the Supreme Court held that agency interpretations of major questions do not bind courts and instead applied an opposite presumption of heightened proof of congressional intent.¹¹⁹

Under the *Chevron* regime, the *Skidmore* principles provided an alternative lens for court review if the agency’s legal conclusion did not carry the force of law (if the issue was a “major question,” then the clear statement requirement applied). When *Chevron* deference was not applicable because the agency action did not have the force of law, courts did not ignore the agency’s interpretation of an ambiguous statute, but rather asked whether the court was persuaded by it.¹²⁰ Under *Skidmore*, a court might not be persuaded by the agency’s legal conclusion and may adopt a different reasonable interpretation of the statute.

During the *Chevron* regime, or *Skidmore*’s second life, scholars paid more attention to when *Skidmore* (versus *Chevron*) should apply than to what courts should do when applying the *Skidmore* principles.¹²¹ There was some scholarly debate about whether the *Skidmore* standard represented merely independent judgment by another name, or whether it signified some level of actual deference to the agency.¹²²

In 2007, Professor Kristin E. Hickman and Matthew D. Krueger conducted an empirical study that identified patterns in the way the

¹¹⁶ *Env’t Prot. Agency*, 597 U.S. at 724–25.

¹¹⁷ *Id.* at 721 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

¹¹⁸ *See id.* at 724–35.

¹¹⁹ *Id.*

¹²⁰ *See, e.g.*, *U.S. v. Mead Corp.*, 533 U.S. 218, 234–35 (2001).

¹²¹ Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1110 (2001) (“[H]istorically courts and scholars have paid scant attention to what *Skidmore* deference means.”).

¹²² Hickman & Krueger, *supra* note 103, at 1251–59.

federal appellate courts used the *Skidmore* factors during *Skidmore*'s second life.¹²³ Hickman and Krueger identified key factors for the *Skidmore* analysis: "thoroughness, formality, validity, consistency, and agency expertise."¹²⁴ Hickman and Krueger observed that a "sliding-scale model" dominated *Skidmore*'s second life.¹²⁵ Under a sliding-scale approach, "the degree of deference var[ies] according to the reviewing court's evaluation" of the *Skidmore* factors.¹²⁶ Under this approach, "*Skidmore* prescribes a method by which a reviewing court should determine how much deference to give an agency's interpretation but does not mandate the outcome"¹²⁷ Hickman and Krueger observed *Skidmore* in practice to represent a "highly deferential" mood toward agency interpretations.¹²⁸ Of the cases in their study, courts accepted the agency's interpretation under *Skidmore* 60.4% of the time.¹²⁹

Hickman and Krueger also examined cases that specifically engaged with the validity *Skidmore* factor.¹³⁰ This *Skidmore* factor is unique, according to Hickman and Krueger, because it focuses less on context (thoroughness, formality, consistency, and agency expertise are focused more on *how* the agency arrived at the legal conclusion) and more on the merits of the agency conclusion.¹³¹ Of the cases in Hickman and Krueger's study, courts engaged with the validity factor more than any other *Skidmore* factor.¹³² The validity factor does not exist in a vacuum, however. The other factors may influence the court's

¹²³ *See id.*

¹²⁴ *Id.* at 1259. There may be a sixth factor of "longevity and contemporaneity." *Id.*

¹²⁵ *Id.* at 1259, 1271.

¹²⁶ *Id.* at 1255.

¹²⁷ *Id.* at 1255–56. Hickman and Krueger concluded that courts "lack a coherent conception of how *Skidmore*'s sliding scale should function." *Id.* at 1291.

¹²⁸ *Id.* at 1271. The mood was less deferential than *Chevron* but "nevertheless highly deferential" *Id.*

¹²⁹ *Id.* at 1275. Other studies have found varying agency win rates during *Skidmore*'s second life. Professors Eskridge and Baer found a 73.5% agency win rate under *Skidmore*. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1099 tbl.1 (2008). Professors Barnett and Walker found a 56% agency win rate under *Skidmore*. Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 30 (2017).

¹³⁰ Hickman & Krueger, *supra* note 103, at 1285.

¹³¹ *Id.*

¹³² *Id.*

view of the validity of the agency's approach.¹³³ Also, the validity factor exists in a larger regime bounded by congressional intent.

The Supreme Court rejected *Chevron* deference when it decided *Loper Bright* in 2024.¹³⁴ *Loper Bright* involved the regulation of fishing vessels.¹³⁵ The Court held that, under the APA, federal courts are not obligated to defer to reasonable agency interpretations of ambiguous statutes.¹³⁶ The Court held that *Chevron* should be overruled because the APA “codifies for agency cases the unremarkable, yet elemental proposition . . . that courts decide legal questions by applying their own judgment.”¹³⁷ The Court noted the absence of any instruction in the statute to defer and the long history of courts deciding questions of law.¹³⁸ The Court labeled *Chevron* as “marked departure from the traditional approach” and rejected its command to defer.¹³⁹

The Court recognized, however, that courts may be persuaded by agency legal conclusions.¹⁴⁰ While no longer tied to those agency legal conclusions, the Supreme Court explained that even in the founding era, “exercising independent judgment often included according due respect to Executive Branch interpretations of federal statutes.”¹⁴¹ This respect was due especially when “an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time.”¹⁴² Additionally, the Court explained that there is a long history of courts giving executive branch interpretations “the most respectful consideration” due to the expertise of executive branch officials.¹⁴³

Now, after *Loper Bright*, courts must always exercise independent judgment in interpreting statutes and cannot be bound by the executive branch's interpretation of the law. But the court's interpretation may take into consideration the executive branch's approach. *Loper Bright*

¹³³ *Id.*; see also Barnett & Walker, *supra* note 129, at 66, 68 (explaining a court preference for long standing agency interpretations and a more limited court reliance on agency expertise as a persuasiveness factor during *Skidmore*'s second life).

¹³⁴ See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

¹³⁵ *Id.* at 380.

¹³⁶ *Id.* at 393–94.

¹³⁷ *Id.* at 391–92.

¹³⁸ *Id.* at 392–93.

¹³⁹ *Id.* at 396.

¹⁴⁰ *Id.* at 388, 394, 402, 431–32.

¹⁴¹ *Id.* at 385.

¹⁴² *Id.* at 386.

¹⁴³ *Id.* (quoting *United States v. Moore*, 95 U.S. 760, 763 (1878)).

invokes *Skidmore* to illustrate how courts may be persuaded by agency legal conclusions in a *Loper Bright* world.¹⁴⁴ Courts interpreting statutes “may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes.”¹⁴⁵

The Court in *Loper Bright* recognized that a court’s independent reading of the statute may be that Congress intended for an agency to have discretionary authority to decide the meaning of a statutory term.¹⁴⁶ If that is the case, the reviewing court should determine the boundaries of the discretion delegated, and then should determine if the agency has acted reasonably in fulfilling its delegated function.¹⁴⁷ This requires a different approach than asking whether the court is persuaded by the agency’s interpretation. Instead, the court is policing the boundaries of a delegation. That policing, however, involves statutory interpretation to decide the scope of the delegation. The court may be persuaded by the agency’s interpretation of the scope of the delegation.

The move to *Loper Bright* dismantled the *Chevron* analysis but left the *Skidmore* persuasiveness factors as a tool for courts to use when engaging in statutory interpretation. The discussions of *Skidmore* during its first two lives are helpful, but should be analyzed through the lens of *Loper Bright*’s demand for independent judicial action. The next section looks at examples of *Skidmore* in action in immigration cases during its second life.

B. *Skidmore and Immigration Statutes During Chevron’s Reign*

Federal courts applied *Skidmore* in immigration cases throughout *Chevron*’s reign. For example, courts applied the *Skidmore* factors to unpublished decisions of the Board of Immigration Appeals. These unpublished decisions did not meet the force of law requirement that triggered *Chevron* deference.¹⁴⁸ In *Arobelidze v. Holder*, the Seventh Circuit provided an example of application of the *Skidmore* factors in

¹⁴⁴ *Id.* at 388, 394, 402, 431.

¹⁴⁵ *Id.* at 394.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 395. Professors Hickman and Wildermuth have proposed a framework for categorizing statutory delegations after *Loper Bright*. Hickman & Wildermuth, *supra* note 115 (manuscript at 37–40).

¹⁴⁸ See, e.g., *Arobelidze v. Holder*, 653 F.3d 513, 519 (7th Cir. 2011); *Rotimi v. Gonzales*, 473 F.3d 55, 57–58 (2d Cir. 2007); *Carpio v. Holder*, 592 F.3d 1091, 1097 (10th Cir. 2010); *Quinchia v. U.S. Att’y Gen.*, 552 F.3d 1255, 1258 (11th Cir. 2008).

this context.¹⁴⁹ In *Arobelidze*, the court was not persuaded by the agency's statutory interpretation due to the agency's lack of thoroughness.¹⁵⁰ The agency spent only one paragraph of its decision dedicated to the legal issue, failed to explain how its interpretation of one part of the statute harmonized with other parts of the statute, failed to address the legislative history, and failed to explain how its interpretation fit with previous agency interpretations.¹⁵¹ The agency's interpretation did not persuade under *Skidmore* due to poor reasoning and explanation.

In *Carpio v. Holder*, the Tenth Circuit also applied the *Skidmore* factors to an unpublished decision of the Board of Immigration Appeals, but focused on the validity *Skidmore* factor.¹⁵² The court expressly considered fairness in analyzing the validity of the agency's interpretation of the statute.¹⁵³ In *Carpio*, the government placed an individual in removal proceedings because it denied the person's application for lawful permanent residence (a green card).¹⁵⁴ Under the relevant statute, Congress gave children under the age of twenty-one the ability to obtain a green card along with their parent who had married a U.S. citizen.¹⁵⁵ In *Carpio*, the child began the application process before his twenty-first birthday.¹⁵⁶ The agency, however, took years to complete the adjudication process.¹⁵⁷ The agency denied his application because by the time the agency adjudicated his application he was no longer under the age of twenty-one.¹⁵⁸ The Tenth Circuit rejected the agency's interpretation of the statute and held that because the child was under the age of twenty-one at the time he began the process, he qualified for a green card.¹⁵⁹ The correct marker of time, according to the court, was the date of the application rather than the date of adjudication.

In reaching its conclusion in *Carpio*, the court not only examined the texts of the statute and related statutes, but also asked whether the

¹⁴⁹ *Arobelidze*, 653 F.3d at 520–22.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 520–21.

¹⁵² *Carpio*, 592 F.3d at 1102.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1095.

¹⁵⁵ *Id.* at 1093–94.

¹⁵⁶ *Id.* at 1095.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1102–03.

agency's interpretation was fair.¹⁶⁰ The Tenth Circuit rejected the agency's interpretation of the statute because the court disagreed with the agency's textual analysis and the agency's interpretation "violate[d] basic principles of common sense and fairness."¹⁶¹ The court's judgment on fairness was not based on amorphous concepts, but rather incorporated "the policies underlying our immigration laws" and a failure to find evidence "in the statutory language that Congress authorized such an unfair practice."¹⁶² The court explained that if it were to adopt the agency's interpretation, then an applicant's eligibility would be left to the whims of the agency's adjudication timetable.¹⁶³ An applicant would have no way of knowing whether they were the right age until the agency adjudicated the application, which, as the case illustrates, can take years.¹⁶⁴

Courts applied *Skidmore* outside the removal context during *Skidmore's* second life as well. In *Fogo de Chao (Holdings) Inc. v. United States Department of Homeland Security*, the United States Court of Appeals for the D.C. Circuit held that a nonprecedential ruling of USCIS' Administrative Appeals Office¹⁶⁵ was not entitled to *Chevron* deference.¹⁶⁶ *Fogo de Chao* challenged USCIS' decision to refuse to grant a lawful immigration status to an employee who *Fogo de Chao* believed possessed "specialized knowledge," and therefore qualified for a type of status in the United States with permission to work at *Fogo de Chao*.¹⁶⁷ In reviewing the agency's interpretation of the statutory term "specialized knowledge," the D.C. Circuit applied the *Skidmore* factors to reject the agency's interpretation.¹⁶⁸ The court found the agency's interpretation to be unpersuasive because it "failed to ground" its interpretation in statutory text or purpose.¹⁶⁹ The court engaged in an independent analysis of the relevant statutory provisions and concluded that the agency's interpretation was inadequate.¹⁷⁰ The

¹⁶⁰ *Id.* at 1102.

¹⁶¹ *Id.*

¹⁶² *Id.* at 1093, 1102.

¹⁶³ *Id.* at 1102.

¹⁶⁴ *Id.*

¹⁶⁵ *The Administrative Appeals Office (AAO)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 5, 2021), <https://www.uscis.gov/about-us/organization/directorates-and-program-offices/the-administrative-appeals-office-ao> [<https://perma.cc/Q8MY-DQRC>].

¹⁶⁶ 769 F.3d 1127, 1136 (2014).

¹⁶⁷ *Id.* at 1129–35.

¹⁶⁸ *Id.* at 1137, 1141.

¹⁶⁹ *Id.* at 1141.

¹⁷⁰ *Id.*

agency had determined that the statutory term “specialized knowledge” excluded “culturally acquired knowledge” because Congress had created other legal immigration categories focused on cultural contributions.¹⁷¹ The court, however, concluded that “nothing in the text of those [other] statutory provisions suggests that Congress meant to isolate cultural considerations to those [other provisions]”¹⁷²

Similarly, in *Kaufman v. Nielsen*, the D.C. Circuit acknowledged the *Skidmore* factors while engaged in an independent analysis, using various tools of statutory construction, to determine that the agency’s interpretation was “impermissible.”¹⁷³ In *Kaufman*, a U.S. citizen attempted to fulfill the statutory conditions to relinquish his citizenship.¹⁷⁴ Congress included an intent requirement but did not define “intent.”¹⁷⁵ The relevant agency concluded that Kaufman could not meet the intent requirement since he had no practical path to residing in another country.¹⁷⁶ The court determined that the agency’s understanding of intent was impermissible given the structure of the overall statute.¹⁷⁷ The agency’s interpretation would add a requirement that explicitly existed in other parts of the statute but was missing from the statutory section before the court.¹⁷⁸

During the *Chevron* era (*Skidmore*’s second life), some immigration scholars argued that *Skidmore* principles, and not *Chevron* deference, should have applied to more types of immigration agency decision-making.¹⁷⁹ Scholars, however, did not pay much attention to how

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Kaufman v. Nielsen*, 896 F.3d 475, 485–89 (D.C. Cir. 2018).

¹⁷⁴ *Id.* at 479.

¹⁷⁵ *Id.* at 485.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 486.

¹⁷⁸ *Id.* at 486–87.

¹⁷⁹ See generally Mary Holper, *The New Moral Turpitude Test: Failing Chevron Step Zero*, 76 BROOK. L. REV. 1241 (2011); Alina Das, *Unshackling Habeas Review: Chevron Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143 (2015); Rebecca Sharpless, *Zone of Nondeference: Chevron and Deportation for a Crime*, 9 DREXEL L. REV. 323 (2017); Michael Kagan, *Chevron’s Liberty Exception*, 104 IOWA L. REV. 491, 495 (2019); Maureen A. Sweeney, *Enforcing/Protection: The Danger of Chevron in Refugee Act Cases*, 71 ADMIN. L. REV. 127, 134–35 (2019); Richard Frankel, *Deporting Chevron: Why the Attorney General’s Immigration Decisions Should Not Receive Chevron Deference*, 54 U.C. DAVIS L. REV. 547 (2020); Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197 (2021).

courts should apply the *Skidmore* factors in immigration law.¹⁸⁰ *Skidmore*'s third life puts the spotlight on the issue of how *Skidmore* should be applied in immigration cases because courts are no longer obligated to defer to reasonable immigration agency legal conclusions.

The next Part explores the opportunities for immigration law presented by *Loper Bright* and by *Skidmore*'s third life. It also explains some potential roadblocks. These are actions by courts or Congress that could stifle *Loper Bright*'s potential positive effects.

III

IMMIGRATION STATUTES AND *LOPER BRIGHT*: OPPORTUNITIES AND CHALLENGES

A. Incorporating Humanitarian Concerns After Loper Bright

Loper Bright demands independent court judgment but allows courts to be persuaded by agency legal conclusions. Courts may use the *Skidmore* factors to structure their analysis. *Loper Bright* highlights agency legal conclusions contemporaneous with a statute and that have been consistent over time as potentially “especially useful,” but the Supreme Court did not rule out any of the *Skidmore* factors.¹⁸¹

One of the *Skidmore* factors is the validity of the agency's reasoning. As Hickman and Krueger explained, this factor allows a court's inquiry to go beyond review of the agency's decision-making process and to delve into the propriety of the interpretation itself.¹⁸² The importance of the *Skidmore* validity factor is underscored by *Loper Bright*'s emphasis on a court's independent judgment. *Loper Bright* goes beyond a review of an agency's decision-making process and demands that a court determine the meaning of a statute itself. In this way, the validity factor rises in importance.

The validity *Skidmore* factor, as well as the tenor of *Loper Bright*, direct courts to take a fresh look at immigration statutes. This look should take place with an open mind about statutory meaning.¹⁸³ Congress has imbued the immigration statutes with humanitarian concerns. The immigration statutes are not solely punitive, nor are they

¹⁸⁰ Some scholars did imagine what *Skidmore* review might look like in specific scenarios. See, e.g., Frankel, *supra* note 179, at 609–10; Holper, *supra* note 179, at 1243.

¹⁸¹ *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394 (2024).

¹⁸² See *supra* note 132 and accompanying text.

¹⁸³ *Loper Bright* will fuel debates about methods of statutory construction. This Article suggests that when congressional intent is deciphered, courts must remember that congressional intent in immigration is diverse and not always punitive.

consistently antimigrant. Courts should not assume that Congress intended the harshest approach in all scenarios. The implementation of immigration law can clash with congressional intent, especially when implementation causes humanitarian harms. As explained in Part II, the implementation of immigration law has a deep effect on liberty. This effect emphasizes the need to hold agencies accountable to congressional humanitarian concerns.

Congress has told us that it recognizes humanitarian goals through its immigration laws. For example, Congress added a nondiscrimination provision to the Immigration and Nationality Act in response to a previous discriminatory quota system.¹⁸⁴ The national origins quota system was engineered to promote permanent immigration from preferred races and nationalities and to deter or outright prohibit immigration from others.¹⁸⁵ The addition of the nondiscrimination provision reflects congressional intent to move away from a permanent immigrant selection system that discriminated against individuals based on race and national origin.¹⁸⁶

Additionally, the lawful entry system contains examples of congressionally created legal status categories that emphasize family reunification and the promotion of human rights. To contrast with the previous national origins system, Congress amended the Immigration and Nationality Act to reflect a theme of family reunification.¹⁸⁷ Congress allows an unlimited number of spouses, children, and parents of U.S. citizens to enter each year.¹⁸⁸ It allows brothers and sisters to petition for each other when they reach the age of twenty-one.¹⁸⁹ Humanitarian parole allows for entry based on urgent humanitarian

¹⁸⁴ 8 U.S.C. § 1152(a)(1)(A) (“[N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.”); Muzaffar Chishti & Julia Gelatt, *A Century Later, Restrictive 1924 U.S. Immigration Law Has Reverberations in Immigration Debate*, MIGRATION POL’Y INST. (May 15, 2024), <https://www.migrationpolicy.org/article/1924-us-immigration-act-history> [<https://perma.cc/BN3K-C9YX>].

¹⁸⁵ Chishti & Gelatt, *supra* note 184.

¹⁸⁶ S. REP. NO. 89-748, at 11 (1965). In *Trump v. Hawaii*, the Supreme Court examined the relationship between the nondiscrimination provision and the admissibility grounds. 585 U.S. 667, 694–97 (2018). The Supreme Court concluded that the nondiscrimination provision in section 1152(a)(1)(A) is not applicable to the admissibility grounds. *Id.* at 695 (“Once [the admissibility statute] sets the boundaries of admissibility into the United States, § 1152(a)(1)(A) prohibits discrimination in the allocation of immigrant visas based on nationality and other traits.”).

¹⁸⁷ S. REP. NO. 89-748, at 13.

¹⁸⁸ 8 U.S.C. § 1151(b)(2)(A)(i).

¹⁸⁹ 8 U.S.C. § 1153(a)(4).

circumstances.¹⁹⁰ One type of temporary visa benefits victims of human trafficking.¹⁹¹ The asylum system is designed to protect those who have a well-founded fear of persecution or who have suffered persecution.¹⁹² Even the removal grounds contain limited exceptions based on family circumstances and humanitarian considerations.¹⁹³ While the immigration system does restrict migration, many of the openings that exist promote family reunification and humanitarian goals.

This congressional intent is best honored through judicial review that keeps these goals in mind when interpreting statutes. Congress' default preference is not always an antimigrant interpretation. Congress' immigration goals at the time of a statute's enactment are not punitive by default. The Tenth Circuit recognized this in *Carpio*, discussed above. The court correctly did not assume that Congress always intends the most restrictive reading of its immigration statutes. Instead, the court found the agency's restrictive reading to be unfair, and the court could not find any evidence of congressional intent to be unfair.¹⁹⁴

Integrating humanitarian concerns in immigration statutory interpretation has a strong historical pedigree. The Supreme Court has explained that the nature of migration control should factor into immigration statutory interpretation. In 1948, the Supreme Court explained in *Fong Haw Tan v. Phelan* that it would narrowly construe statutes in favor of immigrants "because deportation is a drastic measure and at times the equivalent of banishment or exile."¹⁹⁵ Additionally, the Court explained:

To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.¹⁹⁶

¹⁹⁰ 8 U.S.C. § 1182(d)(5)(A).

¹⁹¹ 8 U.S.C. § 1101(a)(15)(T).

¹⁹² 8 U.S.C. § 1101(a)(42).

¹⁹³ 8 U.S.C. § 1229b.

¹⁹⁴ See *supra* note 162 and accompanying text.

¹⁹⁵ *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

¹⁹⁶ *Id.*

The Court has reiterated this principle over time.¹⁹⁷ Known as immigration law’s “Rule of Lenity,” some criticized the principle as outdated in the face of *Chevron* deference.¹⁹⁸ The elimination of *Chevron* deference renders that argument moot. Now, because courts are not obligated to defer to reasonable agency interpretations, there is a renewed space for the Rule of Lenity in immigration statutory interpretation. *Loper Bright* does not negate the Rule of Lenity because the Rule of Lenity is a tool of statutory construction that courts use during their independent interpretation of an immigration statute.

Professor Nancy Morawetz has documented the pedigree of the immigration Rule of Lenity, and has argued that courts must apply it when interpreting immigration statutes after *Loper Bright*.¹⁹⁹ In *Fong Haw Tan*, the Supreme Court faced a variety of interpretations of the same statutory language from different circuits.²⁰⁰ The Supreme Court specifically chose the interpretation it did because it determined it should “resolve the doubts” in favor of the foreign national.²⁰¹ After *Fong Haw Tan*, as Professor Morawetz traced, the Court continually applied its immigration Rule of Lenity.²⁰² Additionally, the Rule of Lenity was not subsumed by *Skidmore* considerations in the pre-*Chevron* era.²⁰³ Instead, the Rule of Lenity coexisted with *Skidmore*. As Professor Morawetz argued, “Now that the Court has overturned *Chevron*, the rule of strict construction of immigration statutes should spring back in full force”²⁰⁴

¹⁹⁷ See, e.g., *Immigr. & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *Immigr. & Naturalization Serv. v. Errico*, 385 U.S. 214, 225 (1966); *Costello v. Immigr. & Naturalization Serv.*, 376 U.S. 120, 128 (1964).

¹⁹⁸ See Patrick J. Glen, *Interring the Immigration Rule of Lenity*, 99 NEB. L. REV. 553, 561–70 (2021); David S. Rubenstein, *Putting the Immigration Rule of Lenity in Its Proper Place: A Tool of Last Resort After Chevron*, 59 ADMIN. L. REV. 479, 482 (2007). The contrasting approach was for the Rule of Lenity to trump *Chevron* deference. See Jennifer Safstrom, *An Analysis of the Applications and Implications of Chevron Deference in Immigration*, 34 GEO. IMMIGR. L.J. 53, 68 (2019). Others advanced methods to incorporate the Rule of Lenity into the *Chevron* framework. See, e.g., John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of INS v. Ventura*, 18 GEO. IMMIGR. L.J. 605, 623 (2005); Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 576–82 (2003).

¹⁹⁹ See generally Nancy Morawetz, *Strict Construction of Deportation Statutes After Loper Bright*, 100 N.Y.U. L. REV. ONLINE 1 (2025), <https://nyulawreview.org/wp-content/uploads/2025/03/100-NYU-LRev-Online-1.pdf> [<https://perma.cc/4XEJ-CDJH>].

²⁰⁰ *Fong Haw Tan*, 333 U.S. at 8–10.

²⁰¹ *Id.*

²⁰² Morawetz, *supra* note 199, at 8–12.

²⁰³ *Id.* at 11.

²⁰⁴ *Id.* at 14.

In addition to the Rule of Lenity, the Supreme Court has used other tools of statutory interpretation to avoid the most drastic reading of immigration statutes. Professors Stephen Legomsky and Hiroshi Motomura each discussed, in 1984 and 1990, respectively, how the Supreme Court used statutory interpretation tools to blunt the effect of the plenary power doctrine.²⁰⁵ Later cases continued that phenomenon. For example, in *Immigration & Naturalization Service v. St. Cyr*, the Supreme Court required a clear statement from Congress to preclude judicial review of a question of law in a removal case.²⁰⁶ In *Zadvydas v. Davis*, the Supreme Court prohibited potentially indefinite detention of immigrants by interpreting a statute to include a time limitation.²⁰⁷ The Court's interpretation relied on the statutory interpretation canon of constitutional avoidance.²⁰⁸

When the Rule of Lenity applies, courts should adequately acknowledge humanitarian concerns in deciphering the narrowest interpretation. A focus on humanitarian concerns is consistent with Congress's adoption of humanitarian concerns as a theme of the Immigration and Nationality Act. There is no indication in the Immigration and Nationality Act that Congress intends for its laws to be applied unfairly and dysfunctionally. Even if the Rule of Lenity does not apply, courts should still incorporate humanitarian concerns into statutory interpretation. This is especially important in immigration benefits cases where the Rule of Lenity may not apply due to its connections to criminal law.²⁰⁹

Loper Bright presents an opportunity for administrative law in immigration law: Courts may and should incorporate humanitarian concerns into their independent review of immigration statutes. If a court is structuring its analysis through the *Skidmore* factors, courts should use the validity factor to question whether agencies have adequately considered the humanitarian implications of any statutory interpretation. Such an approach would acknowledge the humanitarian themes of the immigration statutes. It also would acknowledge the need to interpret immigration statutes in a way that is least restrictive

²⁰⁵ Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 296–99, 302–03; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 567–73 (1990).

²⁰⁶ *Immigr. & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 314 (2001).

²⁰⁷ *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001).

²⁰⁸ *Id.*

²⁰⁹ Kagan, *supra* note 179, at 539–43 (discussing connection to criminal law).

given the rights implicated and the brutality and dysfunction of implementation. If agencies have not adequately considered the humanitarian implications of their statutory interpretations, courts should not robotically cite agency expertise as a reason to adopt the agency's interpretation. Instead, courts should flex their independent review under *Loper Bright* and determine that an agency interpretation is not persuasive if it has not adequately considered humanitarian interests.

Various interpretations of the statutory term “particular social group” show why the approach advanced here is necessary.²¹⁰ The Immigration and Nationality Act provides that an individual is entitled to refugee status in the United States if the individual can show that they have been persecuted or have a well-founded fear of persecution based on membership in a particular social group.²¹¹ What constitutes a “particular social group” has been the subject of varying agency interpretations because it is undefined in the statute.²¹² In 2018, Attorney General Jeff Sessions certified an immigration case to himself and decided that domestic violence victims could not satisfy the condition of being a member of a particular social group.²¹³ Attorney General Sessions reversed agency precedent that had allowed a path for domestic violence victims to prove that they were members of a particular social group.²¹⁴ Attorney General Sessions instead concluded that domestic violence perpetuated by nongovernment actors generally would not support a claim for asylum.²¹⁵ Because this interpretation of an ambiguous statute occurred during *Chevron*'s reign, courts were obligated to defer to it. After *Loper Bright*, however, courts must exercise their independent judgment about ambiguous statutes.

²¹⁰ 8 U.S.C. § 1101(a)(42).

²¹¹ *Id.*

²¹² The Board of Immigration Appeals first adopted a definition of “particular social group” in 1985. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985). The Board narrowed the definition in 2006 and 2014. *In re C-A-*, 23 I. & N. Dec. 951 (B.I.A. 2006); *In re M-E-V-G*, 26 I. & N. Dec. 227 (B.I.A. 2014); *In re W-G-R-*, 26 I. & N. Dec. 208 (B.I.A. 2014). See also *Deadly Inertia: Needless Delay of “Particular Social Group” Regulations Puts Asylum Seekers at Risk*, CTR. FOR GENDER & REFUGEE STUD. (Feb. 10, 2022), https://cgrs.uclawsf.edu/sites/default/files/Deadly%20Inertia%20-%20PSG%20Regs%20Guide_Feb.%202022.pdf [<https://perma.cc/X3MU-27T8>].

²¹³ *In re A-B-*, 27 I. & N. Dec. 316 (A.G. 2018) (overruling *In re A-R-C-G-*, 26 I. & N. Dec. 338 (B.I.A. 2014)).

²¹⁴ See generally *In re A-R-C-G-*, 26 I. & N. Dec. 388 (BIA 2014).

²¹⁵ See generally *In re A-B-*, 27 I. & N. Dec. 316 (A.G. 2018).

If a court were to review Attorney General Sessions's legal conclusion now, the court should consider the humanitarian implications of its statutory interpretation.²¹⁶ Such a humanitarian lens is consistent with congressional intent. Congress was concerned with humanitarian protection in adopting the refugee protection provisions.²¹⁷ That does not mean that the statute provides unlimited protection, but courts should acknowledge that Congress willingly enacted this program to provide humanitarian protection. Courts should not assume that Congress intended for its program to be interpreted in ways that narrow opportunities for protection.

The second Trump Administration's interpretations of immigration statutes will be subject to *Loper Bright* review. Courts should review these interpretations of immigration statutes with humanitarian concerns in mind. For example, the second Trump Administration suspended the refugee program, invoking statutory authority to deem the refugee program "detrimental to the interests of the United States."²¹⁸ The administration also reinstated its Remain in Mexico policy, which requires applicants for admission to the United States to wait in dangerous conditions in Mexico for their immigration hearings.²¹⁹ Another executive order reimagines statutory parole

²¹⁶ Other *Skidmore* factors may also be at play, including the consistency of the interpretation and whether the interpretation was made contemporaneously with the appearance of the statute.

²¹⁷ Refugee Act of 1980, Pub. L. 96-212, § 101(a) ("The Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas, efforts to promote opportunities for resettlement or voluntary repatriation, aid for necessary transportation and processing, admission to this country of refugees of special humanitarian concern to the United States, and transitional assistance to refugees in the United States. The Congress further declares that it is the policy of the United States to encourage all nations to provide assistance and resettlement opportunities to refugees to the fullest extent possible.").

²¹⁸ *Realigning the United States Refugee Admissions Program*, THE WHITE HOUSE (Jan. 20, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/realigning-the-united-states-refugee-admissions-program/> [https://perma.cc/W82A-SCRV]. In *Pacito v. Trump*, the district court considered Congress' humanitarian motivations in creating the refugee program to issue a preliminary injunction against both the executive order announcing the suspension of the program and the agency actions to implement the executive order. *See generally* Findings of Fact, Conclusions of Law, and Order Issuing Preliminary Injunction, *Pacito v. Trump*, 768 F. Supp. 3d 1199 (W.D. Wash. 2025) (No. 2:25-cv-255-JNW), <https://refugeerights.org/wp-content/uploads/2025/03/ECF-45-PI-Order-including-Findings-of-Fact-Conclusions-of-Law.pdf> [https://perma.cc/U56Y-LJFA]

²¹⁹ *Securing Our Borders*, THE WHITE HOUSE (Jan. 20, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/securing-our-borders/> [https://perma.cc/79P6-DC7T]. In *Immigrant Defenders Law Center v. Noem*, the district court incorporated humanitarian concerns into its decision to issue an emergency stay preventing the reimplementing of the

authority and the executive branch's authorization to issue employment authorization.²²⁰ Executive orders require agency action to be implemented, and agencies will interpret statutes in that process.

Suspending the refugee program requires an interpretation of statutes (the laws establishing the refugee program), which clearly were influenced by humanitarian concerns. Putting individuals in dangerous situations cuts against humanitarian goals. Reimagining the grant of immigration benefits raises questions about the underuse of statutes and whether those actions violate congressional intent, including humanitarian concerns.²²¹ These efforts echo the reduction in legal immigration the first Trump Administration achieved through its "invisible border wall."²²²

Considering humanitarian concerns does not guarantee an immigrant a friendly result in every case. In some cases, the best interpretation of the statute may be that Congress intended a harsher result. Even then, by acknowledging the humanitarian interests at stake, courts will be emphasizing the importance of humanitarian concerns and acknowledging that congressional intent toward immigrants is not solely punitive. Additionally, this approach provides a mechanism to identify when congressional intent is, in fact, punitive. While that may not lead to a result in favor of the immigrant, it will serve as a transparency tool by highlighting when congressional actions toward immigrants are intentionally harsh.

Moctezuma-Reyes v. Garland illustrates the importance of explicitly discussing humanitarian concerns, even if those concerns cannot overrule punitive intent. Following the command of *Loper Bright*, the Sixth Circuit conducted its own independent interpretation of the statutory phrase "exceptional and extremely unusual hardship."²²³ Congress has provided relief from removal for certain individuals who

Remain in Mexico program. Order Granting Plaintiffs' Ex Parte Application for Stay of Agency Action at *25–26, *Immigrant Defs. L. Ctr. v. Noem*, No. 25-2581, 2025 WL 2017247 (Apr. 16, 2025), <https://cgrs.uclawsf.edu/legal-document/stay-order-1> [<https://perma.cc/HP5D-SVUK>].

²²⁰ *Protecting the American People Against Invasion*, THE WHITE HOUSE (Jan. 20, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/protecting-the-american-people-against-invasion/> [<https://perma.cc/4JSD-4EBB>]. A district court stayed the implementation of this executive order and accompanying agency actions implementing it. *Doe v. Noem*, No. 1:25-cv-10495-IT (D. Mass. Apr. 14, 2025), <https://justiceactioncenter.org/wp-content/uploads/2025/04/0097-Order-Granting-Stay-of-CHNV-Revocations.pdf> [<https://perma.cc/6LUV-P27S>].

²²¹ Family, *supra* note 3.

²²² *Id.*

²²³ *Moctezuma-Reyes v. Garland*, 124 F.4th 416, 421 (6th Cir. 2024).

can show that their removal from the United States would cause “exceptional and extremely unusual hardship” to a qualifying family member.²²⁴ Congress’s use of the “exceptional and extremely unusual” language was a change to a previous statute that set a lower bar to obtain relief.²²⁵ Congressional intent was to make relief harder to obtain. In such a scenario, a court should emphasize the humanitarian implications of the choice Congress made. The Sixth Circuit explained that the “exceptional and extremely unusual hardship” standard demands more than just ordinary hardship.²²⁶ The court stated, “many severe hardships resulting from deportation aren’t rare, but expected—like the loss of financial prospects, separation from loved ones, and reduced educational opportunities.”²²⁷ Congress determined that separation from immediate family members alone is not enough to justify relief from removal.²²⁸ Parents may be separated from children. There is no statutory right to be with one’s family. That is not a hardship that justifies relief from removal, according to Congress.

Post *Loper Bright*, courts should recognize humanitarian concerns as a major force behind immigration statutes. Even if a court engages with the *Skidmore* persuasiveness factors, an agency interpretation is not valid if it failed to consider or properly weigh humanitarian concerns. This is the promise of *Loper Bright* for immigration law.

B. Avoiding Roadblocks to *Loper Bright*

There are some potential challenges to ensuring that *Loper Bright*’s independent review becomes reality in immigration law. As a threshold matter, immigration cases are not exempt from *Loper Bright*. In applying *Loper Bright*, courts should not show more deference to immigration agency interpretations than to other agency interpretations just because the subject is immigration. Additional complications may come from the application of the major questions doctrine, possible congressional legislation establishing a deferential standard of review for immigration statutes, and potential further restrictions on the availability of judicial review of immigration agency action.

²²⁴ 8 U.S.C. § 1229b(b)(1)(D).

²²⁵ The previous standard was “extreme hardship.” 8 C.F.R. § 240.65.

²²⁶ *Moctezuma-Reyes*, 124 F.4th at 421–22.

²²⁷ *Id.* at 422.

²²⁸ 8 U.S.C. § 1229b(b)(1)(D).

I. Loper Bright Applies to Immigration Agencies

The Supreme Court based its decision in *Loper Bright* on its interpretation of the APA and not the Constitution.²²⁹ That leaves room for other statutes to affect the level of deference a court must show to an agency legal conclusion in a specific context.²³⁰ The Immigration and Nationality Act does not prevent the application of *Loper Bright*. Professor Nancy Morawetz has addressed an argument that the Immigration and Nationality Act requires deference to the Attorney General's legal conclusions independent of the APA.²³¹ As Professor Morawetz has argued persuasively, this argument is "deeply flawed."²³² The government has argued that 8 U.S.C. § 1103(a)(1) expresses Congress's intent that courts should defer to the Attorney General's legal conclusions in immigration law.²³³ This statutory section states that "determination and ruling by the Attorney General with respect to all questions of law shall be controlling."²³⁴ This language appears in a statutory section, however, that deals with the allocation of authority between the Secretary of Homeland Security, the Secretary of State, and the Attorney General.²³⁵ As Professor Morawetz has detailed, this language is meant to resolve intrabranched conflicts and does not address the role of a court in reviewing agency legal conclusions.²³⁶

When applying *Loper Bright* to immigration cases, courts should not apply *Loper Bright* differently.²³⁷ Courts should avoid potential distractions. For example, foreign affairs considerations do not justify reflexive deference to immigration agency legal conclusions despite *Loper Bright*. Before *Loper Bright*, courts at times used foreign affairs as a justification for deference to immigration agency legal

²²⁹ *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 396–401 (2024).

²³⁰ While the Supreme Court did not address whether the Constitution requires independent judicial review of agency legal conclusions, its commentary on the importance of independent court review raises questions about the constitutionality of a statute that would attempt to require *Chevron*-like deference. *Id.* at 384–85.

²³¹ Nancy Morawetz, *Immigration Law After Loper Bright: The Meaning of 8 U.S.C. § 1103(A)(1)*, 99 N.Y.U. L. REV. ONLINE 282–83 (2024), <https://nyulawreview.org/wp-content/uploads/2024/08/99-NYU-LRev-Online-282.pdf> [<https://perma.cc/5UU4-CD5E>].

²³² *Id.* at 284.

²³³ *Id.* at 282–83.

²³⁴ 8 U.S.C. § 1103(a)(1).

²³⁵ Morawetz, *supra* note 231, at 284.

²³⁶ *Id.*

²³⁷ Courts should not relent their judicial review powers in immigration law. *See generally* Aadhithi Padmanabhan, *Abandoning Deportation Adjudication*, 77 STAN. L. REV. 1557 (2025) (arguing for rigorous judicial review in immigration cases).

conclusions.²³⁸ While not an immigration case, the Ninth Circuit refused to apply *Loper Bright* to the Department of State's interpretation of treaties.²³⁹ The Ninth Circuit explained that *Loper Bright* "does not touch, let alone undermine, the principle that we are to give deference to the Executive Branch's understanding of its own treaties."²⁴⁰

Foreign affairs considerations may be relevant in some immigration cases, but those considerations should not be assumed nor overly relied on to decide that the agency legal conclusion is persuasive under *Skidmore* or that *Loper Bright* does not apply. The issue is more complex than the executive branch's interpretation of a treaty. Not every immigration agency action has the same potential effect, or any effect, on foreign affairs.²⁴¹ A removal case may turn on a question of state law, considerations of an individual's activities wholly inside the United States, or solely on factual determinations.²⁴² A benefits determination may have no connection to foreign affairs, as the agency is simply applying congressionally authorized categories of legal immigration status to applicants. Courts should question whether the specific legal interpretation implicates foreign affairs, and if so, how to weigh that implication along with other factors.

Additionally, the plenary power doctrine is a potential influence over courts when applying *Loper Bright*. The plenary power doctrine is a nineteenth century constitutional law concept that elevates political will over the judiciary in immigration law.²⁴³ The plenary power doctrine, when it is effective, operates as an anti-*Marbury* principle and removes the authority of courts to judge the constitutionality of immigration law.²⁴⁴ The plenary power doctrine has limits, however.

²³⁸ See, e.g., *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 348 (2005) (referring to the Court's "customary policy of deference to the President in matters of foreign affairs" and explaining that "[r]emoval decisions, including the selection of a removed alien's destination, 'may implicate our relations with foreign powers' and require consideration of 'changing political and economic circumstances.'"); see also Michael Kagan, *Chevron's Asylum: Judicial Deference in Refugee Cases*, 58 HOU. L. REV. 1119, 1151 (2021). William Eskridge and Lauren Baer argued that deference based on foreign affairs should not exist as a separate category but rather that considerations of foreign affairs could be folded into other types of deference. Eskridge, Jr. & Baer, *supra* note 129, at 1184.

²³⁹ *Rana v. Jenkins*, 113 F.4th 1058, 1066–67 (9th Cir. 2024).

²⁴⁰ *Id.* at 1067.

²⁴¹ Kagan, *supra* note 238, at 1151–55.

²⁴² *Id.*

²⁴³ Jill E. Family, *Removing the Distraction of Delay*, 64 CATH. U. L. REV. 99, 112–13 (2014).

²⁴⁴ *Id.* See generally *Marbury v. Madison*, 5 U.S. 137 (1803).

The doctrine is at its strongest when the question is whether a first-time entrant outside the United States has any constitutional rights.²⁴⁵ Once a foreign national is no longer seeking entry, the Constitution becomes operative.²⁴⁶

The plenary power doctrine is steeped in a nineteenth century notion of sovereignty.²⁴⁷ The idea is that courts need to give up their *Marbury* powers so that Congress can protect the nation's sovereignty.²⁴⁸ Whatever the merits of that argument in limited constitutional law scenarios, concerns about sovereignty do not require a federal court to defer to every immigration agency legal conclusion. The notions behind the plenary power doctrine should not be imported into statutory interpretation that falls outside the reach of the doctrine. The concerns behind the doctrine—particularly sovereignty—may be enticing to courts when deciding whether they are persuaded by an agency's legal conclusion.

In interpreting immigration statutes, courts should acknowledge all interests involved. Sovereignty is not the only motivation behind immigration statutes. Individual rights are not necessarily antithetical to sovereignty even when Congress is concerned with sovereignty. Immigration is more complex than merely a threat. Immigration provides overwhelming benefits that boost sovereignty by improving the United States.²⁴⁹ The United States is a democracy based on a careful balance between individual rights and government interests. Immigration law incorporates both individual rights and government interests, and Congress has recognized this through its design of the immigration statutes.²⁵⁰ At times, individual rights are the governmental interest.²⁵¹

While one of the *Skidmore* factors in deciding whether to adopt an agency legal conclusion is agency expertise, that factor should not bear extra weight in immigration cases. If expertise were treated as a

²⁴⁵ Family, *supra* note 243, at 114.

²⁴⁶ *Id.* In *Department of Homeland Security v. Thuraissigiam*, the Supreme Court held that an individual apprehended in the United States but only twenty-five yards from the border would be treated as still seeking entry for purposes of the Due Process Clause. *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 139–40 (2020).

²⁴⁷ Family, *supra* note 243, at 112–13.

²⁴⁸ *Id.*

²⁴⁹ Jill E. Family, *Disrupting Immigration Sovereignty*, YALE J. ON REGUL. (Feb. 14, 2017), <https://www.yalejreg.com/nc/disrupting-immigration-sovereignty-by-jill-e-family/> [<https://perma.cc/K8DY-WGGN>].

²⁵⁰ *Id.*

²⁵¹ *Id.*

determinative factor in every case, that would negate *Loper Bright*. In fact, the brutality of the implementation of immigration law and administrative law's failure to ensure a functional system demand independent review. The immigration statutes do not require special deference, and courts should not defer to immigration agency legal conclusions simply because the regulated party is an immigrant and immigration law is complex and technical. Courts need to undertake independent review. It may be that the court is persuaded by how the agency has employed its expertise, but it might not be persuaded. Also, not every immigration case turns on issues that implicate specialized agency expertise. For example, courts have equal expertise on questions of liberty.²⁵² Accordingly, courts should not absolve themselves of their duties under *Loper Bright* because the subject is immigration law.

In the months since the Supreme Court decided *Loper Bright*, the courts of appeals have begun to craft approaches to apply *Loper Bright* in immigration cases.²⁵³ For example, in *Lopez v. Garland*, the Ninth Circuit applied the *Skidmore* factors to determine whether a particular offense constitutes a "crime[]" involving moral turpitude" under the Immigration and Nationality Act.²⁵⁴ The court described its task as "to evaluate the statute independently under *Skidmore*, giving 'due respect,' but not binding deference to the agency's interpretation."²⁵⁵ In an amicus brief, Professors Kagan and Walker argued that the Ninth Circuit panel showed too much deference to the agency's legal conclusion via *Skidmore* because the court did not determine the best interpretation of the statute and blindly relied on the agency's expertise.²⁵⁶ While the Ninth Circuit did not say that immigration cases should be treated differently, courts need to be careful not to let immigration cases creep into a *Chevron*-like deference regime.

In *Moctezuma-Reyes v. Garland*, the Sixth Circuit applied *Loper Bright* but seemed less interested in using the *Skidmore* factors to structure its independent interpretation of the statutory term at issue.²⁵⁷ The majority described *Loper Bright*'s discussion of *Skidmore* as "not

²⁵² *Id.*; see also Wadhia & Walker, *supra* note 179, at 1215–24.

²⁵³ This task is not confined to immigration law. See generally Kristen E. Hickman, *Anticipating a New Modern Skidmore Standard*, 74 DUKE L.J. ONLINE 111 (2025).

²⁵⁴ *Lopez v. Garland*, 116 F.4th 1032, 1038–42 (9th Cir. 2024).

²⁵⁵ *Id.* at 1039.

²⁵⁶ See generally Brief for Amici Curiae Professors Michael Kagan & Christopher J. Walker in Support of Petitioner's Petition for Penal Rehearing or Rehearing *En Banc*, *Lopez v. Garland*, 116 F.4th 1032 (2024) (No. 23-870).

²⁵⁷ *Moctezuma-Reyes v. Garland*, 124 F.4th 416, 422–23 (6th Cir. 2024).

a mandate” and presented *Skidmore* as somehow detracting from the court’s independent statutory interpretation.²⁵⁸ As Professor Hickman has stated, however, judicial review under *Skidmore* “is clearly on the menu” after *Loper Bright*.²⁵⁹ Regardless of whether a court employs *Skidmore*, it has the power to determine the validity of the agency’s legal conclusion. Courts should determine validity through independent review; there should not be a preference for an agency legal conclusion because the subject matter is immigration.

2. Other Challenges

As discussed in Part II, in *Loper Bright*, the Supreme Court acknowledged that Congress may delegate the authority to interpret a statute to an agency.²⁶⁰ In this scenario, a court would use statutory interpretation tools to discover the boundaries of the delegation. This creates—dare I say—step one²⁶¹ of the *Loper Bright* analysis. As Professors Hickman and Wildermuth have explained, the initial focus of the *Loper Bright* inquiry is on the text of the delegation.²⁶² *Loper Bright*’s demand for independent judgment applies unless the statutory language reveals congressional intent to leave statutory interpretation to the discretion of the agency. If the delegation leaves statutory interpretation to the agency, then the court’s role is to engage in arbitrary and capricious review of how the agency exercised its discretion.²⁶³ The court would determine if the agency’s exercise of discretion is “reasonable and reasonably explained.”²⁶⁴

This is a kind of loophole from *Loper Bright*’s independent court review. As Professors Hickman and Wildermuth argue, Congress’ ability to delegate statutory interpretation to an agency allows agencies

²⁵⁸ *Id.* at 423. The court, however, ultimately adopted an interpretation that aligned with the agency’s interpretation. *Id.* at 422.

²⁵⁹ Hickman, *supra* note 253, at 136.

²⁶⁰ See *supra* text accompanying note 146.

²⁶¹ An attempt at administrative law humor that refers to the “steps” that made up the *Chevron* doctrine.

²⁶² Hickman & Wildermuth, *supra* note 115 (manuscript at 6).

²⁶³ 5 U.S.C. § 706(2)(A).

²⁶⁴ *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021); see also *Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (addressing arbitrary and capricious review). Review of whether the agency exercised its delegation permissibly might be similar to the type of review courts conducted under *Chevron*. See Hickman & Wildermuth, *supra* note 115 (manuscript at 2 n.6) (collecting arguments that the Supreme Court’s allowance for congressional delegations of authority to agencies to interpret statutes will stifle the effect of *Loper Bright*).

to retain their influence over statutory interpretation.²⁶⁵ It also gives Congress control to decide whether *Loper Bright* applies.²⁶⁶ If Congress delegates the authority to interpret statutory terms to immigration agencies, it could dampen the promise of *Loper Bright* and subject immigration agency legal conclusions only to arbitrary and capricious review.

Professors Hickman and Wildermuth have proposed a framework for categorizing statutory delegations to identify which delegations trigger *Loper Bright*'s independent court review and which leave interpretation to the agency's reasonable discretion.²⁶⁷ They conclude that "general authority/housekeeping" delegations should not prevent a court from exercising independent statutory interpretation, but that "specific" and "hybrid" delegations should result in only arbitrary and capricious review.²⁶⁸ Specific delegations are "specific grants of rulemaking authority."²⁶⁹ With this type of delegation, Congress specifically assigns a duty to an agency by directing an agency to adopt a rule.²⁷⁰ According to Hickman and Wildermuth, "Specific authority delegations are identifiable as such not only because they expressly authorize agencies to adopt regulations for statutory purposes, but because they also specify the topic of those regulations within the broader subject matter of the statutory scheme."²⁷¹

A "[g]eneral [a]uthority/[h]ousekeeping [d]elegation[]" is a delegation that grants general rulemaking authority to an agency "without further elaboration as to subject matter."²⁷² These delegations "allow agencies to adopt interpretations to resolve statutory ambiguities that Congress did not anticipate."²⁷³ A "[h]ybrid" delegation resembles a "general authority/housekeeping" delegation but is placed within a specific statutory section, rather than applying to the entire statutory scheme.²⁷⁴ The Hickman and Wildermuth categorization is an early proposal. Future litigation will allow courts

²⁶⁵ Hickman & Wildermuth, *supra* note 115 (manuscript at 2–3); *see also* BARCZEWSKI, *supra* note 115, at 6–7, 46–47, 49 (2024).

²⁶⁶ BARCZEWSKI, *supra* note 115, at 46–47, 49.

²⁶⁷ Hickman & Wildermuth, *supra* note 115 (manuscript at 6–7, 32–35).

²⁶⁸ *Id.*

²⁶⁹ *Id.* (manuscript at 8).

²⁷⁰ *Id.*

²⁷¹ *Id.* (manuscript at 11).

²⁷² *Id.* (manuscript at 11–12).

²⁷³ *Id.* (manuscript at 12).

²⁷⁴ *Id.* (manuscript at 13).

to provide more guidance on which types of delegations allow for independent review.

The relevance of this loophole for immigration law lies in Congress' ability to control whether independent court review or arbitrary and capricious review will take place. Borrowing Hickman and Wildermuth's categorization, the immigration statutes contain "general authority/housekeeping" delegations. The Immigration and Nationality Act grants "general authority/housekeeping" powers to the Secretary of Homeland Security. Congress states that "[h]e shall establish such regulations . . . as he deems necessary for carrying out his authority under the provisions of this chapter."²⁷⁵ If courts adopt Hickman and Wildermuth's proposal, legal conclusions carried out under this authority would be subject to *Loper Bright's* independent court review. If Congress transformed a grant of "general authority/housekeeping power" to a "specific authority" delegation, then the agency action would be subject only to arbitrary and capricious review.²⁷⁶ In *Moctezuma-Reyes v. Garland*, the Sixth Circuit determined that Congress had not delegated discretion to the agency to determine the meaning of the statutory term "exceptional and extremely unusual hardship."²⁷⁷ While the court did not engage with the Hickman and Wildermuth terminology,²⁷⁸ the court essentially determined that there was no "specific authority" delegation.²⁷⁹ Congress could respond, however, by enacting such a delegation if it wanted to provide less independent review.

Congress could also exercise control over the application of *Loper Bright* by explicitly providing for a different standard of review for immigration agency legal conclusions. The Supreme Court founded its decision in *Loper Bright* on its interpretation of the APA.²⁸⁰ Congress could create a statute that demands more deferential review of

²⁷⁵ 8 U.S.C. § 1103(a)(3).

²⁷⁶ Hickman & Wildermuth, *supra* note 115 (manuscript at 11). At times, the immigration statutes set statutory prerequisites but then leave the ultimate decision up to the discretion of the agency. Shoba Sivaprasad Wadhia, *Darkside Discretion in Immigration Cases*, 72 ADMIN. L. REV. 367, 369 (2020). In this scenario, courts will have to decide whether questions about the meaning of the prerequisites and any legal conclusions reached through an exercise of discretion are subject to *Loper Bright's* independent review.

²⁷⁷ *Moctezuma-Reyes v. Garland*, 124 F.4th 416, 420–21 (6th Cir. 2024).

²⁷⁸ The opinion predates the publication of their article.

²⁷⁹ *Moctezuma-Reyes*, 124 F.4th at 420–21.

²⁸⁰ *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024).

immigration statutes, opting out of the APA.²⁸¹ Congress has already created bespoke standards of review (where limitations on judicial review do not apply) for findings of fact and discretionary determinations made in removal cases.²⁸²

The future of the major questions doctrine also presents a potential challenge to the application of *Loper Bright* in immigration cases, if the doctrine survives *Loper Bright*. As described in Part II, the Supreme Court crafted the major questions doctrine late in *Chevron*'s reign to carve out certain legal conclusions from *Chevron*'s domain.²⁸³ If an agency interpretation of a statute presents a "major question" (one of such political or economic significance that it becomes major) then the doctrine's congressional clear statement requirement applies. If the doctrine survives *Loper Bright*, then the clear statement requirement could supplant what is required under *Loper Bright*. In other words, the more demanding clear statement requirement would apply rather than a court determining the best meaning of the statute.

In some scenarios, the application of the clear statement requirement could work to sustain humanitarian concerns if the agency is proposing an interpretation that weakens rights. A court could block the interpretation by concluding that Congress did not clearly express its desire for the agency to adopt such an interpretation. In other scenarios, application of the clear statement requirement might prevent an agency from implementing an interpretation that promotes humanitarian concerns.

Finally, a court's ability to independently interpret a statute is thwarted if Congress has blocked judicial review. This is an additional challenge to the application of *Loper Bright*. As explained in Part II, Congress has limited judicial review of some immigration agency adjudication. If a case never reaches a federal court, then there is no chance for *Loper Bright*'s independent judgment to apply. Diversions, including expedited removal, prevent cases from starting in the first place. If a case never enters the adjudication system, a statutory interpretation could escape judicial review.

Congress might consider additional limitations on immigration judicial review. Any additional limitations that prevent court review of

²⁸¹ See Robin Kundis Craig, *The Impact of Loper-Bright v. Raimondo: An Empirical Review of the First Six Months*, 109 MINN. L. REV. 2671, 2693 (2025) (citing court decisions that rejected the application of *Loper Bright* where the APA does not supply the deference standard).

²⁸² 8 U.S.C. § 1252(b)(4).

²⁸³ See *supra* notes 114–19 and accompanying text.

statutory interpretation would blunt the effect of *Loper Bright*. The second Trump administration has already effectively limited the availability of judicial review by extending expedited removal to the full extent authorized by Congress.²⁸⁴ Traditionally used more narrowly, the Trump administration enlarged the reach of expedited removal. By doing so, more individuals will be processed under expedited removal and will face limitations on judicial review.

CONCLUSION

The turn away from *Chevron* deference presents administrative law with an opportunity to provide immigration law with the type of judicial review that it needs, to the extent that judicial review is available. Courts should follow the Supreme Court's instruction in *Loper Bright* to assert independent review of immigration statutes. While the *Skidmore* factors are a guide, the factors go beyond agency expertise and include the validity of the agency's interpretation. In determining the validity of an interpretation, courts should integrate humanitarian concerns that are woven throughout the Immigration and Nationality Act. Such an approach is consistent with congressional intent. It also recognizes the harshness and dysfunction of immigration law implementation and its restrictions on individual liberty. Additionally, this approach serves an important transparency function by having courts identify when congressional intent rejects humanitarian interests. Congress should allow the potential positive effects of *Loper Bright* to take hold. Congress should not further restrict judicial review or legislate a *Chevron*-like review standard for immigration law.

²⁸⁴ Designating Aliens for Expedited Removal, 90 Fed. Reg. 8139 (Jan. 24, 2025); 8 U.S.C. § 1225(b)(1)(A)(iii). The administration's efforts to expand expedited removal include dismissing cases in immigration court with the goal of placing the individual in expedited removal to avoid the procedural guarantees of an immigration court hearing and any subsequent judicial review. Trevor Hughes, *ICE Agents Deploy New Tactic: Arresting People as They Leave Mandatory Court Hearings*, U.S.A. TODAY (May 13, 2025, at 13:13 ET), <https://www.usatoday.com/story/news/nation/2025/05/22/ice-arrests-immigration-court-deportation-tactics/83792357007/#> [<https://perma.cc/HPB3-27PP>].